Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Richard Lee Carlson
Docket No. A-15-95
December 16, 2015

RECOMMENDED DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Richard Lee Carlson (Respondent) appeals the July 24, 2015 decision of an Administrative Law Judge (ALJ). *Richard Lee Carlson*, DAB CR4064 (2015) (ALJ Decision). The ALJ upheld the determination of the Office of the Inspector General of the Social Security Administration (SSA I.G.) that Respondent violated section 1129 of the Social Security Act (Act)[1] by returning to work while receiving title II Social Security Disability Insurance (SSDI) benefits and without reporting his work activities to the Social Security Administration (SSA). The ALJ determined that the $20,000 civil monetary penalty (CMP) and $59,488 assessment in lieu of damages that the SSA I.G. imposed on Respondent were reasonable.

As explained more fully below, the Board recommends that the Commissioner of Social Security sustain the ALJ Decision because it is supported by substantial evidence and is consistent with applicable authorities.

Authorities

Title II of the Act authorizes the payment of benefits to insured individuals who are aged, blind, or disabled. Act § 223; 20 C.F.R. Part 404. The term "disability" is defined in part as including the "inability to engage in any 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; . . . ." Act § 223(d)(1). Section 223(d)(2) states that an "individual shall be determined to be under a disability only if his . . . impairment or impairments are of such severity that he is not only unable to do his previous work but cannot . . . engage in any other kind of substantial gainful work which exists in the national economy . . . ." Section 223(d)(4)(A) requires the SSA to issue regulations that "prescribe the criteria for

[1] The current version of the Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact-toc.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp. Table.

determining when services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity" and states that "an individual whose services or earnings meet such criteria shall . . . be found not to be disabled" notwithstanding the severity of the impairment.

The implementing regulations define the term "substantial gainful activity" as "work that . . . [i]nvolves doing significant and productive physical or mental duties; and . . . [i]s done (or intended) for pay or profit." 20 C.F.R. § 404.1510. *See also id.* §§ 404.1572(a) (explaining that "substantial work activity" is "work activity that is both substantial and gainful" and that "work 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"); 404.1572(b) ("Gainful work activity is work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized."). The regulations also explain the meaning of the term "substantial gainful activity" as it relates to the SSA's determination of whether an individual may be considered disabled. Section 404.1571 states, in part:

> The work, without regard to legality, that you have done during any period in which you believe you are disabled may show that you are able to . . . engage in substantial gainful activity . . . Even if the work you have done was not substantial gainful activity, it may show that you are able to do more work than you actually did. We will consider all of the medical and vocational evidence in your file to decide whether or not you have the ability to engage in substantial gainful activity.

The factors that may be considered to determine whether an individual is able to perform substantial gainful activity include the nature of the work activity itself. For instance, if the individual's duties require certain experience, skills, supervision and responsibilities that contribute substantially to the operation of a business, that "tends to show" the individual is able to perform substantial gainful activity. *Id.* § 404.1573(a). Also, SSA considers how well an individual performs work to determine whether he or she is engaged in substantial gainful activity. For instance, if the individual is performing work that "involves minimal duties that make little or no demands" on him or her and "that are of little or no use" to the employer, then the SSA may find that the individual is not working "at the substantial gainful activity level." *Id.* § 404.1573(b). Certain types of activities, such as "taking care of yourself, household tasks, hobbies, therapy, school attendance, club activities, or social programs," generally are not considered substantial gainful activity, however. *Id.* § 404.1572(c).

The regulations hold a recipient of disability benefits responsible for reporting to the SSA changes in disability or employment status. *Id.* § 404.1588. As relevant here, the recipient must inform the SSA if he or she "return[s] to work" or "increase[s] the amount of . . . work" or if his or her "earnings increase." *Id.* § 404.1588(a)(2), (a)(3), (a)(4). The

applicable SSA regulations do not define the term "work." But, as noted above, the regulations define "substantial gainful activity" and provide further explanation of what "substantial gainful activity" means relevant to determining disability.

The Act authorizes the SSA to impose sanctions against individuals who make false statements about or fail to report a material fact to the SSA. Section 1129(a)(1) of the Act authorizes the imposition of CMPs against 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, ...

See also 20 C.F.R. § 498.102(a)(3).

The Act defines "material fact" as "one which the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under title II . . . ." Act § 1129(a)(2); *see also* 20 C.F.R. § 498.101 (defining, among other terms, "[m]aterial fact"). "Otherwise withhold disclosure" means "the failure to come forward to notify the SSA of a material fact when such person knew or should have known that the withheld fact was material and that such withholding was misleading for purposes of determining eligibility or Social Security benefit amount for that person or another person." 20 C.F.R. § 498.101.

Section 1129(a)(1) of the Act authorizes a CMP of "not more than $5,000 for each such statement or representation or each receipt of such benefits or payments while withholding disclosure of such fact." *See also* 20 C.F.R. § 498.103(a). Section 1129(a)(1) also authorizes, in addition to the CMP, an "assessment, in lieu of damages . . . 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." *See also* 20 C.F.R. § 498.104. In determining the amount or scope of any CMP and assessment to be imposed in cases brought under section 1129, the SSA I.G. considers:

(1) the nature of the statements, representations, or actions and the circumstances under which they occurred;
(2) the degree of culpability of the person committing the offense;
(3) the history of any prior offenses of that person;
(4) the financial condition of that person; and
(5) such other matters as justice may require.

20 C.F.R. § 498.106(a)(1)-(5).

In cases brought under section 1129 of the Act, the SSA I.G. may initiate a proceeding for the purposes of imposing a penalty and assessment within six years from the date of the violation. *Id.* § 498.132. An individual against whom the SSA I.G. proposes to impose a CMP and/or assessment, as applicable, may request a hearing before an ALJ to challenge the proposal. *Id.* § 498.109(b). The SSA I.G. bears the burden of going forward and the burden of persuasion, to be judged by the preponderance of the evidence, with respect to all issues, with one exception. A respondent bears the burden of going forward and the burden of persuasion, to be judged by a preponderance of the evidence, with respect to any affirmative defenses and mitigating circumstances. *Id.* § 498.215(b), (c). The ALJ may affirm, deny, increase, or reduce the SSA I.G.'s proposed CMP and assessment, as applicable. *Id.* § 498.220(b). If the ALJ's decision is appealed to the Board, the Board may remand the case to the ALJ for further proceedings or may issue a recommended decision to decline review or affirm, increase, reduce, or reverse any penalty or assessment determined by the ALJ. *Id.* § 498.221(h).

Background[2]

Respondent has an employment history at Anderson Excavating Co. (Anderson), which provides excavation services on large construction projects. In 2002, the SSA found Respondent disabled due to coronary artery disease (onset date June 4, 2002), and determined that he was entitled to SSDI benefits. In December 2008, an individual contacted the SSA to report that Respondent had been working full time as a mechanic at Anderson, for about three years, for "under the table" pay. The informant's report prompted an extensive SSA I.G. investigation of Respondent's activities. ALJ Decision at 3, 5.

Based on the investigation findings, the SSA I.G. determined that, while receiving SSDI benefits, Respondent had returned to work for pay at Anderson, but knowingly failed to disclose his work activity to the SSA and affirmatively represented to the SSA that he was not working, which resulted in payment of over $77,000 in benefits to which he was

[2] The following summary background information is provided for the convenience of the reader. It is drawn from the undisputed facts in the ALJ Decision and in the record before the ALJ and should not be treated as new findings.

not entitled. SSA Ex. 23, at 1. By letter dated December 23, 2013, the SSA I.G. notified Respondent that it intended to commence civil action against him under section 1129 of the Act and provided him an opportunity to respond to the SSA I.G.'s letter within 30 days with mitigating information, such as information about his financial condition, the SSA I.G. could consider in determining the amount of any CMP and/or assessment in lieu of damages to be imposed on him. *Id.* at 1-3. Respondent submitted a financial disclosure form to the SSA I.G. SSA Ex. 24. By letter dated March 27, 2014, the SSA I.G. notified Respondent:

> Your SSA record indicates that you began receiving SSDI in approximately June 2002 for coronary artery disease . . . At the time you applied for SSDI, and in subsequent notifications, SSA notified you of your duty to report changes that could affect your eligibility to receive SSDI, including your work activity.
>
> However, an SSA [I.G.] investigation reveals that you began working for Anderson . . . in November 2005. The investigation further revealed that you worked "under the table," receiving cash for your work activities. Several witnesses indicated that you were the head mechanic for Anderson . . . and received benefits including the use of a company truck and cellular phone. The evidence overwhelmingly supports a finding that you worked as a mechanic while receiving SSDI. Your failure to report your work activity from November 2005 through November 2009 caused SSA to pay $77,990.40 . . . in SSDI to which you were not entitled.

SSA Ex. 25, at 1. The SSA I.G. informed Respondent that it proposed to impose on him a total of $97,990 ($20,000 in CMP; $77,990, rounded down from $77,990.40, in assessment in lieu of damages) under authority of section 1129 of the Act. *Id.* at 1-2.[3]

Respondent appealed, asserting that he did not perform work activity for which he was subject to the SSA's disclosure requirement. Rather, he asserted, he visited the Anderson facility almost daily to socialize with former colleagues at Anderson, and, with

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[3] As the SSA I.G. explained, in consideration of mitigating factors such as Respondent's health status and financial condition, it proposed a CMP of $20,000, reduced from $105,000 that could have been assessed for the 21-month period from March 2008 through November 2009 the SSA I.G. determined Respondent withheld information about his work activity within the six-year limitations period before the proposed imposition of the CMP ($5,000 multiplied by 21). SSA Ex. 25, at 1, 2; 20 C.F.R. §§ 498.106(a), 498.132. As the SSA I.G. also explained, it could have imposed an assessment in lieu of damages of $84,793.60, double $42,396.80, the amount of benefits paid within the same period, but to which Respondent was not entitled. SSA Ex. 25, at 1. But the SSA I.G. decided to impose a lesser amount of assessment in lieu of damages, $77,990, the actual amount of SSDI benefits and Medicare premium payments the SSA paid. *Id.* at 1, 2. The SSA I.G. later lowered the proposed assessment in lieu of damages to $59,488 after recovering some of the damages by withholding Respondent's benefits. SSA Ex. 27, at 2-3 (¶ 7); ALJ Decision at 3 n.2 and 17 (citing SSA Ex. 21, at 1 and I.G. Br. at 1 n.1).

permission from Anderson's owner, a close friend, to use Anderson's tools for his hobby of building miniature models of heavy equipment. He further maintained that he occasionally performed unpaid errands for Anderson, like picking up parts from vendors. ALJ Decision at 3, 13; Respondent's pre-hearing brief.

The ALJ assessed the evidence, which included direct written testimony of ten witnesses offered by Respondent (including those of Respondent; the owner and CEO of Anderson; and the owner/CEO's spouse, the President of Anderson). Also before the ALJ was documentation offered by the SSA I.G. concerning or obtained as a result of surveillance of Respondent at Anderson and his home, monitoring of Respondent's travel by an Anderson-owned truck through a GPS tracking device installed on the truck pursuant to a court order, and interviews of current and former Anderson employees and others who did business with Anderson, such as employees of companies from which Anderson ordered machine parts. That documentation included written statements of interviewed individuals; lists of machine parts inventories; receipts and invoices from parts vendors; and Respondent's cell phone and banking records. *See* ALJ Decision at 3, 6-16; Parties' proposed witness and exhibit lists.

The ALJ upheld the SSA I.G.'s determination based on the written record.[4] In assessing the evidence the ALJ stated, in part:

> Ultimately, the problem with Respondent's explanations is that the overwhelming evidence establishes that he used the [Anderson company] truck, phone, and credit card primarily for company business. The surveillance logs, the cell phone records, and the sheer volume of order forms, equipment inventories, receipts, and other records belie his claims that he only occasionally performed the work activities.

ALJ Decision at 15. The ALJ concluded that Respondent violated section 1129 of the Act and therefore was subject to penalty under section 1129 because:

> the reliable – and largely unrebutted – evidence establishes that, while he was receiving disability benefits, Respondent . . . engaged in work activities. He deliberately withheld that information from SSA and, when asked, he repeatedly and falsely denied any work activity.

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[4] The ALJ explained that she need not hold an in-person hearing because neither party requested to cross-examine any of the other party' proposed witnesses, whose written direct testimonies each party had submitted pursuant to the ALJ's June 2, 2014 Acknowledgment and Pre-hearing Order. *See* ALJ Decision at 3. Neither party asserts error in the ALJ's decision to rule on the written record.

Id. at 16. The ALJ also determined that the CMP ($20,000) and assessment in lieu of damages ($59,488, after SSA recovered some of the money by withholding benefits) the SSA I.G. proposed against Respondent were reasonable. *Id.* at 3 n.2 and 16-17.

Respondent requests review of the ALJ Decision by the Board.

Standard of Review

The regulations governing section 1129 appeals provide that the Board "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." 20 C.F.R. § 498.221(i). The standard of review on a disputed factual issue is whether the ALJ's initial decision is supported by substantial evidence on the whole record. The standard of review on a disputed issue of law is whether the ALJ's initial decision is erroneous. *See id.*; *Guidelines – Appellate Review of Decisions of Administrative Law Judges in Social Security Administration Cases to Which Procedures in 20 C.F.R. Part 498 Apply* (section headed "Completion of the Review Process," ¶ (c)). The *Guidelines* are available at http://www.hhs.gov/dab/divisions/appellate/guidelines/ssa.html.

Substantial evidence is "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971), *quoting Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Under the substantial evidence standard, the reviewer must examine the record as a whole and take into account whatever in the record fairly detracts from the weight of the evidence relied on in the decision below. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

The Board will review only those parts of the record before the ALJ which are cited by the parties or which the Board considers necessary to decide the appeal. The Board will not consider issues not raised in the notice of appeal or in the opposing party's response, nor issues which could have been presented to the ALJ but were not. 20 C.F.R. § 498.221(f).

Analysis

Respondent asserts that the ALJ erred in finding that he had engaged in work activity and withheld that information from the SSA while he was receiving SSDI because the ALJ "disregard[ed] every piece of evidence" he submitted that "refut[es]" and "clear[ly] rebut[s]" the SSA I.G.'s investigation findings on which the ALJ relied. Respondent's brief to the Board (R. Br.) at 2-3. He states that the evidence "shows a reasonable explanation" of his activities at Anderson – which he reasserts were "social and hobby activities" that, unlike his pre-disability work as a mechanic and welder at Anderson, "involved minimal duties and made little or no demands" – and supports a finding that he

"truthfully and reasonably reported [to the SSA] that he was not working during the relevant time period . . . ." *Id.* at 2-3 and 5, *citing* 20 C.F.R. §§ 404.1572(b) and 404.1573(c). He asserts that, to the extent he performed the "occasional errand" for Anderson, like picking up parts from vendors, he did so voluntarily, "never in the hopes of receiving compensation, and more often [as] an excuse to visit with old friends he had done business with before his disability." *Id.* at 9. On occasion, he "mentor[ed] . . . the younger employees of [Anderson]." *Id.* at 7. But, he asserts, the ALJ assigned "little or no weight" to evidence that he believes favors his position, such as the statements of former Anderson colleagues and family members who believed that he was merely socializing with his friends and working on his hobby of building miniature models of construction equipment, and instead "relied heavily" on evidence in the form of investigation records generated by the SSA I.G. special agent who conducted surveillance of Respondent's activities and interviewed Anderson employees. *Id.* at 8. He also asserts that substantial evidence of record supports a finding that the proposed CMP and assessment in lieu of damages were not reasonable and that the ALJ erred in finding otherwise. *Id.* at 12-13.

We address below Respondent's arguments, none of which have merit. We uphold the ALJ Decision for the reasons set out below.

1. *The ALJ's findings that Respondent performed work from March 2008 through November 2009 while receiving SSDI; "deliberately withheld" information about his work activity from SSA and, "when asked, he falsely told SSA that he had not worked since June 2002 (the onset date of his disability)," ALJ Decision at 4, are supported by substantial evidence and free of legal error.*

On appeal, Respondent continues to dispute that he had any activity he was required to report to the SSA. He continues to assert, as he asserted below, that his activities involving Anderson constituted hobbies and social activities which section 404.1572(c) states generally are not considered substantial gainful activity. At the heart of Respondent's assertions is the issue of whether Respondent should have known that his activities involving Anderson were activities that reasonably could be deemed work activities subject to disclosure to the SSA.

The ALJ stated:

> A disability claimant must describe accurately any activities performed, and SSA then determines whether those activities constitute the type of work that would preclude a finding of disability. A claimant is not free to determine on his own whether his activities are disqualifying, reporting only his conclusion to SSA.

* * *

> Respondent was bound to report his activities, regardless of whether they constituted disqualifying substantial gainful activity.

ALJ Decision at 13-14 (footnote and citations omitted).[5]

Respondent asserts the ALJ misunderstood his argument. He states that "[w]hile it is clear that [he, Respondent] is not in a position to decide which *work* activities rise to the level of substantial gainful activity and therefore must be reported," he "is expected to read the SSA guidelines to make a reasonable determination about which activities are work and therefore must be reported and which activities are not and should not [be reported]." R. Br. at 10-11 (emphasis in original). He writes, "Surely the SSA does not intend that beneficiaries report every activity they undertake at or with members of their former place of employment, no matter how social or recreational in nature. Instead, the SSA has promulgated guidelines to aid beneficiaries in making a determination of their reporting duties, and exempted certain activities (such as hobbies or activities that do not contribute substantially to the operation of a business) from being considered work. [His] answers to questions regarding his lack of work activity are entirely reasonable based upon a plain reading of the SSA guidelines and the nature of his activities at [Anderson]." *Id.* at 11.

One implication of Respondent's statements, notwithstanding his acknowledgment that he "is not in a position to decide which *work* activities rise to the level of substantial gainful activity" (*id.* at 10), is that he may decide, and appropriately did so decide, that the activities he had engaged in were not *work* activities. Contrary to Respondent's apparent suggestion, an individual does not have unfettered freedom to decide subjectively whether or not his or her activity constitutes work activity or substantial gainful activity and choose what to report. *See id.* at 9 (stating that "[he] never believed" any of his activities related to Anderson "were 'work'").

We do not agree with Respondent that the ALJ somehow misunderstood (and therefore did not actually consider and respond to) his argument. On the contrary, the ALJ recognized and appropriately responded to his argument, determining that ultimately it is the SSA that decides whether an individual's activity constitutes substantial gainful activity, but the individual is held to disclosing information about activity involving work to enable the SSA to make that determination. *See* ALJ Decision at 13 ("A claimant is not free to determine on his own whether his activities are disqualifying [i.e., not work activities], reporting only his conclusion [in other words, he is not free to simply decide he had no activity that possibly could be considered work activity] . . . .") and 13-14,

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[5] To be clear, we do not read the quoted language from the ALJ Decision to mean the ALJ stated that any and all activity must be reported. In context, it is clear that the ALJ was addressing the question of whether an individual had <u>work activity</u> subject to disclosure to the SSA. *See* ALJ Decision at 16 ("Respondent was obligated to report his work activities, whether he was paid or not.").

citing, *inter alia*, *Anthony Koutsogiannis*, Recommended Decision on Review of Administrative Law Judge Decision, Docket No. A-07-81 (2007) (not reversed or modified by the Commissioner of Social Security). As the ALJ noted (*see id.* at 13-14), in upholding the ALJ's decision in *Koutsogiannis*, which involved an issue of whether a disability benefits recipient had made false and misleading statements concerning his work activities in violation of section 1129(a) of the Act, the Board stated:

> Had Respondent [Koutsogiannis] cooperated with SSA's inquiries by providing accurate information about his work activities, then SSA would have been able to determine whether or not those activities demonstrated a capacity for gainful employment. By concealing the extent of his work . . . Respondent deprived SSA of the ability to evaluate those facts along with medical evidence to make that determination.

Koutsogiannis at 17.

We do not disagree with Respondent to the extent he asserts the SSA plainly put him on notice that the SSA generally does not consider certain types of activities (like hobbies and social activities, *see* 20 C.F.R. § 404.1572(c)), as substantial gainful activity. But that fact does not then mean that the SSA cannot or may not hold him to reporting work activity that possibly could be substantial gainful activity so that the SSA can make the appropriate determination. Certainly that does not mean Respondent can then defend or justify his failure to disclose by simply declaring, based on his own assessment of his activities, that his activities fall into the ambit of section 404.1572(c) or otherwise are not work activities. At a minimum, Respondent had to have some objectively reasonable basis for such a characterization, which is belied here by the strong contrary evidence. By authority of section 223(d)(4)(A) of the Act, the SSA has issued regulations in 20 C.F.R. Part 404 (*see* "Authorities" above) that prescribe the criteria the SSA considers to determine whether an individual is able to engage in substantial gainful activity. Just as a "plain reading of SSA guidelines" (R. Br. at 11) put individuals on notice that certain activities like hobbies *generally* are not considered substantial gainful activities (section 404.1572(c)), a plain reading of other applicable regulations that also must be considered, to include 20 C.F.R. §§ 404.1571 and 404.1588, put individuals on notice that SSA could hold them responsible for reporting work activities that SSA could determine are (or are not) substantial gainful activity.

Another implication to be drawn from Respondent's statements in his brief to the Board is that none of the activities he had engaged in were actually work activities (and that it was reasonable for him to have believed as much). We understand Respondent's position to be that his *only* activities involving Anderson were mostly hobbies and social activities, as well as occasional mentoring of younger Anderson employees and running of errands for Anderson without expectation of payment. Respondent seems to suggest that none of these activities were work activities and, importantly, none could be

considered work activities. Moreover, he suggests that he was not, or should not be considered to have been, employed by or working for Anderson during the relevant time period in light of his disability. *See, e.g.,* R. Br. at 6 (stating that the President of Anderson did not believe Respondent was capable of performing physically demanding work he had performed before 2002) and 9 (stating that "[t]here is no evidence [he] worked as a mechanic or welder, or supervised other mechanics or welders, after 2002" and citing section 404.1573(b), which provides in part that work that involves minimal duties that make little or demands on the individual and that are of little or no use to the employer may not constitute work at the "substantial gainful activity" level).

However, even if, as Respondent alleges, he used Anderson resources merely to work on his hobby, socialize with former colleagues, and mentored or ran "errands," these activities are not necessarily incompatible with a finding that Respondent had engaged in work activity. It is not unusual for individuals to develop friendships with work colleagues that continue beyond their separation from the workplace, or, that more experienced individuals, whether or not still employed with an organization, would mentor younger and less experienced employees. It also is conceivable that an employer may allow a current or former employee to use workplace facilities for whatever reason, even after the employer-employee relationship ends and, in return, the individual would want to return the favor by performing errands for the employer. It also is possible, however, for an individual to be employed and performing substantial gainful activity, while also socializing with and mentoring colleagues. Even though the regulations recognize that certain types of activities *generally* are not considered substantial gainful activities, that an individual had such activities would not necessarily preclude a finding that the individual otherwise had work activities subject to disclosure. In other words, a finding that an individual engaged in work activity and a finding that the individual also engaged in activity that generally is not considered work activity are not mutually exclusive. Furthermore, as the ALJ said, and we agree, here, the issue is not whether Respondent could still perform pre-disability work as a welder and mechanic; the issue is whether the evidence shows Respondent was performing any work activities which he was obligated to disclose to the SSA. *See* ALJ Decision at 13.[6]

The ALJ properly considered all of the evidence – which included direct written testimony of witnesses offered by both parties, neither of which asked for an opportunity to cross-examine the opposing party's witnesses at hearing – and found ample evidence that Respondent performed work activity while receiving SSDI; deliberately withheld that information from the SSA; and falsely told the SSA that he had not worked since the

[6] The ALJ noted, however, that Respondent had returned to work in December 2002, but the SSA considered his work activity from then until May 2005 a "trial work period" during which he could work and still be eligible for disability benefits. ALJ Decision at 5 n.6, citing 20 C.F.R. § 404.1592 and SSA Ex. 22, at 7. The ALJ also noted that, in a decision issued March 22, 2012, an Administrative Law Judge for the SSA determined that Respondent completed his trial work period in May 2005 and began performing substantial gainful activity as of August 1, 2005. *Id.* at 13 n.10, citing SSA Ex. 22, at 8-14.

SSA determined he was disabled. ALJ Decision at 3, 4. The ALJ set out her assessment of the evidence in detail in pages 6-16 of her decision and also to some extent in page 5. We need not exhaustively restate the ALJ's assessment, but note some of the ALJ's findings here.

> On January 6, 2009, an SSA I.G. special agent personally observed Respondent driving a company truck, the fuel and maintenance costs for which Anderson paid. Almost every workday, Monday through Friday, during the period a GPS tracking device was in place on the company truck (more than a full month beginning on August 21, 2009), the company truck was driven from Respondent's home early in the morning and returned to his home in the evening. The truck made regular stops at Anderson work sites or corporate offices and parts vendors, during workdays and normal work hours. *Id.* at 6.
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> Numerous individuals employed at businesses the GPS tracking device indicated that Respondent frequented consistently reported that Respondent stopped to purchase machine parts, which he then delivered to Anderson work sites. Those individuals also said that Respondent ordered parts on behalf of Anderson and that the vendors billed Anderson for them. At least one person said Respondent had been training a welder at Anderson. *Id.* at 9-10.
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> Numerous items seized by the SSA I.G. as part of its investigation included, among other things, parts receipts and invoices identifying Respondent as the contact person or the person ordering. *Id.* at 11-12.
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> Respondent incurred thousands of dollars in company cell phone bills that Anderson paid. Most of the calls were to or from Anderson employees, who also had company phones, or to equipment and parts vendors. *Id.*
>
> Respondent was given "a company credit card to use for company business, and the evidence establishes that he did just that." *Id.* at 15.
>
> Numerous individuals indicated that Respondent performed activities for Anderson, like picking up and delivering supplies, offering advice about equipment, and teaching younger employees. *Id.*

The ALJ stated, too, that activities like ordering parts from vendors not only were some of the job duties Respondent had performed pre-disability, they plainly were the types of activities usually done for pay. *Id.* at 14; 20 C.F.R. §§ 404.1510, 404.1572(b).[7] In other words, the ALJ was stating that the activities the evidence shows Respondent had engaged in included work activities he was obligated to disclose to the SSA. Moreover, the ALJ found that Respondent knew or had reason to know of his obligation to disclose his work activity to the SSA. As part of his disability application, he agreed to notify the SSA if he went to work. Yet twice in December 2008 and once in December 2010, the ALJ found, Respondent affirmatively represented to the SSA in writing that he had not worked since June 2002 or was "not working at all" despite notice that making a false statement or representation of a material fact for use in determining a right to payment under the Act is a crime punishable by federal law. ALJ Decision at 5. The ALJ's findings – which indicate that the ALJ found Respondent's position that it was reasonable for him to believe he had nothing to report not just unreasonable, but not even credible – are supported by substantial evidence in the record.

Respondent's chief complaint, in essence, amounts to little more than disagreement with the ALJ's assessment and weighing of the evidence. In particular Respondent is dissatisfied because the ALJ found the written testimony of Respondent's friends, employees of Anderson, and family members, offered to show that those individuals believed he was not working at Anderson for pay, less than fully convincing. *See* R. Br. at 5-8. We disagree with Respondent's suggestion that the ALJ disregarded certain evidence that Respondent believes favors his position in favor of relying selectively on negative evidence offered by the SSA I.G. Not only did the ALJ consider evidence Respondent offered, when she found such evidence less than fully credible or convincing when weighed against or considered in relation to other contrary evidence, she explained her reasons why. The ALJ expressly acknowledged Respondent's position that he was not engaged in work activity, but rather hobbies, social activity, mentoring and running occasional errands for Anderson, none of which he allegedly believed was work activity, and discussed the evidence Respondent offered in support of that position. *See* ALJ Decision at 13-16. Again, we need not repeat all of the ALJ's assessment, but, of note, the ALJ observed:

[7] Even if ordering parts from vendors; advising, mentoring or supervising less skilled Anderson employees; and running occasional errands for Anderson are assumed to have "involve[d] minimal duties that ma[d]e little or no demands" on Respondent (20 C.F.R. § 404.1573(b)), we question whether such activities would have "little or no use" (*id.*) to Anderson. If anything, an activity like picking up parts from vendors probably would benefit Anderson in some way and would be the type of activity that an employer normally would be expected to pay someone to perform.

> [N]ot one of the outside vendors suggested to the [SSA I.G.] special agents that Respondent . . . had stopped by for a friendly visit. They consistently maintained that he came to their businesses to do business – mainly, purchasing parts for Anderson . . . , which he subsequently delivered to job sites.

Id. at 15.

In general, the Board defers to an ALJ's findings on the credibility of witness testimony (oral or written) and the weight an ALJ assigned to such testimony unless there are "compelling" reasons not to do so. *See, e.g.*, *Van Duyn Home & Hosp.*, DAB No. 2368, at 10-11 (2011); *Koester Pavilion*, DAB No. 1750, at 16, 21 (2000). Respondent has done little more than voice a non-specific dispute about the ALJ's assessment of the evidence – and for no apparent reason other than dissatisfaction with the outcome. In essence, Respondent is dissatisfied because certain evidence he himself submitted did not sway the ALJ's decision in his favor. Yet he does not raise any specific factual dispute concerning other substantial negative evidence the ALJ also considered and weighed appropriately, in accordance with her authority.[8]

In short, here, Respondent has not specifically articulated any compelling reason why the Board should not defer to the ALJ's assessment of witness testimony. And we find none.

2. *The ALJ's determination that the combined amount of the CMP and assessment in lieu of damages, $79,488, is reasonable is supported by substantial evidence and free of legal error.*

Respondent also asserts that the ALJ erred in finding there was substantial evidence in the record to support a finding that the proposed CMP and assessment in lieu of damages were reasonable. R. Br. at 12. He maintains that he, a Vietnam War veteran, is unable to pay the CMP and assessment because he has no significant income or assets and is unemployable because of his heart condition. The SSA is currently withholding payment of his disability benefits. He lives with his son because he cannot afford to live alone and pays his son for groceries when he is able. *Id.* at 12-13. Respondent also states that he has never been convicted, let alone accused, of financial fraud. He asserts he has a low degree of culpability because he made no effort to hide his visits to Anderson or the fact that he occasionally ran unpaid errands for Anderson. He believed that his activities were not work activities, so he had no reason to believe he had anything to report. *Id.* at 13.

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[8] We note that Respondent could have availed himself of the opportunity to cross-examine the SSA I.G.'s witnesses during the ALJ proceedings, but affirmatively declined to do so. *See* ALJ's March 4, 2015 Order Summarizing Prehearing Conference, at 2, ¶ 3 ("Respondent . . . does not wish to cross-examine any of the [SSA] IG's witnesses."). The ALJ's March 4, 2015 Order, page 2, paragraph 5, informed the parties they would have ten days to raise any objections to the Order. The record reveals no objections from Respondent.

The Board finds no basis for further reduction of the CMP and assessment in lieu of damages. As the ALJ noted, the SSA chose to impose a CMP of $20,000, which represents a "fraction" of the amount SSA I.G. had authority to impose. ALJ Decision at 16-17. The SSA I.G. considered only the 21-month period from March 2008 through November 2009 during which Respondent collected benefits while working – which could support a CMP of $105,000 ($5,000 multiplied by 21) – despite evidence that he was working and collecting SSDI benefits before March 2008. *Id.* Moreover, the ALJ noted, the SSA I.G. chose to impose an assessment in lieu of damages lower than the amount that could have been imposed, limiting the assessment amount to the SSA's actual losses. *Id.* at 17. We observe, further, that the SSA I.G. expressly stated that it was imposing a CMP and assessment in lieu of damages lower than the amounts it could have imposed, taking into consideration Respondent's health status and financial condition. *See* SSA Ex. 25, at 2.

The SSA I.G.'s actions, which resulted in a significant reduction in the total possible amount of CMP and assessment in lieu of damages, should be considered with evidence of culpability that weighs against Respondent. Respondent suggested below, and again suggests now, that he is not culpable because any inaction on his part in not disclosing anything to the SSA was due to honest belief that nothing he was doing involving Anderson was work activity and he therefore had nothing to hide. The ALJ found Respondent's position less than credible and found evidence of Respondent's culpability. *See, e.g.,* ALJ Decision at 17 (in three instances, twice in December 2008 and once in December 2010, Respondent affirmatively represented that he was not working at all) and 18 (discussing Respondent's "engage[ment] in deception that lasted for years, much longer than the 21 months for which the [SSA] IG is holding him accountable"). In other words, the ALJ, and the SSA I.G. before her, together considered the nature and circumstances of Respondent's statements and actions, as well as the degree of Respondent's culpability, in accordance with 20 C.F.R. § 498.106(a)(1) and (a)(2), weighing those factors against Respondent's financial condition and "such other matters as justice may require" in accordance with sections 498.106(a)(4) and (a)(5).[9] Respondent has not articulated any additional or different basis permitted under section 498.106(a) for further reducing a CMP and assessment that already have been reduced significantly.[10] We find no cause to disagree with the ALJ's weighing of the mitigating factors in section 498.106(a).

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[9] The SSA I.G. did not assert there is evidence of history of prior offenses. ALJ Decision at 18; SSA I.G. Br. at 14; 20 C.F.R. § 498.106(a)(3).

[10] Respondent does say that, even assuming that his activities at Anderson after 2002 constituted work activity subject to disclosure, they "never rose to the physically demanding level of his previous employment before 2002." R. Br. at 13. Whether or not this is true, Respondent does not explain how specifically the nature of his activities at Anderson after the 2002 disability determination as compared to the nature of his pre-disability activities at Anderson is relevant to an evaluation of the section 498.106 mitigating factors. He also writes that "ambiguity in the code regarding 'work activity,' mitigates in favor of a reduced penalty." *Id.* He cites no authority and offers no reasoned analysis in support of this suggestion.

Conclusion

The Board recommends that the Commissioner of Social Security affirm the ALJ Decision.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Susan S. Yim
Presiding Board Member