

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	
Social Security Administration,)	Date: October 4, 2007
Office of the Inspector General,)	
)	
- v. -)	Docket No. C-07-170
)	Decision No. CR1669
Kay Davidson,)	
)	
Respondent.)	
_____)	

DECISION

I sustain the determination of the Social Security Administration (SSA), Office of the Inspector General (OIG) to impose a civil money penalty (CMP) of \$5,000 and an assessment of \$30,528 against Respondent, Kay Davidson.

I. Background

I hear and decide this case pursuant to section 1129 of the Social Security Act (Act). Section 1129(a)(1) of the Act authorizes the OIG to impose CMPs and an assessment 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 [Social Security] or benefits or payments under [other programs including Medicare], 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 [Social Security] or benefits or payments under [other programs including Medicare], if the person knows, or should know, that the statement or representation with such omission is false or misleading or that the withholding of such disclosure is misleading

....

The Act defines a “material fact” to be a fact which the Commissioner of Social Security may consider in evaluating whether a person is eligible for Social Security or other benefits. Act, § 1129(a)(2).

The OIG is authorized to impose CMPs of not more than \$5,000 for each statement or representation that contravenes section 1129(a)(1), or each receipt of such benefits. In addition, the OIG may impose an assessment in lieu of money damages of not more than twice the amount of benefits paid as a consequence of such statement or statements. Act, § 1129(a)(1).

In reviewing this case on the record, I am to determine whether Respondent should be found liable for the CMP and assessment. 20 C.F.R. § 498.215(a). Respondent has the burden of going forward and the burden of persuasion with respect to affirmative defenses and any mitigating circumstances. 20 C.F.R. § 498.215(b)(1). The OIG has the burden of going forward and the burden of persuasion with respect to all other issues. 20 C.F.R. § 498.215(b)(2). The burden of persuasion is judged by a preponderance of the evidence. 20 C.F.R. § 498.215(c).

On November 29, 2006, the OIG notified Respondent of its intent to impose a CMP and an assessment against her based on false statements she made to receive Title II Child’s Insurance Benefits. On December 5, 2006, Respondent requested a hearing and the case was assigned to me for a hearing and a decision. In the initial pre-hearing conference in this case, Respondent was informed of her right to be represented by an attorney in this matter. Respondent indicated that she understood that right, but chose to represent herself in this matter. During the course of the initial pre-hearing conference, Respondent agreed that an in-person hearing would not be necessary and agreed that the matter could be addressed through written submissions. Respondent, however, reserved the right to ask for an in-person hearing should she decide such a hearing was necessary. Respondent did not request an in-person hearing and, instead, filed her briefs in accordance with an agreed briefing exchange Order. Therefore, I decided the case on briefs submitted by the parties.

Each party filed a pre-hearing brief. (R. Br. and OIG Br.), and the OIG filed a Reply Brief (OIG Reply). Both parties filed exhibits with their briefs and neither party objected to the opposing party's exhibits. Therefore, I receive into evidence exhibits from the OIG which are identified as OIG Ex. 1 – OIG Ex. 19, and 36 unmarked exhibits from Respondent, which we have marked as R. Ex. 1 – R. Ex. 36 to comply with Civil Remedies Procedures.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are:

1. Whether Respondent made statements which she knew or should have known were false or misleading, as are described at section 1129(a)(1) of the Act, as to a material fact concerning her eligibility to receive title II Child's Insurance benefits as Representative Payee for two of her children; and
2. If she made such statements, whether penalties and an assessment as proposed by the OIG are reasonable.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading. I discuss each Finding in detail.

1. Respondent knew or should have know that she made false or misleading statements as to material facts regarding the living arrangements and care of two of her children in order to receive Social Security benefits for them.

At issue are statements made by Respondent to SSA regarding the living arrangements and care of two of her children. I find that these statements are false and misleading as to material facts and that Respondent knew they were false and misleading at the time she made the statements. In making these statements, Respondent mislead SSA by providing false information that SSA used to evaluate whether she was eligible to receive SSA benefits as a Representative Payee of the children.

Respondent and Randell Swisher (the Father) were married in 1983. OIG Ex. 19. They had two children (the Children) together before they divorced. A Texas Court Order dated October 19, 2000, provided that the Father would have the exclusive right to determine the Children's primary residence. OIG Ex. 2, at 3. The Children's Father also had the right to receive and give receipt for periodic payments for the support of the Children and to hold or disburse these funds for the benefit of the Children. *Id.* After October 2000, the Children lived with the Father and only periodically visited Respondent. OIG Ex. 1; OIG Ex. 3, at 3.

In 2001, SSA found Respondent to be entitled to monthly disability benefits. R. Ex. 29. During her 2001 hearing concerning her disability benefits, Respondent told the SSA Administrative Law Judge that only one of her three children lived with her. R. Br. at 1.

On January 15, 2002, Respondent completed two SSA forms relating to benefits under Title II of the Act for the Children. OIG Ex. 4; OIG Ex. 5. On the first SSA form, Application for Child's Insurance Benefits - Life Claim, Respondent stated that she would promptly notify SSA if she no longer had responsibility for the care and welfare of any child for whom she was filing. OIG Ex. 4, at 2. She certified that she understood that payments made to her on behalf of a child must be used for the child's present needs or (if not presently needed) saved for the child's future needs. *Id.* She certified that she would be held personally liable for repayment of benefits she received if they were not spent or saved for the child, or if she was found at fault with respect to an overpayment of such benefits. *Id.* She also affirmed that all of the information she gave in connection with this claim was true. *Id.*

On the second SSA form, Request to be Selected as Payee, Respondent requested that Social Security benefits for the Children be paid to her as Representative Payee. OIG Ex. 5, at 1. She reported that she took care of the Children. *Id.* She also reported that the Children lived with her at that time. *Id.* ("TRENT DOUGLAS SWISHER lives with me. AUDRA LEIGH SWISHER lives with me."). She agreed: (1) to use the payments for the Children's current needs and save any currently unused benefits for future use; and (2) to notify SSA when the Children leave her custody or otherwise change their living arrangements or when she no longer has responsibility for their care and welfare. *Id.* at 2. She again certified that she understood that she must use the payments for the Children's current needs or save them for the Children's future needs; that she may be held personally liable for repayment if she misused the payments or was at fault for any overpayment; and that all information she gave in the document was true. *Id.*

In February of 2002, SSA awarded Respondent \$30,528 of Social Security benefits as Representative Payee for the Children for a period dating from October 1994 to November 2002. OIG Ex. 7, at 2-3. Respondent received a lump-sum back payment of \$13,941 for each child, and she received monthly payments (from March 2002 to November 2002) which added up to \$1,323 for each child. *Id.*

In November of 2002, the Children's Father contacted SSA to inquire about Social Security benefits for the Children and learned that Respondent had already been named Representative Payee and had received \$30,528 on behalf of the Children. OIG Ex. 1, at 2. He informed SSA that he had not received any of the Children's benefits from Respondent and requested to be named as Representative Payee in accordance with the Texas Court Order. *Id.* SSA appointed the Children's Father as Representative Payee for the Children and stopped payments to Respondent. *Id.*

By letter dated February 21, 2003, SSA arranged an appointment for Respondent to go to the Social Security field office on March 3, 2003. OIG Ex. 9. Respondent was to bring proof of how the Children's benefits were spent each month. *Id.* Respondent answered that she would not be able to go to the SSA office at the appointed time and sent a handwritten explanation of her expenditures for the Children. OIG Ex. 3. The expenditures for the children included camp, ski trips, an heirloom ring, and a room conversion for one of the Children at a time when they were only visiting Respondent. *Id.* at 2-3. She indicated in her brief, and in a Texas court in February 2003, that some of the benefits also went towards a car and a house she bought. R. Br. at 1; OIG Ex. 11, at 13.

On June 1, 2006, SSA informed Respondent that the Chief Counsel to the Inspector General was considering proposing a CMP against her for false representations. OIG Ex. 16. SSA provided a financial disclosure form for Respondent to return if she wanted her financial situation to be considered in any final determination to propose a CMP. *Id.* at 2. Respondent did not reply, and on November 29, 2006, the Chief Counsel informed Respondent that she was proposing a \$5,000 CMP and a \$30,528 assessment against her. OIG Ex. 17, at 1.

In the matter before me, the Respondent filed her brief in response to the OIG's initial brief. However, Respondent has not addressed or responded to any of the OIG's arguments set forth in its brief. Moreover, Respondent has not advanced any affirmative defenses to the allegations that she knowingly provided false information or that she omitted information. Instead, she asserts that the OIG's brief contains so many errors that it would be "too burdensome to address them all individually in writing." R. Br. at 2. Respondent does not deny that the Children lived with the Father on January 15, 2002. Respondent asserts that in her 2001 hearing concerning her benefits she told the SSA Administrative Law Judge that the Children did not live with her. R. Br. at 1. This

unsupported assertion does not negate the fact that the information she later provided to SSA on January 15, 2002 was false or misleading but, instead, shows that the Children were not living with her at the time she claimed they did. The evidence presented by the OIG also shows that Respondent knew the children lived with the Father at the time she reported to SSA that they lived with her. A particularly persuasive exhibit is Respondent's letter to SSA dated February 26, 2003, in which she asserts that the Children had only visited her nine times since October 13, 2000. OIG Ex. 3, at 3.

Respondent recounts several unfortunate events that have adversely affected her financial situation. R. Br. at 1-2. These events have nothing to do with whether she provided false or misleading information to SSA to receive payments on behalf of the Children. In what may be an attempt to justify her actions, Respondent refers to the Texas Court Order which gives her the duty to support the children and the right to the services and earnings of the children.* *Id.* at 2. She asserts that she needed the Children's Social Security money to fulfill this court-ordered duty. *Id.* She also states that she has always maintained her obligation of being prepared for the Children to reside with her in the event of the death of their father. *Id.*

Respondent discusses times in the past when the Children lived with her, perhaps alluding to a perceived entitlement to some of the Children's benefits that she received in the form of a back payment. R. Br. at 3. However, as the OIG points out, the SSA regulations state that payments made to a Representative Payee must be used for the beneficiary's current needs. OIG Reply at 4; *see* 20 C.F.R. § 404.2040(a).

Whether Respondent needed the money is irrelevant to this case. Whether she maintained her obligation of being prepared for the Children to reside with her in the event of the death of their father is also irrelevant. The ultimate question is whether she knowingly provided false information to be used in determining benefit eligibility.

Respondent fails to address the critical issue as to whether she knowingly provided false information to SSA. Respondent addresses none of the arguments or allegations made by the OIG. The arguments advanced by the OIG are clearly persuasive and fully and unequivocally supported by the evidence in this case. Therefore, I find that the OIG has sustained its burden of proving its case.

* Respondent does not mention the more pertinent language in the court order that the Father has the right to determine the Children's primary residence and the right to receive, and give receipt for, periodic payments for the support of the Children. OIG Ex. 2, at 3.

2. A CMP of \$5,000 and an assessment in lieu of damages of \$30,528 imposed by the OIG in this case are reasonable.

The OIG argues that I should uphold the CMP imposed in the amount of \$5,000 against Respondent. Additionally, the OIG asks that I sustain the assessment of \$30,528 against Respondent.

CMPs up to \$5,000 may be assessed for *each* deliberately false or misleading statement that a person makes about a material fact. In this case, the OIG seeks only \$5,000 for the false statements made by Respondent. The OIG's proposed assessment of \$30,528 is well below the maximum allowed by law.

Section 1129(c) of the Act establishes criteria for determining the amounts of penalties and assessments. I must consider these criteria in making my decision as to whether the amount of the penalties and assessments in this case are reasonable. These criteria have been implemented by regulation at 20 C.F.R. § 498.106(a):

- (1) The nature of the [false or misleading] statements and representations . . . and the circumstances under which they occurred;
- (2) The degree of culpability of the person committing the offense;
- (3) The history of prior offenses of the person committing the offense;
- (4) The financial condition of the person committing the offense; and
- (5) Such other matters as justice may require.

I have considered the evidence of this case in light of all of these factors. I decide that the penalties and assessment imposed by the OIG are warranted and are reasonable.

Respondent demonstrates a high degree of culpability for her actions. The evidence in this case clearly establishes that she knowingly made false statements as to material facts to deceive SSA. Respondent was aware of the probable impact that her false statements would have on SSA.

As I discuss above, Respondent made false statements in her initial application for the Children's Title II benefits – an application which SSA used in determining to award the benefits – concerning the Children's living arrangements. On January 15, 2002, when she filed that application, Respondent certified that the Children lived with her and that she took care of them. In fact, and as Respondent later reported, the Children lived with the Father at that time and had lived with him since October 2000. *See* OIG Ex. 3, at 3.

I also find that Respondent's high degree of culpability and the nature and circumstances under which she made the materially false statements justifies the imposition of the assessment of \$30,528 by the OIG. While this appears to be Respondent's first offense against SSA, Respondent received several years worth of Social Security benefits for the Children premised on her false statements. After she received the initial lump-sum back payment, she continued to receive payments on behalf of the Children for months. Her culpability is underscored by the fact that she did not use the Children's benefits for their day-to-day care or give any of the payments to the Father for such care. Respondent points out that at the time she received the benefits she was not required to pay child support. R. Br. at 2. However, regardless of whether she was required to pay child support, she misused the Children's benefits, which were to be spent on the current needs of the Children or saved for their future needs. The assessment imposed by the OIG is equal only to the amount of benefits paid to Respondent, which is only 50 percent of the maximum allowed for assessments, and I find it to be justified fully by Respondent's culpability and history.

Respondent has not specifically asked that I take into account her financial condition, but she does argue that she desperately needed the Social Security benefits. R. Br. at 2. If respondent intends this statement to be considered an argument, I do not find it to be persuasive. She has not established a detailed picture of her financial status. She did not, for example, offer information concerning her total financial resources. When the OIG sought information about Respondent's income and resources before it made a penalty and assessment determination, she did not respond. Unsupported assertions of financial distress do not justify the reduction of a proposed penalty and assessment. Here, Respondent bears the burden of proving by a preponderance of the evidence that her financial condition would prevent her from being able to pay the penalty imposed against her in this case. Respondent has failed to do so.

Those arguments that were advanced by Respondent, but which fail to address the OIG's allegations, can only be considered as requesting mitigation under the criteria entitled "such other matters as justice may require." When I consider Respondent's arguments, I find that none of her assertions constitute mitigation circumstances, but rather bolster the OIG's case because they indicate that Respondent was spending the Children's benefits for future hypothetical needs (which is not permitted by the regulations) rather than saving the money for their future needs or using it for their current needs.

