Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Social Security Administration, Inspector General,
Petitioner,

v.

Carrie Young,
Respondent.

Docket No. C-14-1

Decision No. CR3349

Date: August 28, 2014

DECISION

A total civil monetary penalty (CMP) of $15,000 is imposed against Respondent, Carrie Young, for making three false statements or representations on January 29, 2013 and February 4, 2013, during a review of her continuing eligibility for benefits or payments under the Social Security Act (the Act).[1] The CMP is imposed pursuant to section 1129(a)(1) of the Act (42 U.S.C. § 1320a-8(a)(1)).

I. Procedural History

The Counsel to the Inspector General (IG) of the Social Security Administration (SSA) notified Respondent by letter dated September 5, 2013, that the SSA IG proposed imposition of a CMP of $75,000 against Respondent, pursuant to section 1129 of the Act. The SSA IG cited as the basis for the CMP that during a January 2013 Continuing

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[1] The current version of the Act is available at http://www.ssa.gov/OP_Home/ssact/ssact-toc.htm.

Disability Review (CDR) to determine whether Respondent was still eligible to receive Social Security Disability Insurance Benefits (DIB), Respondent made 15 false statements or misrepresentations about her functional abilities and physical condition in an attempt to continue receiving DIB payments. SSA IG Exhibit (SSA Ex.) 15.

Respondent requested a hearing pursuant to 20 C.F.R. § 498.202,[2] by letter dated September 9, 2013.[3] The case was assigned to me for hearing and decision and the parties were notified by letter dated October 30, 2013, that I would convene a prehearing conference on November 18, 2013. The prehearing conference was convened by telephone as scheduled. The substance of the prehearing conference is memorialized in my Scheduling Order and Notice of Hearing issued on November 19, 2013 (Scheduling Order).

On March 25 and 26, 2014, I convened a hearing by video teleconference (VTC). The SSA IG, represented by Deborah Shaw and Erin Justice, appeared by VTC from Baltimore, Maryland. Respondent, who was unrepresented, appeared by VTC from Tampa, Florida, with her husband, Allan Wilson, who was present throughout most of the hearing. I participated by VTC from Kansas City. The staff attorney assigned to assist me in the case and the court reporter participated by VTC from Washington, DC. Witnesses testified by VTC from Tampa, Florida, and by telephone from various locations. The SSA IG called the following witnesses: Special Agent (SA) Anna Miller from the SSA's Atlanta Field Division, Tampa Cooperative Disability Investigations (CDI) Unit; Stephen Miller, DVM, a veterinarian familiar with Respondent; Dinelle Ashcraft, the operator of a horse rescue in Florida; Patricia Eden, an employee at an animal feed store in Florida; Investigator Thomas Montgomery from the Florida Department of Financial Services; Timothy Bane, an Examiner and Master Adjudicator with the Florida Disability Determination Service (DDS); Jeanette Kerns, an SSA Program Analyst with SSA's Atlanta Field Division, Tampa CDI Unit; and Respondent Carrie Young. Respondent also testified as part of her case-in-chief.

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[2] Citations are to the 2012 revision of the Code of Federal Regulations (C.F.R.) that was in effect at the time of the I.G. action, unless otherwise stated.

[3] Respondent's request for hearing was postmarked October 11, 2013 and it was received at the Civil Remedies Division, Departmental Appeals Board on October 17, 2013, during the partial shutdown of the federal government due to a lapse in appropriations. The case was assigned to me for hearing and decision when the shutdown ended.

A transcript (Tr.) of the March 25 and 26, 2014 hearing was prepared. Unfortunately, the court reporting company omitted the testimony of Jeanette Kerns from the official transcript. At the location in the official transcript where Analyst Kerns' testimony should appear is the statement "JEANETTE KERNS TESTIMONY ALREADY TYPED." Tr. 351. I surmise that the omission was due to the fact that the SSA IG requested a transcript of Analyst Kerns' testimony when I notified the parties of the need for a supplemental hearing, which I convened on April 3, 2014, prior to completion of the official transcript. I further surmise that the court reporting firm failed to include the testimony of Analyst Kerns when the official transcript was prepared because it had previously provided a copy of the transcript of her testimony to SSA. The SSA IG offered a transcript of Analyst Kerns' testimony marked as SSA Ex. 45 at the supplemental hearing. Neither party complained of the omission of Analyst Kerns' testimony from the official transcript. No issue has been raised by the parties regarding the accuracy of the transcription of her testimony in SSA Ex. 45. Accordingly, I have not ordered that the official transcript be corrected to add Analyst Kerns' testimony.[4] Therefore, I treat SSA Ex. 45 as the official transcript of Analyst Kerns' testimony and all references to her testimony are to SSA Ex. 45.[5]

During the hearing on March 25 and 26, 2014, the SSA IG offered SSA Exs. 1 through 39, which were admitted as evidence. Tr. 29. The SSA IG also offered SSA Ex. 40, which consisted of two compact discs (CD) containing various media exhibits. I required the SSA IG to authenticate each media exhibit on the disc before being admitted. Ultimately, the entirety of SSA Ex. 40 was admitted. Tr. 102, 214; SSA Ex. 45 at 35, 40-41. The SSA I.G. also offered SSA Ex. 41, printed copies of photographs posted online, as well as SSA Ex. 42, the declaration of Dinelle Ashcraft, who was called as a witness by the SSA IG. SSA Ex. 41 was admitted but SSA Ex. 42 was not. Tr. 31, 38-41.

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[4] The SSA IG also offered at the supplemental hearing a transcript of the testimony of SA Miller, marked as SSA Ex. 44. The testimony of SA Miller is included in the official transcript. I have compared the testimony of SA Miller as reported in SSA Ex. 44 and in the official transcript and note minor, non-substantive variations that I find consistent with the two transcripts being prepared by separate transcriptionists. All references to SA Miller's testimony are to the official transcript rather than SSA Ex. 44, which is not admitted as evidence.

[5] This procedure is similar to that followed when the testimony of a witness is preserved by deposition and the witness is unavailable for the hearing.

Respondent offered Respondent's exhibits (R Ex.) 1 through 23, which were admitted as evidence.[6] Tr. 45.

The supplemental hearing was convened on April 3, 2014, and a transcript of that proceeding was prepared (Supp. Tr.). Respondent, SA Miller, Analyst Kerns, and Erin Justice appeared by VTC from Tampa, Florida. Deborah Shaw appeared by VTC from Baltimore, Maryland. I appeared by VTC from Kansas City. My staff attorney and the court reporter appeared by VTC from Washington, DC. Court Exhibit 1 was marked at the supplemental hearing and copies provided to the parties after the hearing. SSA IG Exs. 43, 44, and 45 were also marked at the hearing. Supp. Tr. 52, 63-64. Subsequent to the supplemental hearing the SSA IG offered SSA Exs. 43, 44, and 45. Court Exhibit 1 and SSA Exs. 43 and 45 are admitted as evidence. SSA Ex. 44, a transcript of the testimony of SA Miller is not admitted because it is cumulative of the official transcript.

On April 8, 2014, Respondent filed a motion to strike all testimony of SA Miller and Analyst Kerns. On May 30, 2014, the SSA IG moved to strike evidence of the supplemental hearing. Respondent filed an opposition to the SSA IG motion on June 4, 2014. The motions are discussed in section II.C of this decision. The SSA IG filed a post-hearing brief on June 2, 2014 (SSA Br.), and a waiver of a reply on July 3, 2014. Respondent filed a post-hearing brief on June 2, 2014 (R. Br.), and her reply on July 1, 2014 (R. Reply).

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. In addition to certain income requirements, to be eligible for SSI payments a person must meet U.S. residency requirements and be: (1) 65 years of age or older; (2) blind; or (3) disabled. Disability under both programs is determined based on the existence of one or more impairments that will result in death or that prevent an individual from doing his

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[6] R. Ex. 24 was a copy of the same video as appeared on SSA Ex. 40. R. Ex. 24 is cumulative evidence and not separately admitted as an exhibit. Tr. 59.

or her past work or other work that exists in substantial numbers in the economy for at least one year. 20 C.F.R. §§ 416.202, 416.905, 416.906. SSI is not at issue in this case as Respondent received no benefits under that program.

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

> (a)(1) Any person . . . who –
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> (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,
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> (B) makes such a statement or representation for such use with knowing disregard for the truth, or
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> (C) omits from a statement or representation for such use, or otherwise withholds disclosure of, a fact which the person knows or should know is material to the determination of any initial or continuing right to or the amount of monthly insurance benefits under title II or benefits or payments under title VIII or XVI, if the person knows, or should know, that the statement or representation with such omission is false or misleading or that the withholding of such disclosure is misleading . . . .

The Commissioner of SSA (the Commissioner) delegated the authority of section 1129 of the Act to the IG:

> (a) The Office of the Inspector General may impose a penalty and assessment, as applicable, against any person who it determines in accordance with this part—
>
> (1) Has made, or caused to be made, a statement or representation of a material fact for use in determining any initial or continuing right to or amount of:
>
> (i) Monthly insurance benefits under title II of the Social Security Act; or

> (ii) Benefits or payments under title VIII or title XVI of the Social Security Act; and
>
> (2)(i) Knew, or should have known, that the statement or representation was false or misleading, or
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> (ii) Made such statement with knowing disregard for the truth; or
>
> (3) Omitted from a statement or representation, or otherwise withheld disclosure of, a material fact for use in determining any initial or continuing right to or amount of benefits or payments, which the person knew or should have known was material for such use and that such omission or withholding was false or misleading.

20 C.F.R. § 498.102(a). A material fact is a fact that the Commissioner may consider in evaluating whether an applicant is entitled to benefits or payments under titles II, VIII, or XVI of the Act. Act § 1129(a)(2); 20 C.F.R. § 498.101. An individual who violates section 1129 is subject to a CMP of not more than $5,000 for each false or misleading statement or representation of material fact or failure to disclose a material fact. Violators are also subject to an assessment in lieu of damages, of not more than twice the amount of the benefits or payments made as a result of the statements, representations, or omissions. Act § 1129(a)(1); 20 C.F.R. § 498.103(a). Only a CMP has been proposed in this case.

In determining the amount of the CMP to impose, the SSA IG 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(a).

Section 1129(b)(2) of the Act 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. pt. 498 that a person against whom a CMP is proposed by the SSA IG may request a hearing before an administrative law judge (ALJ) of the Departmental Appeals Board (the Board). The ALJ has jurisdiction to determine whether the person should be found liable for a CMP and/or an assessment and the amount of each. 20 C.F.R. §§ 498.215(a), 498.220(b). The person requesting the hearing, the Respondent, has the burden of going forward with the evidence and the burden of persuasion with respect to

any affirmative defenses and any mitigating circumstances. 20 C.F.R. § 498.215(b)(1). The SSA IG has the burden of going forward with the evidence as well as the burden of persuasion with respect to all other issues. 20 C.F.R. § 498.215(b)(2). The burdens of persuasion are to be judged by a preponderance of the evidence. 20 C.F.R. § 498.215(c).

B. Issues

This case presents the following issues:

> Whether there is a basis for the imposition of a CMP pursuant to section 1129(a)(1) of the Act and 20 C.F.R. § 498.102(a); and
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> Whether the SSA IG's proposed CMP is reasonable considering the factors specified by section 1129(c) of the Act and 20 C.F.R. § 498.106(a).

Whether or not Respondent may be liable for an overpayment of Social Security benefits and whether or not she continues to meet the requirements for payment of Social Security benefits are not issues before me.

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

My conclusions of law are set forth in bold followed by the statement of pertinent facts and my analysis. I have carefully considered all the evidence and the arguments of both parties, although not all may be specifically discussed in this decision. I discuss the credible evidence given the greatest weight in my decision-making.[7] I also discuss any evidence that I find is not credible or worthy of weight. The fact that evidence is not specifically discussed should not be considered sufficient to rebut the presumption that I considered all the evidence and assigned such weight or probative value to the credible evidence that I determined appropriate within my discretion as an ALJ. There is no requirement for me to discuss the weight given every piece of evidence considered in this case, nor would it be consistent with notions of judicial economy to do so. Charles H. Koch, Jr., *Admin. L. & Prac.* § 5:64 (3d ed. 2013).

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[7] "Credible evidence" is evidence worthy of belief. *Black's Law Dictionary* 596 (8th ed. 2004). The "weight of evidence" is the persuasiveness of some evidence compared to other evidence. *Id.* at 1625.

1. **A supplemental hearing is a proper method to make an ex parte communication part of the public record.**

2. **Striking witness testimony is not necessary to remedy an allegation of witness coaching as the facts do not show that witness testimony was affected.**

3. **Striking the record of supplemental hearing is inconsistent with the requirements of law.**

Prior to addressing the substantive issues, it is necessary to address several procedural issues raised by the parties, including an allegation of witness coaching by a federal agent at the hearing site in Tampa; ex parte communication between Respondent and my office; and the purpose of the supplemental hearing convened on April 3, 2014.

After the hearing was adjourned on March 26, 2014, Respondent sent an email to my attorney advisor in which she alleged that SA Miller coached Analyst Kerns during Analyst Kerns' testimony. Because Respondent did not send a copy of her email to counsel for the SSA IG, the email was an "ex parte" communication. The Scheduling Order ¶ XIV advised the parties that ex parte communication with me was prohibited. The Commissioner has also provided by regulation that ex parte communication is prohibited. The regulation states that "[n]o party or person (except employees of the ALJ's office) will communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate." 20 C.F.R. § 498.205. The prohibition against ex parte communication is also found in the Administrative Procedure Act (APA), 5 U.S.C. §§ 554(d) and 557(d). Under the federal statute, an ex parte communication is "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given" not including requests for status reports, in matters or proceedings under the APA. 5 U.S.C. § 551(14). The adjudication before me is a matter or proceeding under the APA as an administrative adjudication to impose a CMP, within the authority of an executive branch of the government under the Social Security Act. 5 U.S.C. §§ 551(1), (7), (10), (12), (13); 554. Not all ex parte communication is prohibited. The APA prohibits "ex parte communication relevant to the merits of the proceeding." 5 U.S.C. § 557(d)(1)(A), (B). The prohibited ex parte communication under the Commissioner's regulation is upon ex parte communication "on any matter at issue in a case." 20 C.F.R. § 498.205. Although Petitioner's allegation of witness coaching may not be relevant to the merits of the SSA IG case against Respondent, if coaching occurred, it could affect both the credibility of the testimony and the weight it should be given in determining the merits. Therefore, I conclude that the ex parte communication was not merely related to status or a procedural matter, but rather, it was a communication that is relevant to the merits of the case or a matter at issue in this case. When a prohibited ex parte communication occurs, the APA specifies the remedial action required. Pursuant to 5 U.S.C. § 557(d)(1)(C), when an ex

parte communication occurs, the ex parte communication must be made part of the public record. In this case, the ex parte communication occurred on March 26, 2014. I concluded that the best approach to making the communication part of the public record was to convene a supplemental public hearing where the allegation could be made part of the public record and it could also be investigated. The supplemental hearing was convened on April 3, 2014, the earliest date when the multiple VTC sites required could be coordinated and the parties and witnesses could be scheduled to attend. The ex parte communication was cured by placing it on the public record as required by the APA.

The APA also authorizes me to consider an appropriate sanction against the party that made the prohibited ex parte communication. The APA provides that an ALJ "may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation." 5 U.S.C. § 557(d)(1)(D). In this case, Respondent is a non-attorney representing herself in this proceeding. Her ex parte communication is contained in Court Ex. 1. Respondent's ex parte communication alleges that during the hearing at the VTC site in Tampa on March 26, 2014, she observed conduct about which she was uncertain but, subsequently, she developed the belief that the conduct was incorrect, which prompted her communication with my attorney advisor. Respondent expressed concern in her communication that by reporting her concern she might create more issues for herself. I conclude that no sanction against Respondent is appropriate or in the interest of justice. Respondent, as a non-attorney, cannot be expected to have more than limited knowledge of court or administrative proceedings. It would have been preferable for Respondent to have objected during the hearing rather than waiting, but as a non-attorney she would not likely have understood that and it is not appropriate to hold her to the same litigation standards that apply to attorneys. Furthermore, any potential witness coaching is a clear threat to the integrity of the adjudication process, therefore identification of such a threat should not be punished, even when it necessitates a supplemental hearing to cure the ex parte nature of the report. In this case, the supplemental hearing was also the best approach to investigate the allegation thoroughly.

On April 8, 2014, Respondent filed a motion to strike all testimony of SA Miller and Analyst Kerns. Respondent also requested the audio recordings of the hearings on March 25 and 26, and April 3, 2014. Respondent argues that SA Miller's and Analyst Kerns' testimony should be stricken because the record shows that SA Miller coached Analyst Kerns during Analyst Kerns' testimony and because both have diminished credibility. Respondent's motion is denied. I conclude based on my review of the evidence that SA Miller was present in the hearing room and did make some noise or gesture during the testimony of Analyst Kerns. Tr. 71-72. SA Miller denied knowledge of why the supplemental hearing was convened. Tr. 72. However, SA Miller testified as follows in response to my question regarding whether she recalled any unusual occurrence during the testimony of Analyst Kerns during the hearing on March 26, 2014:

> MS. MILLER: The only thing that comes to my mind is that Ms. Young gestured that she thought I might be trying to help Ms. Kerns, and I gestured back that I was not. And then I pointed slowly to you, that if she had any concerns to tell you about it. And all this was just a gesture.

Supp. Tr. 72-73. SA Miller agreed that during the hearing on March 26, 2014, she heard Respondent tell Mr. Wilson that she thought SA Miller was coaching Analyst Kerns. Supp. Tr. 75. She agreed in response to questions from counsel for the SSA IG that she may have cleared her throat during Analyst Kerns' testimony. Supp. Tr. 78. SA Miller acknowledged that on March 27, 2014, she sent an email to counsel for the SSA IG that, among other concerns, referred to an allegation by Respondent that SA Miller had coached Analyst Kerns during Analyst Kerns' testimony.[8] Supp. Tr. 79; SSA Ex. 43. Based on my review of the testimony received at the supplemental hearing, SSA I.G. Exs. 43 and 45, and Court Ex. 1; I conclude that the noise and gesture made by SA Miller during the testimony of Analyst Kerns on March 26, 2014, was insufficient to impact Analyst Kerns testimony. My review of the testimony of Analyst Kerns shows that her testimony is consistent with the documentary evidence in the record with no apparent inconsistency that suggests that her testimony was affected by coaching. Furthermore, my decision that Respondent made false statements or representations in this case does not turn upon the testimony of either Analyst Kerns or SA Miller and their testimony and credibility do not weigh in the decision of this case.

Respondent's motion to strike is denied as striking the testimony is not necessary as a remedy. Respondent's request for copies of the audio recording of the proceedings is also denied. Pursuant to 20 C.F.R. § 498.218(a), the hearing must be recorded and transcribed and a copy of the transcript provided to the parties who request a copy. Pursuant to 20 C.F.R. § 498.218(b), it is the transcript of the testimony that is part of the

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[8] Counsel for the SSA IG was therefore aware of the allegation of witness coaching on March 27, 2014, the day after the incident allegedly occurred. However, I find no record of the SSA IG notifying my office of this very serious allegation that impugned the integrity of its witnesses and the hearing process. Counsel should have immediately notified my office of the allegation of improper conduct and is admonished to report any such allegations in the future. SA Miller, who is clearly an experienced investigator, should have brought the alleged coaching incident to my attention immediately during the proceedings so that the issue could have been addressed at the time rather than a week later.

record for decision not the recording of the proceeding. Because the testimony of Analyst Kerns and SA Miller is not the basis for my conclusions that Respondent made three false statements or misrepresentations in this case, further review and litigation regarding noises on the audio recording of the hearing would serve no purpose in the decision of this case. I conclude that Respondent and the SSA IG suffer no prejudice as a result of the audio recordings not being made available for their review.

On May 30, 2014, the SSA IG moved to strike evidence of the supplemental hearing. Respondent filed an opposition to the SSA IG motion on June 4, 2014. The SSA IG specifically requested that the testimony from the supplement hearing "be stricken from the publically available record in this case." SSA-OIG Motion to Strike Supplemental Hearing On April 3, 2014 and Associated Testimony (SSA Mot. to Strike) at 1. The SSA IG advances two arguments. The SSA IG argues that the agency was prejudiced as a result of Respondent's ex parte communication because it could not prepare for the supplemental hearing. SSA Mot. to Strike at 1, 3. The SSA IG argues that I should have advised the SSA IG as soon as I was aware of the ex parte communication of the allegation. SSA Mot. Strike at 3. However, the SSA IG cites no authority in support of its argument. The SSA IG also fails to articulate any specific prejudice and I perceive none. All participants in the supplemental hearing participated in the hearing on March 26, 2014, and had actual knowledge of the March 26 proceeding. Counsel for the SSA IG was advised by SA Miller on March 27, 2014, that there had been an allegation of witness coaching during the March 26 hearing. If counsel for the SSA IG had promptly notified me of the alleged witness coaching among its witnesses, SSA IG would have been advised of the purpose of the supplemental hearing. However, given only the complaint by respondent, advising counsel for the SSA IG of the purpose for the April 3 supplemental hearing would have been ill advised because there was no method by which to prevent the SSA IG from interviewing SA Miller and Analyst Kerns and preparing their testimony in advance of the supplemental hearing. Advanced witness preparation involved a significant risk that testimony at the supplemental hearing could be tainted by the preparation and communication among the witnesses and counsel and would have required extensive interrogation regarding any preparation and how testimony may have been affected. Nondisclosure of the subject of the supplemental hearing was the best way to ensure that the testimony of SA Miller and Analyst Kerns was not affected by preparation. Preserving the integrity and credibility of the potential testimony outweighed any inconvenience to the SSA IG due to not being specifically aware of the subject of my intended inquiry. Certainly the lack of notice did not prevent the SSA IG from being prepared to offer SSA IG Exs. 43, 44, and 45 at the supplemental hearing. In fact, SSA Exs. 44 and 45 involved the SSA IG contacting the court reporter and ordering advanced copies of the transcripts of the testimony of SA Miller and Analyst Kerns. SSA Ex. 43 is a laundry list of complaints of the SSA employees involved regarding conducting hearings by VTC, as well as the revelation that SA Miller recognized that Respondent accused her of communicating with Analyst Kerns during Analyst Kern's testimony. The SSA IG was not denied the opportunity to engage in meaningful

examination of either SA Miller or Analyst Kerns at the supplemental hearing. The SSA IG has not alleged that it would have (or even could have) done anything differently in preparing for or during the actual supplemental hearing itself. I conclude that contrary to the representations of the SSA IG, the SSA IG suffered no undue prejudice due to the lack of specific advance notice of the subject of my inquiry during the supplemental hearing. Even if the SSA IG suffered some prejudice, that prejudice was outweighed by the need to preserve unadulterated testimony for the public record. Both the Act and the Commissioner authorize me to sanction any party or attorney for misconduct that interferes with the speedy, orderly or fair conduct of a hearing. Act § 1128A(c)(4); 20 C.F.R. § 498.214(a)(3). Failure to report the allegation of witness coaching may be viewed as being sanctionable under the regulation. I conclude no sanction is required but rather caution Counsel to the SSA IG to always promptly report to me any allegation that may impact the integrity of the Commissioner's hearings over which I have authority.

The second SSA IG argument for striking the supplemental hearing causes me even greater concern. The purpose of the supplemental hearing was to place the ex parte communication on the public record as required by the 5 U.S.C. § 557(d)(1)(C) and that purpose was fulfilled. The secondary purpose of the supplemental hearing was to investigate the allegations of improper conduct by agency employees during the hearing in this case. The SSA IG expresses concern that there exists a "public record of even an unsubstantiated allegation against a Federal agent" due to potential future hardship for the agent and the SSA IG in future judicial proceedings and due to potential adverse professional consequences for the agent. SSA Mot. to Strike at 1, 4. Contrary to the position of the SSA IG, protecting government agents from allegations of wrong doing is not a primary concern of an ALJ. Even if an ALJ should be concerned, once an allegation is made and part of the public recording covering-up the allegation is not an acceptable approach to addressing the allegation. When an allegation is made that some misconduct may have tainted or raised issues as to the integrity of the proceedings, the ALJ's primary focus is properly upon investigating the allegations and preserving and protecting the record and the interests of the parties. The SSA IG's argument reflects an apparent lack of knowledge of the APA and its requirements regarding ex parte communications and how prohibited ex parte communications must be remedied. Transparency in government has long been a popular topic of concern. The APA has long required transparency in agency rule-making and agency adjudications by requiring that matters related to agency operations, including rule making and agency adjudications, be open and part of the public record. The SSA IG's motion to strike is an

overt attempt to bury the allegations against its employees and inconsistent with the transparency required by the APA.[9] The SSA IG motion is, accordingly, denied.

4. **Respondent falsely stated to a Disability Determination Services Examiner on January 29, 2013, that she did not take care of animals, a statement which she knew to be false, and which was material to determining whether she was entitled to ongoing DIB.**

5. **Respondent falsely stated in an Adult Function Report (Form SSA-3373-BK) dated February 4, 2013, that she did not take care of any pets or other animals, a statement which she knew to be false, and which was material to determining whether she was entitled to ongoing DIB.**

6. **Respondent knowingly misrepresented in an Adult Function Report (Form SSA-3373-BK) dated February 4, 2013, the scope of her daily activities, a representation which she knew to be false, and which was material to determining whether she was still entitled to ongoing DIB.**

7. **The SSA IG has not proven by a preponderance of the evidence that Respondent made any additional false or misleading statements or representations of fact, which she knew were false or misleading, and that were material to determining whether she was entitled to ongoing DIB.**

a. Allegations

Counsel to the SSA IG, B. Chad Bungard, notified Respondent by letter dated September 5, 2013, that the SSA IG proposed to impose of a CMP of $75,000 against Respondent, pursuant to section 1129 of the Act (42 U.S.C. § 1320a-8). The SSA IG cited as the basis for the CMP that Respondent knowingly made numerous false statements and misrepresentations during a 2013 CDR. SSA Ex. 15, at 1-2. The SSA IG initially alleged that Respondent made 15 false statements or misrepresentations, and requested that I approve a total CMP of $75,000, the maximum imposable CMP of $5,000 per violation. SSA Ex. 15.

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[9] The Commissioner also requires that the hearing before an ALJ be open to the public, unless the ALJ orders otherwise for good cause. 20 C.F.R. § 498.215(d).

Counsel for the SSA IG advised me during the supplemental hearing on April 3, 2014, that the IG withdrew 9 of the 15 original allegations and that the IG would proceed upon only 6 allegations. Supp. Tr. 5-7; SSA Ex. 15; SSA Br. at 1-2. The SSA IG also advised me that he proposed the maximum CMP of $5,000 for each of the six allegations, a total CMP of $30,000. The six remaining allegations of false statements or representations are:

- During a Report of Continuing Disability Interview, SSA 454-BK [SSA IG Ex. 1], [Respondent] stated that [she] had difficulty walking, especially on uneven pavement.

- On an Adult Function Report – SSA Form 3373 completed and signed on February 4, 2013 [SSA IG Ex. 5], [Respondent] stated that [her] daily activities consisted of lying around. [Respondent] stated that if [her] fibromyalgia was not flaring up, [she] could read, use the computer or go for a ride, indicating that those were the only three activities [she] engaged in most of the time.

- On this Report [Adult Function Report – SSA Form 3373] [SSA Ex. 5], [Respondent] stated that [she] did not take care of any pets or other animals.

- When a Disability Determination Service examiner called [Respondent] on January 29, 2013 and [Respondent] answered the phone "Ohana Horse Rescue", the examiner directly asked [Respondent] if [she] took care of any animals. [Respondent] falsely stated that [she] did not.

- On a Reconsideration Request letter that [Respondent] submitted on March 29, 2013 [SSA Ex. 8], [she] stated that [she] was depressed, did not have a normal life, and had problems being around people.

- [Respondent] stated [in SSA Ex. 8] that [she] forgot to go shopping because [her] mind and memory were affected by [her] illness and that [she] was constantly tired.

SSA Ex. 15, at 1-2; SSA Br. at 1-2. The SSA IG requests that I approve a total CMP of $5,000 for each of the six allegedly false statements or representations, a total CMP of $30,000. SSA Br. at 1.

The SSA IG has the burden to establish by a preponderance of the evidence, that is, that it is more likely than not, that Respondent made the six allegedly false statements or misrepresentations; that she knew or should have known that the statements were false or misleading; and that the statements were material to a determination of whether Respondent would continue receiving DIB. Act § 1129(a)(1); 20 C.F.R. §§ 498.102(a), 498.215(b)(2) and (c). I conclude that the SSA IG has met its burden for three of the six alleged false statements or misrepresentations.

b. Facts

In January 2011, SSA awarded Respondent DIB retroactive to January 2009, based on her fibromyalgia, fatigue, and chronic pain. SSA Ex. 15 at 1. Based on an anonymous tip that Respondent was operating a horse rescue while receiving DIB, the SSA IG began an investigation of Respondent in early 2013, at about the same time as Respondent was subject to a CDR. SSA Ex. 1, SSA Ex. 9 at 2-3, Tr. 349. SSA terminated Respondent's DIB on March 18, 2013, based on the determination that she was no longer disabled. SSA Ex. 13 at 2; Tr. 300. On March 29, 2013, Respondent submitted a Request for Reconsideration, Form SSA-789-U4 that she signed and dated March 25, 2013, with her argument attached. SSA Ex. 8. She stated that her "memory seems to be effected more, most likely because I am constantly tired." SSA Ex. 8 at 2. She also stated that she was "depressed and I cannot live a normal life . . . . I have problems being around people anymore. I have issues walking for a long period of time, so forget going shopping." SSA Ex. 8 at 2. SSA denied the reconsideration request, and Respondent then appealed the cessation of her DIB to an ALJ in a proceeding separate from this one. Tr. 301.

Analyst Kerns testified that on January 17, 2013, she began to investigate the fraud allegation against Respondent related to Respondent's operation of the horse rescue while receiving DIB. SSA Ex. 38; SSA Ex. 45 at 6, 47. Analyst Kerns reported the results of her preliminary web-searches to SA Miller. The CDR was already in progress and being conducted by the SSA field office. SA Miller opened a formal CDI investigation. Analyst Kerns continued to work the case after SA Miller opened the formal investigation. SSA Ex. 45 at 8. In the course of her investigation, Analyst Kerns located several websites that referred to Respondent and "Ohana Horse Rescue." SSA Ex. 38 at 1; SSA Ex. 45 at 7-8. She found a Facebook account named "Ohana Rescue Carrie Young," which included thousands of photographs, several of which had been posted in December 2012 showing Respondent bathing horses as well as three photographs with an embedded date of January 12, 2013, showing Respondent leading a horse across a paddock, standing next to a horse, and sitting on the ground near a horse. SSA Ex. 45 at 8-13; SSA Ex. 40 (CD 2 of 2); SSA Ex. 22. Analyst Kerns testified that she located a Facebook page for Respondent that stated Respondent founded, owned, and operated Ohana Rescue. SSA Ex. 45 at 14; SSA Ex. 23. Analyst Kerns read from a Facebook post dated November 19, 2013, which she testified exemplified the general type of

postings she saw on the Facebook page in January 2013. SSA Ex. 45 at 16. She testified that based on her review of the Facebook page for "Ohana Rescue Carrie Young" between October 2012 and January 2013, she observed that new posts were made almost daily. SSA Ex. 45 at 17. Analyst Kerns later found several news articles posted online and linked to the Ohana Rescue website, which discussed Respondent and her horse rescue operation. SSA Ex. 45 at 19-24. The articles were from November 2011, October 2012, April 2013, and July 2013. SSA Exs. 24-28. Analyst Kerns testified that she also found videos posted on the Facebook page, including one that showed Respondent standing and grooming a horse using a "shredder" with two hands, and another video, posted on March 3, 2012, which showed Respondent riding a horse, then dismounting it by sliding down the side of the horse and landing upright on her feet. Another video showed Respondent standing up on a large, square piece of wire fencing and being dragged on that fencing behind a golf cart. SSA Ex. 45 at 25-33; SSA Ex. 40 (CD 1 of 2, Runtime 07:31-11:50).[10] Analyst Kerns admitted in response to my questioning that her duties with CDI involved obtaining evidence of the activities in which her targets engaged, and not making a medical assessment or determining the target's residual functional capacity.[11] Supp. Tr. 43-44. Analyst Kerns inferred that Respondent posted all the content to her Facebook page. She testified that she did not have a Facebook page but she understood it was possible for others to paste to the owner's Facebook page. She believed the Facebook postings were important both for the activities depicted and the mental activity required to maintain the Facebook page. SSA 45 at 48-50.

DDS Examiner Timothy Bane testified by telephone. He testified that he conducted the initial CDR for Respondent. As part of the CDR a work history report form, a functional report form, and a pain questionnaire were mailed to Respondent with instructions to complete and return the forms. Tr. 292. Examiner Bane testified that as part of the CDR he called Respondent by telephone on January 29, 2013. He testified that Respondent answered the telephone stating "Ohana Horse Rescue." SSA Ex. 39 at 2; Tr. 297-98. Among other questions about her activities of daily living (ADL), he asked her whether she took care of any children or animals. According to Examiner Bane, she denied caring for children or animals. SSA Ex. 39 at 2; Tr. 298. He testified that Respondent's entitlement to DIB ceased on March 18, 2013, but she had a pending appeal of that determination. Tr. 300-01. In response to my questions, Examiner Bane testified that it

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[10] Respondent later testified that being pulled behind the golf cart on the piece of fencing is referred to colloquially as "cowboy surfing." Tr. 389.

[11] Residual functional capacity "is the most you can still do despite your limitations," physical and mental, caused by "impairment(s), and any related symptoms, such as pain." 20 C.F.R. § 404.1545.

was not part of his duties to make determinations regarding an individual's residual functional capacity as that task was done by the medical examiners. Tr. 306-11. He testified that Respondent's records show that she was granted disability in 2011 by an ALJ because the ALJ concluded that she had a residual functional capacity for less than sedentary activity and could not maintain a 40-hour per week work schedule. Tr. 310. He testified that her entitlement ceased in March 2013, because it was determined that her functional capacity had increased and she could return to her past relevant work as a credit manager. Tr. 320-21, 344-45; R. Ex. 13. He testified that he made no determinations as to whether Respondent would have trouble sitting, standing, or lying down; whether she had difficulty with ADLs; whether she had trouble with her memory or depression; or whether she was constantly tired. Tr. 325-26. Examiner Bane testified that it was his job to collect information and pass it on to the medical doctors. Tr. 325, 343.

Respondent does not deny that she completed a CDR Report, Form SSA-454-BK, marked and admitted as SSA Ex. 1, although the CDR Report is not signed or dated. In Section 10 of the form Respondent describes her daily activities. In the narrative she states that if she is able to sleep she gets up at 8 a.m.; she tries to clean if she does not hurt; she loves to read a book but requires drops for dry eyes; her son and girlfriend live with her and sometimes they go for a ride to town or in the golf cart; and she tries to sit at the computer. She stated that she wears eye-glasses and uses a cane when her leg hurts. She checked "Yes" blocks on the form indicating difficulty with ADLs, including difficulty walking, and wrote that her difficulty walking was "especially on uneven ground." SSA Ex. 1 at 10-11.

Respondent does not deny that on February 4, 2013, she completed a "Function Report – Adult," Form SSA-3373-BK. SSA Ex. 5. Question 6 of the Function Report asked Respondent to "[d]esribe what you do from the time you wake up until going to bed." Respondent wrote that she:

> Lay around, try to walk around if dry eyes from fybermalgia [*sic*] aren't bothering me, I can read. Play game on computer if they don't hurt. Maybe go for ride in car.

SSA Ex. 5 at 2.

Question 8 of the Adult Function Report asked Respondent – "Do you take care of pets or other animals?" Respondent checked "No." Question 9 asked Respondent – "Does anyone help you care for other people or animals." Respondent checked the box next to "Yes," and, wrote "son will feed." SSA Ex. 5 at 2. Elsewhere on the Function Report, Respondent stated that she felt "I have lost my life. Can't be around people anymore, can't live normal." SSA Ex. 5 at 5. She also stated she can only walk for "a few minutes" before needing to stop and rest. SSA Ex. 5 at 6.

Examiner Bane testified regarding the statements made in the forms completed by Petitioner, that he did not make any determination about their truth or falsity because that was not his job. Tr. 306-08. He explained that the statements made in the forms were reviewed in conjunction with Respondent's medical records by medical doctors. Tr. 307, 325-27. In response to my questioning, Examiner Bane acknowledged that Respondent's statement that she had to lay down during the day was not inconsistent with fibromyalgia, but he personally did not attempt to determine the truth of her statement. Tr. 309.

On February 25, 2013, as part of the investigation into the fraud allegation against Respondent, Investigator Thomas Montgomery went to a local Publix Supermarket and obtained video surveillance footage of Respondent in the store on January 6, 2013 and January 21, 2013. SSA Ex. 40 (CD 1 of 2, Runtime 00:00-07:30); Tr. 199-200. Investigator Montgomery testified that he determined the time and date of the Publix surveillance footage relevant to the investigation based on his review of records of Respondent's use of her electronic benefits transfer (EBT) card. Tr. 200-05. There are two video clips and both show Respondent checking out of the store. The January 6 video shows Respondent waiting at the checkout aisle for about four minutes, carrying her purse over her shoulder, and accompanied by an unknown woman. After checking out, Respondent walks out of the store unassisted while the unknown woman carries out the grocery bags. SSA Ex. 40 (CD 1 of 2, Runtime 00:00-05:18). The January 21 video shows Respondent again at the checkout aisle, alone, and carrying her purse over her shoulder. After checking out, she places five plastic grocery bags over her hand, forearm, and wrist, and walks out of the camera range. SSA Ex. 40 (CD 1 of 2, Runtime 05:20-07:30). Investigator Montgomery described Respondent in the January 21 video as having an "unremarkable gait, carrying a large purse and alone, entered the grocery aisle. [Respondent] was captured bending and crouching to the floor to look at items on display." SSA Ex. 37 at 2. Investigator Montgomery clarified at hearing that the "grocery aisle" to which he was referring was actually the checkout aisle shown in the video. Tr. 212, SSA Ex. 40 (CD 1 of 2, Runtime 05:37-05:39).

Investigator Montgomery and SA Miller interviewed Respondent at her home in Brooksville, Florida, on March 6, 2013. Tr. 67, 214. Both testified that Respondent met them outside of her house, although SA Miller clarified on cross-examination that Respondent's husband first had to go inside the house to get Respondent because she was lying down in bed. Tr. 115-16, 215, 223. The substance of the interview was not documented, but SA Miller wore a hidden video-surveillance camera and obtained video footage of Respondent with no sound. SSA Ex. 40 (CD 1 of 2, Runtime 11:51-19:52). The investigators introduced themselves to Respondent and claimed they were investigating food-stamp fraud in the area. Tr. 67, 106, 215-16. Investigator Montgomery testified that Respondent's handshake was "firm," which to him indicated "that her arm strength is strong and that she had a firm, strong shake, and not a weak shake." SSA Ex. 37 at 3; Tr. 238. Accordingly to both investigators' testimony, they and

Respondent sat outside on a picnic table near Respondent's house and went over her food stamp usage. Tr. 67, 216.

Investigator Montgomery at one point asked if he could see the horses and Respondent agreed. Investigator Montgomery, SA Miller, and Respondent walked to a corral, which Investigator Montgomery estimated to be "150 feet across uneven terrain." SSA Ex. 9 at 8; SSA Ex. 37 at 3, Tr. 220. SA Miller initially testified that there was a "slight incline" from where they were seated at the picnic table to the corral where the horses were located, but then clarified that the corral was down a slope from Respondent's house and was on "uneven terrain." Tr. 68-69. The investigators and Respondent stood near the corral on "grass and dirt." Tr. 69. The Summary Report stated that Respondent "walked without assistance with an even fluid gait, and did not appear to display any physical difficulties . . . . [Respondent] presented herself as a socially interactive person; she was pleasant, friendly, polite and respectful." SSA Ex. 9 at 8. Both SA Miller and Investigator Montgomery testified that neither of them observed Respondent having difficulty walking on the day of the interview. Tr. 69, 219. In response to my questioning, Investigator Montgomery testified that he learned to assess someone's ability to walk from his colleagues in the CDI unit, as well as "a lot of conferences and evaluations, videos . . . to determine what is normal and abnormal." Tr. 241-42. SA Miller testified that when they walked to the corral, Respondent was even with her and Investigator Montgomery, but when returning back to the house, Respondent was walking behind them because the investigators "thought it would seem odd if we lagged behind her . . . ." Tr. 69-70. SA Miller produced a copy of the video she obtained that day, offered as portion of SSA Ex. 40 (CD 1 of 2, Runtime 11:51-19:52), but stated that the video had been edited for time. Tr. 112. SA Miller testified that the only video footage deleted was nothing of significance and only showed the investigators, Respondent, and Respondent's husband standing near the corral for approximately 15 minutes. She also testified that no surveillance was conducted at the rescue and no other video was made. Tr. 112-13.

Based on my review of the video SSA Ex. 40 (CD 1 of 2, Runtime 17:12 – 19:52), I find that the terrain on which SA Miller and Investigator Montgomery observed Respondent walk had a slight slope or grade. Although the camera angle was inconsistent, comparing the surface with the visible horizon, the grade was no more than a couple degrees and certainly less than five degrees. The assertion that the terrain was uneven is misleading. The terrain was mostly grass-covered, with what appeared to be an occasional flat stone visible in the grass. There were no obvious dips, mounds, ruts, or ditches apparent in the video. The terrain was not as smooth as finished concrete, but it was certainly not so uneven as to have prevented the use of a wheelchair. I further note that the video shows that during the walk from the picnic table to the horses, Investigator Montgomery walked beside Respondent to her left only a few steps and the remaining distance he was in front of Respondent. Therefore, Investigator Montgomery's opinion regarding Respondent's

gait and her ability to walk during his visit to Respondent's home is of limited weight and credibility.

Investigator Montgomery and SA Miller also interviewed Patricia ("Patty") Eden, the owner of Wagon Wheel Feed Store in Brooksville, Florida, on March 6, 2013. Ms. Eden told the investigators that Respondent came to her store weekly and purchased about $300 worth of horse feed. The investigators reported that she told them that Respondent "appears fine" with regard to any apparent physical disability. SSA Ex. 10 at 2. Ms. Eden testified by telephone at the hearing. Ms. Eden testified that the bags of feed Respondent purchased weighed 50 pounds but her staff, not Respondent, loaded the bags into Respondent's truck. Tr. 185-87. Once the feed was purchased, the purchaser would drive around the store to trailers outside, hand a ticket to the staff, and staff loaded the order into the purchaser's vehicle. Tr. 192. She stated that from the front door to the counter of the store, where Respondent would purchase the feed, is about "five to [ten] steps." Tr. 191. Ms. Eden acknowledged that Respondent was often at the store with her husband. Tr. 188. Ms. Eden testified that she had never been to Respondent's home. Tr. 189.

Investigator Montgomery interviewed Stephen Miller, DVM, a veterinarian in Trillby, Florida, by telephone on March 8, 2013. Tr. 220-21. Dr. Miller told Investigator Montgomery that he saw Respondent about once per month and that she did not show any apparent physical disabilities. SSA Ex. 10, at 2; Tr. 221. Dr. Miller testified at the hearing that he has provided veterinary services to horses at Ohana Rescue "a couple of times a month" for "a couple of years." Tr. 82. Dr. Miller testified that either Respondent or her husband calls him if a horse needs medical attention, and that any care-related decisions seem to be "a mutual decision" between Respondent and her husband. Tr. 83, 85. He testified that based on his observations of Respondent, he had the impression that she was physically disabled, and that Respondent's husband typically handles the horses while Dr. Miller is providing treatment. Tr. 84. He believed Respondent was "reluctant and unable" to handle the horses while they were undergoing treatment. Tr. 85-86. In response to my questioning, Dr. Miller clarified that Respondent "almost never" assisted him with the horses while he was providing care. Tr. 95. He also could not recall observing Respondent caring for the horses because he is "normally focused on the horse and what [he is] doing." Tr. 96.

Dinelle Ashcraft, who owns and operates Domino Effect Rescue Ranch, a horse rescue in Florida, testified that typical daily activities of her horse rescue include mucking or cleaning out stalls, moving horses into the paddock, feeding them, and making sure they have clean water. Horses must be groomed and examined weekly. She also testified that she routinely runs errands to pick-up feed and hay. Tr. 129-30. Ms. Ashcraft stated that once hay bales had been picked up and brought to the horse farm, she must physically unroll the bales in different areas. Each bale, according to Ms. Ashcraft weighs between 800 and 1,000 pounds, which she asserted she can unroll without assistance. Tr. 134-35,

165. Ms. Ashcraft also testified that she must network using social media and advertise her rescue activities on a daily basis. Tr. 130, 137. I find that Ms. Ashcraft's testimony regarding the operation of her horse rescue and her activities, while credible, is of minimal or no relevance as it sheds little light upon the operation of Respondent's rescue operation or Respondent's activities. Tr. 166-69, 171-72. There is no evidence of any industry standard for operation of horse rescues and little evidence from which I might infer that the operation of Ms. Ashcraft's rescue and Respondent's rescue is similar, other than both have some horses that require feeding and care which takes money that is obtained through some form of fund raising.

Ms. Ashcraft testified that she knew Respondent, but could not remember seeing her in person between January 2013 and March 2013. Tr. 138. Most of her interactions with Respondent were through social media, "because we have the same affiliates from the rescue and mutual friends and different things that were going on, [so] I made it my business to know what was going on, on her page." Tr. 140. However, she could not recall with specificity items that Respondent had posted between January 2013 and March 2013. Tr. 140. Ms. Ashcraft testified that when she would review various postings from Respondent's horse rescue, it appeared that there was a daily status update. Ms. Ashcraft acknowledged that she had no direct knowledge of Respondent's daily activities or how she ran her own horse rescue, but only relied on Facebook posts – to which she admitted no knowledge of who actually posted them – to determine what Respondent did. Tr. 141-42, 168-69. She testified that she saw Respondent and Respondent's husband at the Wagon Wheel Feed Store once during the summer of 2013, once on an unspecified date at a dollar store in Brooksville, Florida, and on other sporadic occasions as she drove past Respondent's property or at other supply stores, amounting to between 6 and 12 observations per year. Tr. 146-47, 153-54, 170. She testified that she once observed Respondent walk about "an acre"[12] on her neighbor's property and walk up "three or four" steps on another neighbor's property. Tr. 171. Ms. Ashcraft did not specify when she made these observations, but stated that one of the observations was "back in November." She did not specify which year. Tr. 175.

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[12] An "acre" is a squared measure, representing 43,560 square feet, often referred to as about the size of a football field, which without the end-zone is approximately 48,000 square feet (160 feet x 300 feet). Ms. Ashcraft could not provide an estimate of the distance in feet that she observed Respondent walk, but, in response to my questioning, she conceded that it might have been 200 or 300 feet but she could not recall with certainty. Tr. 174-75.

Ms. Ashcraft further testified that Ohana Rescue has "attacked" her rescue for years through false allegations to various government offices, but that she did not have enough knowledge of Respondent to judge whether she liked Respondent personally. Tr. 157-58. She acknowledged, however, that she tries to avoid Respondent when possible. Tr. 161. The animosity between Ms. Ashcraft and Respondent is apparent and I give Ms. Ashcraft's testimony less weight due to her lack of objectivity.

Respondent testified at hearing that she assists in feeding the horses at her rescue in the morning at 8:00 a.m. Tr. 356, 359. From September to October 2013, during which time she changed the feeding regimen, each horse was given a five-pound bucket of mixed ingredients. Tr. 361. Prior to September 2013, and after October 2013, the feeding regimen consisted of providing a scoop of feed to each horse, with each scoop weighing two pounds. Tr. 360-62. Respondent testified that her husband puts the grain on the back of the golf cart, and then Respondent and her husband drive to the horses and scoop the grain from the bag and place it into each horse's bucket. Tr. 363. She also testified that her husband provides hay to the horses in the evening. Tr. 365. Respondent stated that she or her husband will provide medication to the horses, if needed, which consists of dissolving the medication in an inch of water, then dumping that water over the horse's hay. She has also given injections to horses in the past, but the period is uncertain. Tr. 367. With regard to cleaning out the horses' stalls, Respondent testified that volunteers or her husband usually do it. She asserted that she is unable to lift shovels of manure and put it in the golf cart or truck and so does not physically assist in cleaning stalls. Tr. 369.

Respondent further testified that both she and her husband will pick-up horses in need of rescue, but she has never picked one up alone. Tr. 370-71. She acknowledged posting photographs online as well as posting stories or updates about the horse rescue online. Tr. 371-73. Respondent initially denied that she was responsible for soliciting donations for the horse rescue, but she acknowledged that in state non-profit registration forms she listed herself as being the individual responsible for solicitations. Tr. 374; SSA Ex. 20 at 3. She testified that the horse rescue uses online fundraising through Facebook ("Fundrazr") to solicit and receive donations, but limited her role as only establishing one or two such fundraisers. Her husband or volunteers have initiated other fundraisers. Tr. 380-81. Respondent further testified that her husband, son, and son's friend all have access to the "Ohana Rescue Carrie Young" Facebook page and have all updated it on numerous occasions. Tr. 383-84. She denied making a post on Facebook during July 2013 that referred to constant work and "working myself sick" to run the horse rescue and suggested that her husband was more likely to have written that particular post. Tr. 410-11. Respondent clarified that the Facebook name "Ohana Rescue Carrie Young" includes her name because "there's another rescue by the name Ohana that was getting threatening emails, things posted on the [Facebook] wall. So, [Respondent's] name is put on there specifically to differentiate the other rescue." Tr. 412.

Respondent testified that some days she wakes without pain but is exhausted; other days she wakes with pain; and she lays down a lot. She asserted she does not have a happy life. Finally, she testified that she has good days and bad, and asserted that the videos posted of her "cowboy surfing" and riding a horse were from her birthday, a good day. Tr. 413. Respondent questions, why if she was trying to hide the fact that she had a horse rescue, there are videos, photos, and posts on her Facebook page. Tr. 414; R. Br. 2. Respondent testified in her case-in-chief that work at the horse rescue, including the website and taxes, is done by volunteers. She asserted that her pain is obvious in her face in the pictures in evidence. Tr. 418.

c. Analysis

The SSA IG alleges that in January, February, and March 2013, during the processing of her CDR, Respondent made six false statements or misrepresentations of material fact to SSA or agents of SSA on various forms and during a telephone conversation. SSA proposes a $5,000 CMP for each alleged offense.

The SSA IG bears the burden to show by a preponderance of the evidence for each alleged offense that:

(i.) Petitioner made or caused to be made a statement or representation of fact;

(ii.) The statement or representation was a fact material to the determination of Petitioner's continuing right to DIB;

(iii.) The statement or representation was false or misleading;

(iv.) Petitioner made the statement or representation –
(a.) Knowing that it was false or misleading, or
(b.) She should have known it was false or misleading, or
(c.) She made the false or misleading statement with knowing disregard for the truth.

Act § 1129(a)(1); 20 C.F.R. § 498.102(a). A "material fact" is one that the Commissioner may consider in evaluating whether an applicant is entitled to benefits or payments under the Act. Act § 1129(a)(2); 20 C.F.R. § 498.101. There is no requirement that the Commissioner actually considered a fact or representation in making a determination about benefit entitlement, the Act and implementing regulations merely require that the fact or representation be one that Commissioner may consider for it to be

"material." "Representation" is not specifically defined in the Act or regulations.[13] Therefore, I construe "representation" as used in the Act and regulation to be "[a] presentation of fact – either by words or by conduct – made to induce someone to act." *Black's Law Dictionary* 1327 (8th ed. 2004). Misrepresentation and false representation are treated as synonyms in this decision.

The SSA IG has satisfied the elements for three of the six alleged offenses and Respondent has not met her burden to rebut the SSA evidence or to establish an affirmative defense. The SSA IG failed to meet its burden for three of the alleged offenses. The three false or misleading statements the SSA IG has proven are discussed first.

i. False statement on Function Report –Adult, SSA-3373-BK, Item 8, on February 4, 2013, that Respondent did not take care of any pets or other animals.

The SSA IG alleges that Respondent falsely reported on February 4, 2013, that she did not take care of pets or other animals. SSA Ex. 5 at 2. The SSA needs to prove by a preponderance of the evidence, that Respondent did care for pets or other animals, that Respondent knew or should have known that she took care of animals, and that the fact she took care of animals was a material fact that could be considered in assessing her continued entitlement to DIB.

There is substantial, unrefuted evidence, certainly more than a preponderance, that at the time Respondent asserted to SSA that she did not take care of any animals, she and her husband ran a horse rescue on their property. Tr. 355-56. She acknowledged during the hearing that she participated in feeding the horses daily, and routinely provided them with medication. Tr. 356, 367. She also assisted in grooming them and buying their food. Tr. 184; SSA Ex. 10 at 2; SSA Ex. 40 (CD 2 of 2). The feeding, grooming, medicating, and other routine functions to assist in providing a healthy life for an animal constitutes "taking care of" that animal under any reasonable and ordinary meaning of that phrase. Therefore, the evidence in this case shows that Respondent more likely than not cared for animals in February 2013, she knew that she did so, and she falsely stated that she did not when she completed the SSA-3373-BK on February 4, 2013.

Respondent's care for animals, including the ability to feed, medicate, and groom another living being, may certainly have been facts considered by the Commissioner in reaching a

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[13] The SSA IG offered a definition for "misrepresentation" but without citation to source or authority. SSA Br. at 3.

determination about whether Respondent was entitled to ongoing DIB. The false statement was made on the Function Report – Adult, that Respondent completed as part of the CDR process. Examiner Bane testified that the answers about a person's ADLs are considered in conjunction with medical records to determine whether an applicant for benefits or continuing benefits is entitled to DIB. Tr. 229, 343. I conclude that the fact that Respondent fed and otherwise provided care to horses at her horse rescue was a material fact under the Act and regulations. By checking "no" as the response to the question of whether or not she cared for pets or other animals, Respondent made a false statement which she knew to be false.

Respondent points-out that in response to question 9 on the SSA-3373-BK which asks "[d]oes anyone help you care for other people or animals" she checked yes and wrote that her "son will feed." SSA Ex. 5 at 2. Respondent asserts that her inconsistent responses show that she simply answered the questions as she understood them. R. Br. at 6-7. Respondent's inconsistent answers certainly should have provoked a request for clarification from SSA. But that fact does not absolve Respondent for her clearly untruthful response that she did not care for animals. Based on the documents that Respondent has filed in this case, her interaction with counsel during the hearing, her examination of witnesses during the hearing, and her comments on her behalf during the hearing, it is apparent that she is above average intelligence. Respondent also has above average ability to understand these proceedings and the CDR process. Therefore, I find it not credible that she did not understand the question on the SSA-3373-BK – "[d]o you take care of pets or other animals?" SSA Ex. 5 at 2. There is no evidence of a mental impairment of such magnitude that may have caused Respondent to be unable to remember that she had horses at her house or that she helped care for those horses at the time she completed the form.

Accordingly, I conclude that Respondent falsely stated on the SSA-3373-BK, Function Report –Adult, on February 24, 2013, that she did not take care of pets or other animals, she knew that her statement was false, and the fact is material to a determination of her continuing entitlement to DIB. The false statement is a basis for the imposition of a CMP.

ii. False statement to Examiner Bane during a telephone interview on January 29, 2013, that Respondent did not take care of children or animals.

The SSA IG alleges that in response to a question of DDS Examiner Bane during a telephone interview on January 29, 2013, Respondent falsely state that she did not take care of any animals. SSA Ex. 15 at 2. In order to prove this allegation, the SSA IG must show by a preponderance of the evidence that Respondent took care of animals on about January 29, 2013, when she made her statement to Examiner Bane denying that she took care of animals. The SSA IG must also show that Respondent knew her statement was

false or misleading. The SSA IG must also show that the fact was material. Examiner Bane testified at hearing that he interviewed Respondent by telephone on January 29, 2013, and asked her whether she took care of any animals. Tr. 298. She told him that she did not. Tr. 298; SSA Ex. 39 at 2. I find Examiner Bane's testimony to be credible and entitled to weight. Respondent does not directly dispute Examiner Bane's testimony.

The preponderance of the evidence is that Respondent stated to Examiner Bane that she did not take care of any animals. However, the preponderance of the evidence shows that statement was false as the evidence shows that Respondent and her husband ran a horse rescue on their property. Tr. 355-56. Respondent acknowledged during the hearing that she assisted with feeding the horses daily, and routinely provided them with medication. Tr. 356. She also assisted in grooming them and buying their food. Tr. 184;SSA Ex. 40 (Disc 2 of 2). The feeding, grooming, medicating, and other routine functions to assist in providing a healthy life for an animal constitutes "taking care of" that animal under any reasonable and ordinary meaning of that phrase. Therefore, the evidence in this case shows that Respondent more likely than not cared for animals and falsely stated that she did not.

A person's ADLs are considered in conjunction with medical records to determine whether an applicant for benefits or continuing benefits is entitled to DIB. Tr. 229, 343. Therefore, I conclude that evidence of Respondent's ADLs was material to a determination of her continuing entitlement to DIB.

Accordingly, I conclude that Respondent falsely stated during a telephone interview with Examiner Bane on January 29, 2013, that she did not take care of pets or other animals, she knew that her statement was false or misleading, and the fact was material to a determination of her continuing entitlement to DIB. The false or misleading statement is a basis for the imposition of a CMP.

iii. False representation on SSA-3373-BK on February 4, 2013, that Respondent's daily activities were limited to lying around, and if her fibromyalgia was not flaring up, she could read, use the computer, or go for a ride.

The SSA IG alleges that Respondent falsely represented her daily activities as being very limited when she completed the SSA-3373-BK on February 4, 2013. SSA Ex. 15, at 1.

Question 6 on the SSA-3373-BK asked: "Describe what you do from the time you wake up until going to bed."[14] There is no dispute that Respondent wrote in response:

> Lay around, try to walk around if dry eyes from fybermalgia [*sic*] aren't bothering me, I can read. Play game on computer if they don't hurt. Maybe go for ride in car.

SSA Ex. 5 at 2. To prove that Respondent's response was a false or misleading representation of her ADLs, the SSA IG must show by a preponderance of the evidence that Respondent engaged in more activities on a daily basis than she stated and that her false or misleading representation was as to a material fact or facts. A person's ADLs are considered in conjunction with medical records to determine whether an applicant for benefits or continuing benefits is entitled to DIB. Tr. 229, 343. Therefore, I conclude that evidence of Respondent's ADLs was material to a determination of her continuing entitlement to DIB.

The evidence before me is consistent with the ADL's listed in response to Question 6 on the SSA-3373-BK. The evidence shows that Respondent was lying down during the day when investigators arrived to interview her at her home on March 6, 2013. SA Miller testified on cross-examination that Respondent's husband first had to go inside the house to get Respondent because she was lying down in bed. Tr. 115-16, 215, 223. The video captured by SA Miller when she first met Respondent shows that Respondent was recently awakened judging from her appearance, including the state of her hair and eyes. SSA Ex. 40 (CD 1 of 2, Runtime 11:51-19:52). Respondent admitted posting items on Facebook and generally using the computer. Tr. 371-73. The video establishes that she

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[14] Despite the breadth of this question, the form provides only four blank lines for a response. There is no indication that the response should be continued in the "Remarks" section or that the respondent should attach sheets to complete the response. The clear implication is that whatever description of activities is provided should be summarized in the small space provided and no detailed description is desired. Listing all ADLs, even for one severely disabled, would require far more than four blank lines considering such activities as waking, toileting, brushing teeth and hair, washing or bathing, other personal hygiene, eating meals, reading, watching television, talking on the phone, surfing the web, emailing, texting, napping, and similar activities that even many of the severely disabled undertake with and without assistance. Nevertheless, this does not excuse Respondent's failure to mention her activities related to the horse rescue, which was admittedly, a significant part of Respondent's life. R. Br. at 1.

traveled by some means to Publix to shop for groceries, on one occasion by herself and on another with an assistant. SSA Ex. 40 (CD 1 of 2). The evidence also shows that Respondent traveled to the feed store. Tr. 188.

The problem for Respondent, however, is that by limiting her list of ADLs she made a false representation as to the true scope and nature of her ADLs. For example, Respondent did not state that she went to stores, such as the grocery store and the feed store, to shop, which the evidence shows she clearly did. Respondent did not state she assisted with feeding the horses on a regular basis and engaged in other activities related to the horse rescue she and her husband operated. Tr. 356, 367. Respondent certainly knew of the activities she was doing on her horse farm on a daily basis, and she has never denied doing those tasks. She has disputed whether she performs some of the more physically demanding activities related to running a horse rescue, such as training and handling horses, or cleaning stalls but she concedes to feeding horses daily and routinely providing medication to them if needed. Tr. 356, 367; SSA Ex. 40 (CD 2 of 2). A preponderance of the evidence shows that the absence of any activities related to the horse rescue from Respondent's description of her daily activities was an incomplete and misleading representation of her true daily activities and she knew it.

I conclude the SSA IG has established by a preponderance of the evidence that Respondent misrepresented material facts about her ADLs on February 4, 2013 in responding to Question 10 of the SSA-3373-BK. Respondent knew or should have known that her representation of her ADLs was false or misleading. Respondent's misrepresentation was as to material facts that may have been considered in determining her continuing eligibility for DIB. Accordingly, there is a basis for the imposition of a CMP.

iv. The SSA IG failed to make a prima facie showing of a basis for a CMP based on Respondent's subjective complaints that she had difficulty walking, especially on uneven ground; that she was depressed, did not have a normal life, and had problems being around people; that she forgot to go shopping because her mind and memory were affected, and that she was constantly tired.

The SSA IG alleges that Respondent made the following false or misleading statements or representations in connection with her CDR: she had difficulty walking, especially on uneven ground; she was depressed, did not have a normal life, and had problems being around people; she forgot to go shopping because her mind and memory were affected, and she was constantly tired. SSA Ex. 15. The SSA IG bears the burden of showing that each of Respondent's statements or representations was false or misleading by a preponderance of the evidence. The SSA IG must show that it was more likely than not that Respondent: had no difficulty walking, even on uneven ground; was not depressed;

had a normal life; had no problems being around other people; that her mind and memory were not affected; that she did not forget to go shopping; and that she was not constantly tired.[15] I conclude that the SSA IG has failed to satisfy his burden to show that these statements and representations were false or misleading.

The SSA IG argument is that I should infer that the statements and representations are false or misleading because they appear to be inconsistent with the evidence of Respondent's activities presented by the SSA IG and the fact that Respondent was involved in the operation of a horse rescue. Counsel for the SSA IG and I discussed at length my concerns about the SSA IG's theory and the factual issues that needed to be carefully addressed. SSA Br. at 3, 16-19; Tr. 327-34; 384-85; 388-92; 396-406; 427-30. However, when the totality of the SSA IGs evidence is considered, one finds that it is very limited. The SSA IG evidence includes limited observations of Respondent, specifically a one-time visit by agents to Respondent's home and horse facility and videos of discrete instances of the Respondent in a grocery store and engaged in activities at her home and horse rescue. While some of the activities depicted in the videos are inconsistent with Respondent's subjective complaints of pain and limitation, Respondent is not charged with asserting that she never did any of the activities reflected. Rather, Respondent statements when fairly interpreted are that sometimes activities are prevented due to her symptoms of pain, fatigue, limited motion, and feelings of depression due to the impairments for which she was originally adjudicated to be disabled, that is, unable to sustain even sedentary work 40 hours per week. The SSA IG also relies upon screen shots taken from the internet that reflect discrete instances in time, some long before and others long after the period of the CDR, when Respondent engaged in some activity that she has not asserted she was unable to do due to her impairments. The SSA IG also attempts to rely upon the testimony of another horse rescue operator who admitted to never having visited Respondent's facility, admitted to having no knowledge of how Respondent and her husband ran their facility, and who showed clear animus to Respondent. The SSA IG presented no medical evidence contemporaneous to the CDR from which it may be determined whether or not any of the impairments listed by Respondent have any medical basis or whether they are exaggerated. But there is no

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[15] The SSA IG must also show as an element that each of the allegedly false or misleading statements or representations of fact were material. Because I conclude that the SSA IG has failed to meet its burden to establish that the statements or representations were false or misleading, I do not discuss the materiality of these facts related to her ADLs.

dispute that she was adjudicated to be disabled due to the same impairments of which she continues to complain. The individual alleged false or misleading statements and representations require some limited discussion.

The SSA IG alleges Respondent falsely stated that she "had difficulty walking, especially on uneven pavement." SSA Ex. 15, at 1. In order to prove the allegation, the SSA IG must show by a preponderance of the evidence that Respondent did not have difficulty walking on uneven surfaces. Respondent points out that her actual statement to the SSA was that she had difficulty walking, "especially on uneven *ground*." SSA Ex. 1 at 11 (emphasis added). Respondent has offered a definition of "pavement" as being "the hard surface of a road or street" and argued "pavement" is different than "ground." R. Br. at 5. The distinction between "pavement" and "ground" is not material to the outcome of this case. Rather, the material elements of Respondent's statement are that she had "difficulty" walking, especially when on a surface that was "uneven."[16]

The evidence presented shows that Respondent was able to walk prior to and during the CDR and that she was, at times, able to walk without apparent difficulty on flat, even surfaces. However, the evidence does not establish that Respondent was able to walk on uneven surfaces without difficulty. Surveillance video footage of Respondent at a Publix Supermarket on January 6 and January 21, 2013, shows her standing for a few minutes without assistance, then walking out of the store without assistance or any apparent difficulty. SSA Ex. 40 (CD 1 of 2, Runtime 00:00-07:30). In the video, Respondent does not exhibit a limp, hesitation, or other outward display of pain or other difficulty while walking away from the checkout line. The floor of the supermarket appears flat and even. Therefore, this evidence shows that on January 6 and 21, 2013, Respondent was able stand and walk for several minutes without any outward signs of difficulty on a level and smooth surface. The evidence does not depict her ability to walk on uneven ground, nor does it show her ability to walk longer than a few steps within a few minutes.

The video footage that SA Miller captured during her March 6, 2013 interview with Respondent shows Respondent walking on a slightly sloped grassy area. SSA Ex. 40 (CD 1 of 2); Tr. 68-69. SA Miller testified that the area was "uneven terrain," but there are no clear undulations in the grass; rather, there appears to be a gradual, low-grade slope in the grass. The video is shaky, without audio, and it is difficult to discern whether

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[16] This misstatement is one of several instances in this case where the SSA IG has inaccurately recounted Respondent's statements. However, the discrepancy between the charge and what Respondent actually reported does not affect the analysis.

Respondent had any limp or other noticeable difficulty walking. Investigator Montgomery, who was also present for the interview, testified that he did not notice Respondent having any difficulty walking but the video shows him walking beside or in front of Respondent, at least on the trip from the picnic table to the horses. Tr. 219. Respondent does not walk quickly in the video or ahead of the investigators as one would expect if she was leading them to the horses. Investigator Montgomery, testified that the three of them were even with each other while walking to the horses, but there is no evidence as to how quickly, or with what level of ease or difficulty Respondent walked. Tr. 69-70. As already noted, Investigator Montgomery's testimony regarding the positions of the three as they walked from the picnic table to the horses is misleading. The video shows him to Respondent's left and even with her only a few seconds the remainder of the time he was in front of her. The video also establishes that SA Miller followed Respondent as the camera perspective throughout the walk from the picnic table to the horses is from Respondent's rear. Due to its poor quality, the video does not clearly show whether Respondent was in pain or had other difficulty while walking, such as grimacing, groaning, or similar signs of pain. Investigator Montgomery failed to elaborate upon how he concluded that Respondent was walking without difficulty, or how he was able to conclude that his brief observation of Respondent sufficiently demonstrated her ability to walk without difficulty at other times. Tr. 219. Therefore, while the video shows that Respondent could do a particular task for a brief period of time, i.e., walking approximately 150 feet on a slightly sloping but relatively even surface – the video footage obtained by SA Miller and the related testimony at hearing about the interview does not show by a preponderance of the evidence that Respondent did that task with ease or otherwise without difficulty.

Some social media photographs offered as evidence include imbedded date stamps of January 12 and 13, 2013, and are during the period when Respondent made her statements during the period of the CDR from approximately January through March 2013. SSA Ex. 40 (CD 2 of 2). One photograph shows Respondent standing and smiling near a horse, but it does not show her walking or show her on "uneven" terrain – the ground, while grassy, appears fairly flat. A second photograph shows Respondent walking, midstride, and leading the same horse on the same flat, grassy field. The third photograph shows Respondent seated cross-legged on the ground, smoking next to the horse. It is not clear exactly how many minutes or hours apart these three photographs were taken, but Respondent is wearing the same clothes and is near the same horse, which indicates they were taken within a short time of each other. However, these photographs depict a moment in time, likely a brief period in one day, but do not provide reliable insight as to the ease or difficulty with which Respondent was able to perform the tasks shown, whether this was sustained activity, or the frequency with which Respondent repeated these activities. Images of Respondent standing near a horse, leading a horse on flat ground, or sitting next to a horse show by a preponderance of the evidence that Respondent was able to engage in that activity at a particular time on a particular day, but those images do not prove that she could do so without difficulty.

Respondent also testified that she routinely takes pain medication that allows her to engage in more activities. I cannot draw an inference from the photographs that they reflect Respondent's usual or regular level of activity or even that she was engaging in the activities depicted without pain or limitation. The photographs do not establish that Respondent can walk on uneven surfaces without pain, limitation, or other difficulty. Tr. 412-13.

Despite the SSA IG's position throughout this case, the mere ability to do an activity does not equate to the ability to do that activity with ease, without pain, limitation, or without difficulty. Absent evidence that demonstrates Respondent was able to walk on uneven surfaces *without difficulty*, the SSA IG does meet its burden with regard to this particular statement.[17] The SSA IG has not offered any definition or standard that I may apply to determine the existence or non-existence of "difficulty." The SSA IG does not attempt to quantify or define "difficulty" in the context of a CDR or standard by which difficulty may be measured. In this case, as a practical matter, the SSA IG's failure to prove by a preponderance of the evidence the absence of difficulty and other subjective complaints prevents the SSA IG from making a prima facie showing.

With the exception of the evidence already discussed, the cumulative evidence that the SSA IG points to in this case is worthy of only limited weight because nearly all of it is either undated or was obtained outside of any period of time that is relevant to Respondent's statements in January, February, and March 2013, related to the CDR. Furthermore, the objective evidence that the SSA IG offers is so limited in time and focus that it is of minimal or no utility in attempting to show that Respondent's subjective

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[17] I cautioned the SSA IG during the hearing in this case that the subjective nature of the alleged false statements or representations of Respondent made the SSA IG's case significantly more difficult. Tr. 327-34; 384-85; 388-92; 396-406; 427-30. Had Respondent stated that she cannot walk or that she cannot walk without assistance, the evidence that the SSA IG presented in this case would have easily proven the falsity of those statements. But the fact that Respondent's statements were subjective posed a serious evidentiary obstacle that the SSA IG did not overcome in this case. As I cautioned counsel at the hearing, it is difficult to show it more likely than not that an individual does not have a subjective feeling that pain is worse at one time or another or with certain activities, or that he or she feels unstable while walking, or uncomfortable in certain situations. The SSA IG is encouraged to more thoroughly consider what evidence is necessary to disprove subjective complaints, including appropriate medical evidence that may prove or completely disprove the existence of an underlying condition or impairment.

complaints were false or misleading and that she knew them to be false or misleading. General assertions from witnesses that they did not observe Respondent with an apparent physical limitation do little to show whether she had difficulty walking on uneven ground. Dr. Miller testified that he, in fact, believed that Respondent may have had some type of physical disability based on her apprehension in handling horses while he was around. Tr. 84. Therefore, while I recognize that the cumulative evidence shows Respondent's ability to walk before and after she made the February 4, 2013 statement, and that untrained individuals agreed that she did not exhibit outward signs of physical disability, I cannot find that the evidence shows it was more likely that not that she was able to walk on uneven ground without difficulty at the time relevant to the CDR and Respondent's statements made during that time.

The SSA IG alleged that Respondent made a false statement or representation when she stated that she was depressed, did not have a normal life, and had problems being around other people. SSA Ex. 15 at 2. To prove this allegation, the SSA IG must show by a preponderance of the evidence that Respondent did not feel she was depressed; did not feel she did not have a normal life; and did not feel she had a problem being around people. The actual statements in Respondent's reconsideration request letter she sent to SSA on March 25, 2013, read: "I am depressed because I cannot live a normal life . . . . I have problems being around people anymore." SSA Ex. 8, at 2. The SSA IG separated Respondent's first sentence into two separate statements, changing "I am depressed because I cannot live a normal life," to "you stated that you were depressed, [and] did not have a normal life"). The SSA IG evidence does not show that either version is false or misleading.

The SSA IG did not offer any evidence, beyond mere speculation, that Respondent was not depressed, had a "normal life," or did not have problems being around people. There is evidence that shows Respondent happy at specific times and that she could tolerate being around people at times. But there is no evidence – direct or circumstantial – that shows Respondent considered her life to be normal. There is no evidence that Respondent was not uncomfortable being around other people. Indeed Respondent testified that she did not have a "happy life" (Tr. 413), and the SSA IG has not disputed that Respondent suffers from various medical conditions, including fibromyalgia and chronic fatigue, which, on its face, is consistent with Respondent's claim that she had feelings of depression because she did not have a normal life as a result of her medical conditions. Moreover, a serious problem with this allegation is that the SSA IG has not identified one specific statement of Respondent that was false or misleading. As stated above, based on the false statement that the SSA IG alleged Respondent made, the SSA IG would have to show that Respondent falsely stated or misrepresented that: (1) she was depressed; (2) she did not have a normal life; *and* (3) she had problems being around other people. SSA Ex. 15, at 2. The SSA IG has offered no evidence about Respondent's mental health or psychiatric diagnoses. The SSA IG has offered no evidence of what a "normal life" is or what Respondent would have considered a "normal

life" to be, which leaves no standard by which any evidence can be evaluated.[18] Finally, the SSA IG has offered no evidence or argument that defines or provides a standard to judge whether one has "problems" being around other people or the absence of such "problems" in Respondent's case. Indeed, the SSA IG conceded in its post-hearing brief that he is "unable to prove [Respondent's] assertion that she has problems being around people." SSA Br. at 15.

Therefore, I conclude that the SSA IG has not met its burden to prove that it is more likely than not that Respondent had had no feelings of depression, no feelings that her life was not normal, and no feelings she had problems being around other people.

The SSA IG also alleged that Respondent made a false statement or representation as follows: "[you] stated that you forgot to go shopping because your mind and memory were affected by your illness and that you were constantly tired." SSA Ex. 15, at 2. Based on its allegation, the SSA IG has the burden to show by a preponderance of the evidence that Respondent did not forget to go shopping; her mind and memory were not affected by her illness; and she was not constantly tired.

Before considering the specific charge of the SSA IG, I first acknowledge that Respondent correctly points out the SSA IG again incorrectly read Respondent's actual statements. The actual statements in Respondent's reconsideration request that she sent to SSA on March 25, 2013, that the SSA IG incorrectly paraphrased are:

> My memory seems to be effected more, most likely because I am constantly tired . . . .
>
> * * * *
>
> I have issues walking for a long period of time, so forget going shopping.

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[18] Counsel for the SSA IG highlighted, perhaps inadvertently, the problem with regard to this assertion when she argued that if Respondent was depressed, "or did not have a normal life, *whatever that entails*, these factors did not impinge upon her ability to continue running the rescue operation with her husband . . . ." SSA Br. at 15 (emphasis added). If counsel for the SSA IG concedes her ignorance as to what constitutes a "normal life," it is baffling that she can nevertheless argue that Respondent lied about not having a normal life.

SSA Ex. 8, at 2. The two statements are not even in the same paragraph. Respondent did not claim that she is too forgetful to go shopping, as the SSA IG alleges. SSA Ex. 15 at 2. Rather, she stated that she does not go shopping because she has "issues walking for a long-period of time." SSA Ex. 8 at 2. The SSA IG's allegation that Respondent falsely stated or misrepresented that she "forgot to go shopping because [her] mind and memory were affected by [her] illness" is incorrect and inconsistent with the SSA IG's evidence and the charge must fail. No evidence supports that Respondent actually made the statement as alleged.

The SSA IG has also failed to present any competent evidence to prove the charge it did allege. The evidence does not show Respondent never forget to go shopping on some occasion, either due to her mind and memory or being constantly tired. The evidence does not show that Respondent's mind and memory were unaffected by her medical conditions. The evidence also fails to show that Respondent was not constantly tired, either physically or mentally.

I conclude that the SSA IG has failed to show it more likely than not that Respondent's alleged statements and representations of her subjective complaints including, that she had difficulty walking, especially on uneven ground; that she was depressed, did not have a normal life, and had problems being around people; that she forgot to go shopping because her mind and memory were affected, and that she was constantly tired, were false. Accordingly, none of those statements or representations is a basis for the imposition of a CMP.

8. Pursuant to section 1129 of the Act, there is a basis to impose a maximum CMP of $5,000 for each of three false statements or representations made by Respondent, a total CMP of $15,000.

9. A total CMP of $15,000 is reasonable.

I have concluded that Respondent made three false or misleading statements during her CDR that were material to a determination of whether she was entitled to continuing benefits. Accordingly, there is a basis for the imposition of a maximum $5,000 CMP for each false statement or representation. Act § 1129(a)(1)(C); 20 C.F.R. § 498.103.

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

> (1) The nature of Respondent's statements and representations and the circumstances under which they occurred;

(2) Respondent's culpability, history of prior offenses, and financial condition; and

(3) Such other matters as justice may require.

While the SSA IG has the general burden of going forward with the evidence and the burden of persuasion as to nearly all issues, Respondent bears the burden of persuasion with regard to affirmative defenses and mitigating circumstances. 20 C.F.R. § 498.215(b).

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

Respondent made three false statements during the CDR in January, February, and March 2013. Two of Respondent's false statements were denials that she provided care for any animals. During the telephone interview with a DDS Examiner on January 29, 2013, Respondent may have been taken off guard by the question about her care for animals, and may have simply responded "no" out of confusion. However, her repeated answer, in writing just five days later, that she did not take care of any animals indicates that Respondent was likely not confused about the question, but deliberately trying to understate her ADLs. Her understanding of the question is apparent when one considers that her response to the next question on the form as to whether anyone helped her care for people or animals was that her "son would feed." CMS Ex. 5 at 2. In fact, I have no doubt that on February 4, 2013, Respondent knew that she had multiple horses at her rescue that she helped feed and care for, even if her activities were limited. A "yes or no" question does not leave any gray area for explanation, such as she provided some care, but not as much as others, but Respondent did not add that caveat at any time. Therefore, while the nature of a "yes or no" response precludes the ability to clarify or elaborate, the absence of any mention on the form of her horse rescue and her activities, limited though the activities may have been, show a deliberate attempt to understate her ADLs.

Respondent's third false statement or misrepresentation was related to her daily activities, wherein she again understated her daily activities and functions. She did not mention anything about her horse rescue when asked to describe her daily activities, yet at the hearing she acknowledged that she had routine, if not daily, contact with the horses on her property. Tr. 355-56. Her response was in her own words, not merely a "yes or no" answer, yet she did not mention her apparent passion in life: the horse rescue. R. Br. at 1. Based on her omission of a very important and pertinent part of her life and daily activity, it is evident that Respondent was attempting to minimize her daily activities in an attempt to maintain her DIB.

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 about her personal financial condition. I do not consider evidence of the financial condition of the horse rescue as it is not clear that the resources of the rescue are lawfully available to satisfy personal obligations of Respondent and I do not intend to suggest that they are. But Petitioner has not asserted an inability to pay a $15,000 CMP or that the amount of the CMP should be mitigated because of her limited financial resources.

I conclude that Respondent was culpable for knowingly making false statements or representations. As the video admitted as SSA Ex. 40 shows, Respondent's residence was within 150 feet of her rescued horses. Respondent also admitted during the hearing daily contact with the rescued horses, albeit on a limited basis. It is simply not credible that the horse rescue and her role in the horse rescue slipped Respondent's mind when she was responding to the CDR. The evidence shows that Respondent purposefully minimized her ADLs as a means of exaggerating or hiding her true condition.

c. Other matters as justice may require.

Respondent has not expressly raised any other mitigating factors or issues for me to consider with regard to the SSA IG's proposed CMP. A $15,000 CMP, which represents $5,000 for each of three false statements or representations that Respondent made, is reasonable in light of the nature of the statements, Respondent's high level of culpability in making the statements, and the absence of any financial evidence or other mitigating circumstances. Justice requires the consideration of no other matters in this case.[19]

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[19] I do not accept the repugnant argument that Respondent's exercise of her rights to due process related to both the CDR review and the CMPs, should be considered to justify an increased CMP. SSA Br. at 20-21. Citizens should not be punished for exercising the rights guaranteed by the Constitution as granted by the Congress and the Commissioner.

III. Conclusion

For the foregoing reasons, I conclude that Respondent made three false statements or representations of material fact during her CDR from January through March 2013. Maximum CMP of $5,000 per instance, a total CMP of $15,000, is reasonable.

/s/
Keith W. Sickendick
Administrative Law Judge