Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Social Security Administration Inspector General,	)	Date: March 8, 2007
Petitioner,	)	Docket No. C-06-435
	)	Decision No. CR1571
v.	)	
Thomas Tobias,	)	
Respondent.	)	

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 $5000 is imposed against Respondent for making a false or misleading statement on May 8, 2003, in support of his application for benefits or payments under the Act.

I. Background

Respondent, Thomas Tobias, timely requested a hearing by an administrative law judge (ALJ) pursuant to 20 C.F.R. § 498.202. Respondent appeals from the March 9, 2006 notice of the Social Security Administration (SSA) Inspector General (I.G.) that proposes imposition of a civil money penalty (CMP) of $15,000 against him pursuant to section 1129 of the Social Security Act (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 May 11, 2006. On June 7, 2006, 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 June 12, 2006. An additional prehearing conference was convened by telephone on October 10, 2006, to discuss final procedural details. Transcript (Tr.) 16-20.

On October 17, 2006, a hearing was convened in this case in Hammond, Louisiana. Erin M. Justice, Esquire, appeared on behalf of Petitioner, the SSA I.G. Respondent appeared without counsel but he was assisted by Marion Tobias, Jr. Respondent was advised of his right to representation but he elected to proceed without an attorney. Tr. 3, 8-9. The I.G. offered and I admitted Petitioner's exhibits (P. Ex.)[1] 1 through 22. Respondent offered and I admitted Respondent's exhibits (R. Ex.) 1 and 2.

A 254-page transcript of the hearing was prepared and provided to the parties. SSA filed its "Petitioner's Post-Hearing Brief" (P. Brief) on December 7, 2006 and its post-hearing reply brief (P. Reply) on December 18, 2006. Respondent submitted multiple documents post-hearing: an undated letter postmarked November 14, 2006 and received at the CRD on November 16, 2006; an undated letter postmarked November 20, 2006 and received at CRD on December 13, 2006; a letter dated December 13, 2006; a letter dated December 19, 2006; and a letter dated January 5, 2007.

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 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 prevent an individual from doing his or her past work or other

---

[1] Petitioner incorrectly marked its exhibits "R. Ex." but that marking shall be read to be "P. Ex." Tr. 13-14.

work that exists in substantial numbers in the economy for at least one year or that will result in death. 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, 416.1100. 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 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 . . . .

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).

Individuals who violate section 1129 are subject to a CMP of not more than $5000 for each such false or misleading statement or representation. 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 or representations. Act § 1129(a)(1). Because Respondent received no benefits or payments in this case, no assessment could be made.

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 Departmental Appeals Board of the Department of Health and Human Services. The ALJ has jurisdiction to determine whether the person should be found liable for a CMP. 20 C.F.R. § 498.215(a). The person requesting the hearing, that is Respondent, has the burden of going forward and the burden of persuasion with respect to any affirmative defenses and any mitigating circumstances. 20 C.F.R. § 498.215(b)(1). The I.G. has the burden of going forward as well as the burden of persuasion with respect to all other issues. The 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 pursuant to section 1129(a)(1) of the Social Security Act.

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

C. Analysis

In this case, the I.G. notified Respondent that it was imposing CMPs of $5000 for each of three false or misleading statements made in the following documents: (1) a "Supplemental Interview Outline" form completed on May 8, 2003; (2) a "Function Report – Adult" completed on April 18, 2004; and (3) a "Disability Report – Adult" completed on October 4, 2005. P. Ex. 18; 19. After reviewing all the evidence and the

arguments of the parties, I conclude that: (1) the I.G. has proven by a preponderance of the evidence that Respondent made false or misleading statements that blindness prevented work or activities of daily living (ADLs) on May 8, 2003, based on the fact that Respondent renewed his driver's license after that date; (2) the I.G. has failed to prove the charge that Respondent made any false or misleading statement on April 18, 2004 and, in fact, no document with that date has been produced by the government; and (3) the I.G. has failed to prove by a preponderance of the evidence that Respondent made any false or misleading statements on October 4, 2005, that blindness prevented work or ADLs given the credible medical evidence of significant visual impairment and the absence of credible evidence that Respondent actually engaged in work or ADLs that he stated he could not perform.

1. Respondent made a false or misleading statement on May 8, 2003, related to his 2003 applications for title II and title XVI benefits, when completed a "Supplemental Interview Outline" form.

Respondent filed an application for disability insurance benefits under title II of the Act on April 28, 2003. He alleged in the application that he became unable to work on March 31, 2003, due to a disabling condition. The application does not identify the disabling condition. P. Ex. 1. Respondent also filed an application for supplemental security income pursuant to title XIV of the Act on April 28, 2003. Respondent alleges in the application that he is disabled and that the disability began on March 31, 2003. This application also fails to identify the alleged disabling condition, however, the application includes the statement that "I am not blind." P. Ex. 2. Both applications include a warning above the line on which Respondent's signature appears that it is a crime to make a false statement or representation of material fact or to knowingly lie or misrepresent the truth when making an application under the Act. P. Ex. 1, at 3; P. Ex. 2, at 3.

The I.G. charges Respondent with making false or misleading statements that he could not work and had limited ADLs due to blindness on the "Supplemental Interview Outline" he signed on May 8, 2003. P. Ex. 3.[2] The I.G.'s case is not based upon evidence

---

[2] On April 28, 2003, Respondent's son, Thomas J. Tobias, completed a "Disability Report Adult" related to Respondent's applications. Thomas J. Tobias stated that Respondent suffered from "loss vision/blurred vision – Glaucoma servre (sic) optic nerve Damage" that began to bother him in January 1997 and caused him to become unable to work on March 31, 2003, due to "loss of vision/for safety reasons and work related 'task'." P. Ex. 4, at 2. The form indicates that Respondent saw Dr. Hollimon who gave

(continued...)

that Respondent worked or that he engaged in ADLs that he denied he could perform. Prehearing, the I.G. argued that Respondent made false statements and that the falsity of Respondents statements is shown by evidence that: (1) Respondent applied for and received a renewal of his driver's license in December 2003, and he claimed on the application that his uncorrected vision was 20/40 in each eye; and (2) in October 2005, Respondent was videotaped "walking and climbing stairs to a convenience store, unassisted and without the use of a cane." P. Prehearing Brief at 11; Tr. 47. In post-hearing briefing, Petitioner relies upon the same evidence except that the I.G. now agrees that the video does show Respondent was carrying a cane when recorded at the convenience store. Petitioner also argues in post-hearing briefing that Respondent's testimony at hearing also shows that he made false statements. P. Brief at 3, 11; P. Reply at 2. Respondent has never denied that he made or caused to be made statements on any forms. Rather, Respondent's position is that he was blind and that all statements made are true.

The fact issue to be resolved is whether or not Respondent, when he completed the "Supplemental Interview Outline," was "blind" or unable to see to the extent that his ADLs and ability to drive were as limited as he reported on the form. The Commissioner's regulations in the "Listing of Impairments" at 20 C.F.R. Part 404, Subpart P, Appendix 1, Listings 2.00 through 2.04, establish standards for finding one disabled due to impairment of visual acuity, contraction of peripheral visual fields, and loss of visual efficiency. Blindness as used in the Act is also referred to as "statutory blindness" and refers to the degree of visual impairment as described in Listings 2.02 and 2.03. 20 C.F.R. Part 404, Subpart P, Appendix 1, Listing 2.00A.7; § 404.1581. However, if an applicant for benefits or payments does not meet the requirements specified by the listing of impairments, under the Commissioner's five-step sequential evaluation process it must be determined whether given established impairments one's residual functional capacity permits a return to past work or other work existing in substantial numbers in the economy. The Commissioner's sequential evaluation process provides a convenient model for analysis for this case that considers first the medical evidence and, if it is not conclusive, focuses upon evidence of "functional capacity."

---

[2](...continued)
him Travatan drops to relieve the pressure in his eyes and that he saw Dr. Armini for a second opinion. P. Ex. 4, at 4, 7. The I.G. does not allege that statements on this form are a basis for imposing a CMP.

The medical evidence from 2003 reveals visual impairment but does not establish that Respondent was blind.

Jerry A. Hollimon, O.D.[3], indicates in a letter dated March 26, 2003, that he saw Respondent on March 19, 2003. Dr. Hollimon states that Respondent complained of problems seeing his computer and driving vehicles. On visual examination, Dr. Hollimon found optic nerve changes. Best corrected visual acuity for Respondent was determined to be 20/30 and 20/40 in each eye. A visual field study revealed severe peripheral field loss in both eyes. Dr. Hollimon diagnosed low tension glaucoma for which he prescribed drops to prevent further deterioration of Respondent's optic nerve. Dr. Hollimon did opine that Respondent's glaucoma made it difficult for him to perform normal tasks and he requested that Respondent be indefinitely excused from work. P. Ex. 21, at 1.

Dr. Hollimon signed another letter dated April 16, 2003, in which he states that he saw Respondent on March 19, April 1, and April 16, 2003. Dr. Hollimon states the findings included in his previous letter and further that, "(t)his glaucoma problem is causing Mr. Tobias severe visual fatigue, loss of sight and blurred vision." Dr. Hollimon further opines that **damage** to Respondent's optic nerve previous to prescribing medication has made it difficult for him to perform any work related tasks and that he cannot work. P. Ex. 21, at 2.

On April 24, 2003, Michael Armini, M.D., signed a note on a prescription pad that indicates he saw Respondent who complained of loss of vision to the level of light perception only since March 19, 2003. Dr. Armini did not give a diagnosis but referred Respondent to Louisiana State University for further evaluation. P. Ex. 21, at 3. Respondent testified that he never went to Louisiana State University on the referral by Dr. Armini because the visit would not be covered by his insurance. Tr. 201-08.

The state agency that processed Respondent's 2003 applications sent him to consultative examinations. Michael L. Fajoni, M.D., Eye Physicians & Surgeons, Inc., examined Respondent and issued a report dated May 12, 2003. Dr. Fajoni noted Respondent's complaint of decreased visual acuity and that his only medication was Travatan eye drops for low tension glaucoma. Dr. Fajoni commented that it was inconsistent that Respondent's visual acuity was measured by Dr. Holliman in April of 2003 as 20/30 and 20/40, but when Respondent saw Dr. Armini his visual acuity had dropped to the level of

---

[3] A licensed optometrist is an acceptable medical source for determining measurements of visual acuity and visual fields for purposes of determining eligibility for benefits or payments. 20 C.F.R. §§ 404.1513(a)(3); 416.913(a)(3).

blindness. Dr. Fajoni found no indication of low tension glaucoma and he commented that evaluation of the visual field performed by Dr. Holliman's office is not consistent with glaucoma. Dr. Fajoni opined that, based on his normal examination, the visual field performed by Dr. Holliman is more consistent with "post-chiasmal pathology or a non-organic cause." Dr. Fajoni explains that cortical or cerebral blindness is a complete or incomplete loss of visual acuity from occipital lobe damage rather than eye disease. Because Respondent had both normal pupillary light responses and a normal fundus examination, cortical or cerebral blindness might be the explanation for loss of visual acuity. Dr. Fajoni recommended an MRI to try to determine that. He also noted that hysteria and malingering (non-organic causes) might also be indicated by a normal MRI examination. P. Ex. 21, at 4-5.

Respondent was also referred to Pervez Mussarat, M.D.,[4] for a consultative examination on July 3, 2003. Dr. Mussarat reported that Respondent complained of losing his vision starting in March 2002 and the vision loss progressed to the point that, at the date of the examination, he had total loss of vision. Dr. Mussarat also notes, however, that Respondent reported having blurred vision making it difficult for him to read and he reported that he could not see or count fingers. Dr. Mussarat lists Respondent's various physical complaints and states that Respondent was referred to him "to rule out any physical disability." Dr. Mussarat opined, apparently based upon notes provided from Dr. Hollimon, that Respondent had central vision only. Dr. Mussarat records as his impression that Respondent was "legally blind" based on visual field testing by Dr. Hollimon. P. Ex. 21, at 7. He ordered an MRI but a hand-written note dated July 22, 2003, indicates that Respondent was a no show for the MRI. *Id.*

The record also contains a letter on Tulane University Hospital & Clinic letterhead, dated July 28, 2003, from Leon A. Weisberg, M.D., Director and Professor, Tulane Neurology, addressed to T. Hamilton, Disability Determination. Dr. Weisberg reports that Respondent was referred to him for a neuropsychiatric consultation that occurred on July 28, 2003. Dr. Weisberg reports that Respondent told him he was involved in a car wreck in February 2000, that his vision became blurred and then progressed to blindness over a period of one month, and that, as of the date of the examination, he was totally blind. Dr. Weisberg opined that Respondent did not appear to be malingering and there was no evidence of a conversion reaction. Dr. Weisberg observed that Respondent's optic discs appeared normal and that his pupils reacted to light. Dr. Weisberg states that Respondent

---

[4] Whether or not Dr. Mussarat is a specialist in a particular field of medicine is not clearly indicated on his report. However, the report indicates he performed a neurologic examination.

could finger count, but he also states Respondent is totally blind, an obvious inconsistency. Dr. Weisberg concluded that he found no evidence of optic nerve disease, that he did not feel there was a conversion reaction, and that he had no "good explanation for Respondent's visual loss." P. Ex. 21, at 9. He found no evidence to suggest glaucoma either based on his own examination or the report of the ophthalmologist. He opined that Respondent's report was inconsistent with damage within the occipital cortex. But he concluded that Respondent "can not (sic) care for himself because of the blindness." P. Ex. 21, 8-10.

Medical evidence from 2003 shows Respondent was reporting visual disturbance, but the nature and degree of that disturbance is not settled by the medical experts, either Respondent's treating sources or the consultative examiners. Respondent's treating optometrist Dr. Holliman concluded on examination on March 19, 2003, that Respondent retained corrected visual acuity of 20/30 and 20/40 in each eye. Although Dr. Holliman opined that there was severe peripheral field loss in each eye and that Respondent would have a great deal of difficulty driving, he recommended frequent rest to prevent visual strain, but did not indicate that he told Respondent he had to quit driving. Dr. Holliman also never states in either of his reports that Respondent is blind. P. Ex. 21, at 1-2. Dr. Armini's note dated April 24, 2003, is of little probative value as it does not reflect the basis for his conclusion that Respondent's level of vision had been reduced to light perception only in both eyes since March 19, 2003. Dr. Armini's report is also clearly at odds with Dr. Holliman's reports. Dr. Fajoni, in his report of May 12, 2003, highlights the fact that the reports of Holliman and Armini are inconsistent. Dr. Fajoni also found Dr. Holliman's opinions to be inconsistent. Dr. Mussarat states that Respondent is legally blind, but that conclusion is based upon Dr. Holliman's conclusions. Dr. Weisberg also found no evidence of glaucoma and noted inconsistencies in Respondent's presentation. He could not rule out brain injury, but noted no depression, psychosis, or organic brain disturbance. Dr. Weisberg states that Respondent cannot take care of himself because of blindness, but he reveals no basis for concluding Respondent is blind other than Respondent's subjective complaints. P. Ex. 21, at 8-10.

The most damning piece of evidence against Respondent and his allegation that he was blind in March of 2003, is the fact that he applied for a driver's license on December 24, 2003, less than six months after his last consultative medical examination. Petitioner produced Respondent's renewal application for Louisiana Personal Driver's License dated December 24, 2003, which bears Respondent's signature. The application indicates that Respondent requested a downgrade of his license from an "A" to an "E"; that he reported no physical or mental condition that could impair his ability to operate a motor vehicle safely; and that he did not wear contact lenses or glasses. The form indicates that Respondent's vision without correction was 20/40 in both eyes. The form indicates that

Respondent certified by his signature subject to legal penalty, that all statements on the application were true. Respondent was issued a class "E" license without restrictions that is effective until January 3, 2008. P. Ex. 15; Tr. 94-95. Respondent showed me his driver's license at the hearing. The license was a class "E" with an expiration date of January 3, 2008, and there were no endorsements or restrictions listed. Respondent testified that the license renewal notice was read to him by his son. He knew he could not pass the examination but he wanted an identification card. He testified that he told the lady at the motor vehicle division that he was having eye problems and that the doctor had taken his glasses because they did him no good. The lady had him look in the eye machine. He testified that he told her things were blurred. He testified he saw a few letters of the alphabet and told the lady he could not see anymore, she said okay and then they took his picture. He testified that his son had to put his hand on the line so that he could sign his name. In response to cross-examination by counsel for the I.G., Respondent testified that he continued to drive between 2000 and 2003, despite occasional loss of vision. He testified that when doing the vision examination he recalled seeing the first of the letters but then told her he could not see anymore. Tr. 216-39. I do not find credible Respondent's assertions that he only sought an identification card and that he was essentially given a renewal of his driver's license in error or through negligence by licensing officials. Two documents bearing Respondent's signature and dated December 24, 2003, show that he applied for a Louisiana personal driver's license, that he had uncorrected 20/40 vision bilaterally, and that he had no physical or mental conditions that impaired his ability to operate a motor vehicle safely. Respondent admitted taking the eye examination, that he told the examiner that he was having some vision problems and that his vision was blurry, but he admitted that he was able to read some of the letters. Tr. 206-08. Respondent has never asserted that he told the examiner that he was blind or that he could not see to drive.

Respondent's testimony also shows that he engaged in more ADLs in 2003 than he reported on the form in question. Respondent testified that in April 2000 he experienced his first loss of vision, but it returned after a short time. Tr. 192-93. He began seeing Dr. Holliman in 2001. Between 2000 and 2003, sometimes he could see; sometimes he could not; and sometimes his vision was blurred. Tr. 193. Respondent testified that he used one cane for balance and a different cane to help find his way in unfamiliar locations. Tr. 194. Respondent testified that he did attend church activities but other people transported him. Tr. 200, 203. Respondent testified that he could take a shower or bath except when his body pains prevented it. He testified that blindness never prevented him from showering or bathing, although, he sometimes had assistance to ensure he had all the soap off and was dried completely. He testified that he never cooked because he never learned

how. He recalled last watching television in 2003, although he still listens. He lived by himself from April 2000 to July 2006, although sometimes people stayed with him for brief periods. Tr. 200-04.

Respondent's testimony indicates that between 2000 and 2003 he was experiencing instances of blurred or lost vision. Tr. 193-94. However, during the processing of his 2003 applications and specifically at the time he made or caused to be made the entries on the Supplemental Interview Outline, the evidence shows that Respondent was not as limited as he alleged on that form. Respondent admitted that he continued to live alone, albeit with occasional assistance from family or friends, he continued to participate in church activities, and he remained able to do some self-care ADLs such as showering or bathing. Tr. 200-04.

I conclude that the preponderance of the evidence shows that Respondent was not blind or suffering visual impairment to the extent he alleged in the Supplemental Interview Outline on May 8, 2003. Respondent has never denied that he provided the responses that appear on the Supplemental Interview Outline or that he signed that form on or about May 8, 2003. The form includes entries that state, among other things: "I can not see at all to do for myself" (P. Ex. 3, at 1); "I can not do for myself because I can not see" (P. Ex. 3, at 1); "I can't see" "I'm legally blind" "I have loss (sic) my sight in both eyes" (P. Ex. 3, at 2); "I can not see (I am legally blind) (P. Ex. 3, at 2); "I can not see the food or the prices" (P. Ex. 3, at 2); "I can't see the words (legally blind)" (P. Ex. 3, at 3); "I can not see (legally blind)" (P. Ex. 3, at 3); "I am disabled to protispate (sic) in activities because of loss of sight (legally blind)" (P. Ex. 3, at 4); and "I am legally blind future test and exams to follow" (P. Ex. 3, at 4). I find that Respondent either made or caused to be made each of these statements and that he either knew or should have known that they were false or misleading when he made them in order to gain benefits or payments under the Act. There is no question that that document was prepared by Respondent and submitted to convince the Commissioner to find Respondent entitled for benefits or payments under title II and title XVI of the Act. Evidence such as the Supplemental Interview Outline must be considered when the disability determination is made. 20 C.F.R. § 404.1512(b)(3). Thus, the statements in the Supplemental Interview Outline are material within the meaning of section 1129(a)(2) of the Act. I also conclude that Respondent knew or should have known that his statements on the Supplemental Interview Outline were false or misleading and that they were made intentionally. I do not doubt that Respondent was having some visual disturbance in 2003. However, the evidence is clear to me that Respondent's limitations were not as great as he claimed.

The false or misleading statements Respondent made or caused to be made on the Supplemental Interview Outline on May 8, 2003, are a basis for the imposition of a CMP pursuant to section 1129(a)(1) of the Act.

2. Petitioner has not proven by a preponderance of the evidence that Respondent made or caused to be made a false or misleading statement on April 18, 2004, or that he completed a form entitled "Function Report – Adult" on that date.

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). The Commissioner's regulations implementing section 1129 of the Act are even more specific than the Act regarding notice. The Commissioner requires that the SSA I.G. serve written notice upon the person against whom a CMP will be imposed. The notice must include, among other things:

> (2) A description of the false statements, representations, and incidents, as applicable, with respect to which the penalty and assessment, as applicable, are proposed;

20 C.F.R. § 498.109(a)(2).

Petitioner notified Respondent by letter dated January 24, 2006, that imposition of a CMP under section 1129 was being considered based upon false statements or misleading representations. Petitioner alleged that Respondent made four misrepresentations in a "Supplemental Interview Outline" form that he completed on May 8, 2003. The specific misrepresentations alleged were that Respondent was blind and therefore he did not prepare his own meals; he did not do other household chores; he did not read; and he did not participate in any clubs or groups. Petitioner also alleged Respondent made a false statement on **April 18, 2004** when completing a form entitled "Function Report – Adult" because he said that he did not drive due to blindness. Finally, Petitioner alleged Respondent made a false statement on October 4, 2005, when he completed a form entitled "Disability Report – Adult," on which he indicated that he was unable to work due to blindness that began in March 2003. P. Ex. 18.

Petitioner notified Respondent by letter dated March 9, 2006, that a CMP of $15,000 was proposed pursuant to section 1129 of the Act. The basis for the CMP was alleged to be false statements Respondent made to SSA on the May 8, 2003, "Supplemental Interview Outline," including the statements that he was blind in both eyes; that he did not clean

house, launder clothes, or do other work around the house due to blindness; that he did not read due to blindness; and that he did not participate in clubs or groups due to blindness. SSA alleged in the notice that the CMP was also based on a false statement Respondent made on **April 18, 2004** in a "Function Report – Adult," specifically that he did not drive due to blindness. SSA also cited an alleged false statement Respondent made on an October 4, 2005, "Disability Report – Adult," specifically that he was unable to work since March 2003, due to blindness. P. Ex. 19.

Both the January 24 and March 9, 2006, SSA notices allege that Respondent made false statements on **April 18, 2004**, on a form entitled "Function Report – Adult." However, Petitioner has offered no such form as evidence or any evidence that such a form exists. Furthermore, Petitioner does not refer to such a form with that date in its prehearing or post-hearing briefing. Petitioner's Prehearing Brief at 2-5; P. Brief at 1-4.

The I.G. does discuss in its briefs a "Function Report – Adult" dated April 18, 2005, alleging that Respondent made false statements in that form. Petitioner's Prehearing Brief at 2; P. Brief at 2-3. However, it is not alleged in either the January 24, 2006 or the March 9, 2006 notices to Respondent that he made false statements on such a form on April 18, 2005, or that those alleged false statements were the basis for the I.G.'s proposal to impose a CMP.

One might argue that the date "2004" in the I.G. notices of January 24, 2006 (P. Ex. 18, at 1) and March 9, 2006 (P. Ex. 19, at 1) was a typographical error that should be overlooked based on the fact that the I.G. has produced and argued about a document with a similar title dated April 18, 2005. The error, even if a clerical error, is too significant and too prejudicial to be simply overlooked. Congress was specific that the target of a CMP be given written notice and an opportunity to be heard. The Commissioner was no less specific in his regulations. Absent accurate notice of the basis for a CMP, one responding to such allegations can be deprived of the opportunity to adequately defend, particularly where as here a citizen elects to defend him or herself. It is fundamental to our system of jurisprudence that due process requires proper notice and an opportunity to defend. Proper notice was not given in this case, even if that failure may be attributed to a "typo."

Petitioner has not complied with the notice requirement of the Act as interpreted by the regulation with regard to any false statements allegedly made in the form dated April 18, 2005. Accordingly, those statements may not be considered the basis for a CMP at this point. Petitioner has also failed to produce any evidence that Respondent made or caused to be made a false or misleading statement on April 18, 2004. Accordingly, I conclude

that Petitioner failed to establish by a preponderance of the evidence that Respondent made a false statement on April 18, 2004, when completing a form entitled "Function Report – Adult."

3. Petitioner has not proven by a preponderance of the evidence that Respondent made or caused to be made false or misleading statements in support of his applications for title II and title XVI benefits and payments in 2005.

One might be tempted to assume, because Respondent has been found to have made false or misleading statements in 2003, that his statements in 2005 are also false or misleading. However, such an assumption is neither permitted nor warranted in this case. The I.G. bears the burden of proving by a preponderance of the evidence that statements upon which it seeks to impose a CMP are false or misleading. The I.G. may not be relieved of its burden by the simple expedient of an assumption. Rather, evaluation of the medical and other evidence related to the application and statement in 2005 is required to determine whether the I.G. has met its burden and whether or not Respondent has overcome the I.G. showing.

I have no evidence that shows when Respondent filed applications for title II and title XVI benefits and payments in 2005. However, there is no dispute that he did apply for benefits and payments in 2005. The March 9, 2006, I.G. notice indicates that Respondent has not been paid any benefits and I infer that Respondent's 2005 applications were denied. P. Ex. 19 at 2.

The I.G. alleges that Respondent made false or misleading statements in a "Disability Report – Adult" on October 4, 2005 (P. Ex. 10) and that the false or misleading statements were that Respondent could not work due to blindness that began in March 2003. Tr. 43-44; P. Brief at 2-3. The I.G. argues that I should conclude that Respondent made false or misleading statements in support of his 2005 applications because he made false or misleading statements in support of his 2003 application and because a video shot by investigators in October 2005 appears to show Respondent walking with little assistance. Petitioner has presented no evidence that during the period 2003 through 2005 that Respondent drove or worked. The video shot by the investigators does not show that Respondent was not blind or that he could work or drive. Furthermore, SSA's medical evidence is convincing that Respondent' vision was significantly more impaired in 2005 than it was in 2003.

The medical evidence from consultative examinations in 2005 is consistent with Respondent's assertion that in 2005 his vision was extremely limited to the extent that he could not drive or work. Dr. Satyarthi Gupta states on an eye examination report dated May 26, 2005, that "(c)linical findings do not correlate with the loss of vision" but he provides no narrative to explain his conclusion. Dr. Gupta's diagnosis includes a cataract and chronic open angle glaucoma. He made no findings of central visual acuity and questioned whether or not Respondent was cooperative with the examination, but he does not explain the basis for his suspicion that Respondent was not cooperative. P. Ex. 21, at 12-13. Joshua Willis, M.D., performed a consultative examination of Respondent on June 4, 2005. Dr. Willis reported that Respondent's vision was 20/200 bilaterally.[5] Dr. Willis also reported that Respondent's claim of blindness was clinically consistent because Respondent had no direct light reflex, which in the words of Dr. Willis "is something that you cannot fake." P. Ex. 21, at 14-17. Dr. Stephen J. Capps, M.D., completed a consultative examination report dated August 16, 2005. Dr. Capps reported in the blanks for central visual acuity that Respondent had "light perception" only. Dr. Capps' diagnosis indicates "decreased vision, etiology unclear." Dr. Capps also notes that the examination was not consistent with complaints or with acuity, but he provides no narrative explanation. P. Ex. 21, at 18. Although, Dr. Willis is apparently not an ophthalmologist, his observation that Respondent has no light reflex is not the type of clinical finding that requires a specialist in ophthalmology. Furthermore, Dr. Willis' narrative report is sufficiently detailed to allow one to assess that he did a thorough examination lending credibility to his opinion. The absence of narrative in Dr. Gupta's and Dr. Capps' reports make it difficult to assess those reports as credible and the statements noted on the forms they completed are subject to various and conflicting interpretations.

The medical evidence, while not conclusive that Respondent is blind, certainly indicates that Respondent was suffering significant visual impairment in 2005. Dr. Willis' findings make it impossible to find by a preponderance of the evidence that Respondent was not blind or suffering extremely limited vision as he alleged in 2005. Based upon the medical evidence, the charge of false or misleading statement against Respondent cannot be proved unless there is other evidence that he was engaging in activities inconsistent with blindness or significant visual impairment.

---

[5] Statutory blindness is 20/200 or less in the better eye with the use of correcting lenses. 20 C.F.R. § 404.1581.

The I.G. called Special Agent Ozwaldo Fong, of the SSA I.G., who assisted the CDI unit with conducting surveillance of Respondent on October 17, 2005. Agent Fong and Agent Chester Davis made video recordings of Respondent. P. Ex. 16. The video was viewed at hearing and Agent Fong described what he observed. Agent Fong identified Respondent in the video arriving for a consultative examination with a cane of the type used by blind people, wearing dark glasses, and with the assistance of another person. After Respondent exited the location for the consultative examination, Agent Fong testified that Respondent and his driver, who was identified as Respondent's brother Marion, traveled to a gas station and convenience store. On arriving at the convenience store Respondent exited the right, passenger-side, turned his head to the right and left, walked to the convenience store without apparent assistance of Marion, opened the door and entered the convenience store. Marion Tobias and Respondent exited the store after a brief time and Respondent entered the passenger-side without apparent assistance by Marion. Surveillance ended when the car passed into Mississippi. Tr. 122-32.

The I.G. also called Louisiana State Police Investigator Chester Davis who was detailed to work with the CDI unit. Investigator Davis also viewed the video and described what he observed for the record. Investigator Davis testified that the week prior to hearing he went to Respondent's residence and interviewed a neighbor, Denise Nichols. Ms. Nichols identified Respondent from a picture. Ms. Nichols told Investigator Davis that she saw Respondent drive, move around on his own with a walking cane, but not the kind the blind use, and that he looks at her, speaks, and waves. Investigator Davis also interviewed Robin Brown who said that when she saw Respondent outside he would sometimes speak and wave to her first. Tr. 135-47.

Marion Tobias testified that at the convenience store Respondent used a cane; and that he gave Respondent verbal instruction for finding the railing that led into the store, that there were three steps up to the store, and the location of the door handle. Marion Tobias testified that he also gave Respondent verbal instructions as they left the store. Tr. 54, 176-86.

Respondent testified on cross-examination that he had no idea why Denise Nichols said she saw him driving but she was a new neighbor who simply assumed the person she saw driving was him. He testified that he never really talked to Nichols about his affairs but indicated that they had been introduced. Nichols and Brown just moved to the neighborhood in 2005. He acknowledged that when he was outside he did wave at people, but he could not be sure who it was as he simply waved when he heard a car pull-up and a door close or a horn blow. Respondent testified that he does own a 2001 Mazda

pickup truck, but it has not been in his possession for a while as his brother has been using it. He stated that the pickup truck has been at his address on many occasions. Tr. 235-238.

I find that the video is not persuasive on the issue of whether or not Respondent was blind or suffering significant visual impairment. I note that Marion Tobias, upon questioning by the I.G., testified in detail how he verbally directed Respondent at the convenience store. Marion Tobias gave this testimony before he had an opportunity to view the video. His testimony was not inconsistent with what was observed on the video when it was viewed. His testimony prior to viewing the video was also not inconsistent with his additional testimony after viewing the video. Tr. 54, 59, 177-86. Marion Tobias' testimony that he gave verbal direction to Respondent at the convenience store is credible. The fact that Respondent was not wearing dark glasses at the convenience store or that he turned his head left and right is also not inconsistent with Respondent's position that he was blind or significantly visually impaired.

I give no weight to the hearsay statements of either Denise Nichols or Robin Brown. These witnesses could have been subpoenaed to testify subject to cross-examination or my questioning, but they were not. I have no doubt that Investigator Davis accurately testified to what he recalled being told by Respondent's two neighbors. However, I find insufficient indicia of reliability for their out-of-court statements because there has been no opportunity to inquire as to their ability to observe Respondent, the conditions under which they allegedly observed Respondent, or whether they could accurately identify Respondent.

I conclude that the I.G. has not shown by a preponderance of the evidence that Respondents' statements in 2005 were false or misleading. Thus, no CMP may be imposed for those statements pursuant to section 1129(a)(1) of the Act.[6]

---

[6] My conclusion in this regard may not be read to be a conclusion that Respondent meets the requirements for a finding he is disabled or that he is eligible for benefits or payments under title II or title XVI of the Act. These issues are not within my jurisdiction.

4. A $5000 CMP is reasonable in this case.

I have found that Respondent made a false statement on May 8, 2003, related to his 2003 applications for title II and title XVI benefits, when completing the "Supplemental Interview Outline" form. Thus, there is a basis for the imposition of a CMP pursuant to section 1129(a)(1) of the Act.

The maximum penalty authorized is $5000 for each false or misleading statement or representation. Act, § 1129(a)(1)(C); 20 C.F.R. § 498.103. Pursuant to 20 C.F.R. § 498.220, 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 and 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."

See also SSA v. Lorene Griffith, DAB CR1019 (2003); *SSA v. Estal*, DAB CR1049 (2003). Pursuant to 20 C.F.R. § 498.215(b), the I.G. has the burden of going forward with the evidence and the burden of persuasion as to all issues, except Respondent's affirmative defenses and mitigating circumstances.

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

Petitioner alleged that Respondent made four false statements on the "Supplemental Interview Outline" dated May 8, 2003. P. Brief at 1-2. I conclude, however, that the "Supplemental Interview Outline" should be treated as a single statement for purposes of imposition of a CMP in this case. Treating the "Supplemental Interview Outline" as a single false or misleading statement for purposes of imposing a CMP is consistent with the I.G. notices to Respondent dated January 24, 2006 and March 9, 2006. The January 24-notice advised Respondent that the I.G. was considering a $15,000 CMP based upon four misrepresentations in the "Supplemental Interview Outline," a false statement in a "Function Report-Adult" dated April 18, 2004, and another false statement in a "Disability Report – Adult" dated October 4, 2005. The March 9-notice states that a $15, 000 CMP was proposed based upon false statements in the "Supplemental Interview Outline," a false statement in a "Function Report-Adult" dated April 18, 2004, and

another false statement in a "Disability Report – Adult" dated October 4, 2005. My reading of both notices is that the I.G. treated the "Supplemental Interview Outline" as a single false or misleading statement for purposes of proposing the CMP.

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

I have no evidence of any prior offense by Respondent. Respondent has not presented evidence to support his allegations at hearing that he is in difficult financial circumstances. Respondent admitted to owning a vehicle, that he received a significant payment from his employer in 2003, and that he owned a private residence, albeit subject to a mortgage that Respondent alleges is near foreclosure. I do not have sufficient evidence of Respondent's financial circumstances to find he is unable to pay a $5000 CMP or that the amount of the CMP should be mitigated.

I do find that Respondent was culpable for making a false or misleading statement in the form of the "Supplemental Interview Outline." Certainly one knows if he is blind. Further, it is clear from the record that rather than accurately report the impact of a visual impairment, Respondent simply chose to overstate the degree of his visual impairment and the impact upon his ADLs when he completed the "Supplemental Interview Outline."

(c) Other matters as justice may require.

I impose the maximum penalty permitted under the Act for a single false or misleading statement. The first applications Respondent signed in 2003, warned him that making false or misleading statements could lead to punishment. Furthermore, deterrence of others prone to over-state their impairments, is a legitimate consideration in imposing a CMP in this case. I do not consider that Respondent may ultimately be found disabled due to impaired vision as grounds for mitigating the CMP.

D. Findings of Fact

The following findings of fact are based upon the exhibits admitted and the testimony at hearing. Citations to exhibit numbers or transcript pages related to each finding of fact may be found in the analysis section of this decision if not indicated here.

1. Petitioner notified Respondent by letter dated January 24, 2006, that imposition of a CMP under section 1129 of the Act was being considered based upon false statements or misleading representations in a "Supplemental Interview Outline"

form that he completed on May 8, 2003; a "Function Report – Adult" that he completed on April 18, 2004, and a "Disability Report – Adult" that he completed on October 4, 2005. P. Ex. 18.

2. Petitioner notified Respondent by letter dated March 9, 2006, that a CMP of $15,000 was proposed pursuant to section 1129 of the Act based upon false statements Respondent made to SSA in a May 8, 2003 "Supplemental Interview Outline,"an April 18, 2004 "Function Report – Adult," and an October 4, 2005 "Disability Report – Adult." P. Ex. 19.

3. Respondent did not make or cause to be made false or misleading statements in a "Function Report – Adult" dated April 18, 2004, and no such document has been presented as evidence.

4. Petitioner did not give Respondent notice that it considered or proposed imposition of a CMP based upon an alleged false or misleading statement that he made or caused to be made on a "Function Report – Adult" dated April 18, 2005.

5. Respondent filed applications for disability insurance benefits under title II of the Act and for Supplemental Security Income under title XVI of the Act on April 28, 2003, in which applications he alleged that he became disabled March 31, 2003.

6. Respondent's April 28, 2003 applications were denied and he received no payment thereon.

7. Respondent completed or caused to be completed by filling in various blanks, a "Supplemental Interview Outline" that he signed on May 8, 2003, on which he indicates that he has very limited ADLs due to blindness.

8. Petitioner has not presented evidence that Respondent did perform ADLs that he stated he could not perform on the "Supplemental Interview Outline" that he signed on May 8, 2003.

9. Jerry A. Hollimon, O.D. examined Respondent on March 19, 2003, found optic nerve changes; best corrected visual acuity for Respondent was determined to be 20/30 and 20/40 in each eye; he diagnosed glaucoma and prescribed eye drops; but he did not state Respondent was blind or direct that he no longer drive. P. Ex. 21, at 1-2.

10. Michael L. Fajoni, M.D., Eye Physicians & Surgeons, Inc., examined Respondent and issued a report dated May 12, 2003, in which he found no indication of low tension glaucoma, and that Respondent had a normal examination with both normal pupillary light responses and a normal fundus examination. P. Ex. 21, at 4-5.

11. Leon A. Weisberg, M.D., Director and Professor Tulane Neurology, Tulane University, signed a letter dated July 28, 2003, in which he reports as his findings of examination of Respondent, that Respondent did not appear to be malingering and there was no evidence of a conversion reaction; that Respondent's optic discs appeared normal and that his pupils reacted to light; that Respondent could finger count but he also states Respondent is totally blind, an obvious inconsistency; that he found no evidence of optic nerve disease; that he did not feel there was a conversion reaction or glaucoma; and that he had no "good explanation for Respondent's visual loss." P. Ex. 21, at 8-10.

12. Respondent applied to renew his Louisiana Personal Driver's License on December 24, 2003, requesting on the application that his license be downgraded from a commercial to a personal license; he reported no physical or mental condition that could impair his ability to operate a motor vehicle safely; he reported that he did not wear contact lenses or glasses and that his vision without correction was 20/40 in both eyes; and the renewed license was issued and remains effective until January 3, 2008. P. Ex. 15; Tr. 94-95.

13. On December 24, 2003, Respondent did not tell the driver's license examiner that he was blind or that he could not drive due to limited vision.

14. Respondent was not blind or suffering visual impairment to the extent he alleged in the Supplemental Interview Outline that he completed on May 8, 2003.

15. Respondent filed applications for benefits and payments under title II and title XVI of the Act in 2005.

16. Respondent's 2005 applications for benefits or payments under title II and title XVI of the Act were denied and he received no payments thereon.

17. Respondent made or caused to be made statements on a "Disability Report – Adult" on October 4, 2005, that he could not work since March 31, 2003, due to "(b)lindness, lower back/neck pain/hand/arm and leg pain – caused by car accident" and that "extensive pain constantly" limited his ability to work. P. Ex. 10 at 1.

18. Petitioner presented no credible evidence that Respondent did any work or that he drove in 2005 or in the period March 31, 2003 through whatever was the date of his application in 2005.

19. Joshua Willis, M.D., performed a consultative examination of Respondent on June 4, 2005, finding that Respondent's vision was 20/200 bilaterally; and that Respondent's claim of blindness was clinically consistent because Respondent had no direct light reflex, which in the words of Dr. Willis "is something that you cannot fake." P. Ex. 21, at 14-17.

20. The evidence does not show that Respondent was not blind or significantly visually impaired in 2005.

E. Conclusions of Law

1. Respondent timely requested a hearing.

2. Respondent made statements that he knew or should have known were false or misleading on May 8, 2003, related to his 2003 applications for title II and title XVI benefits, when completing a "Supplemental Interview Outline" form.

3. The false or misleading statements Respondent made on May 8, 2003, were material to the Commissioner's determination as to whether to find Respondent eligible or entitled to receive benefits or payments based on Respondent's 2003 applications for title II and title XVI benefits.

4. The false or misleading statements Respondent made or caused to be made on the Supplemental Interview Outline on May 8, 2003, are a basis for the imposition of a CMP pursuant to section 1129(a)(1) of the Act.

5. The I.G. has not proven by a preponderance of the evidence that Respondent made or caused to be made a false or misleading statement on a form entitled "Function Report – Adult" dated April 18, 2004 and no such form has been presented as evidence by Petitioner.

6. Petitioner did not notify Respondent that it proposed a CMP based upon alleged false or misleading statements Respondent made in a "Function Report – Adult" dated April 18, 2005, thus, Petitioner has not complied with the notice requirement of section 1129(b)(2) of the Act, as implemented by 20 C.F.R. § 498.109(a), and those statements may not be considered the basis for a CMP.

7. Petitioner has not proven by a preponderance of the evidence that Respondent made false or misleading statements in support of his applications for title II and title XVI benefits and payments in 2005.

8. Petitioner has not shown by a preponderance of the evidence that Respondent's statements in the October 4, 2005, Disability Report – Adult were false or misleading.

9. Petitioner has not shown by a preponderance of the evidence that Respondent could or did work or drive during the period March 31, 2003 through 2005.

10. A $5000 CMP is reasonable in this case.

III. Conclusion

For the foregoing reasons, I conclude that a CMP of $5000 is appropriate for the false or misleading statements that Respondent made on a "Supplement Interview Outline" on May 8, 2003.

/s/

Keith W. Sickendick
Administrative Law Judge