Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Social Security Administration,	)	Date: September 17, 2007
Office of the Inspector General,	)	
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-70
	)	Decision No. CR1650
Bobbie Carol Smith,	)	
	)	
Respondent.	)	
	)	

DECISION

I find that Respondent, Bobbie Carol Smith made material representations to the Social Security Administration (SSA) concerning her impairments during the course of her application for a period of disability and disability insurance benefits. For the reasons set forth below, I agree that respondent Smith knowingly represented material facts to the SSA regarding the determination of her eligibility for Title II disability benefits, and that the Inspector General (I.G.) has met the burden of persuasion by a preponderance of the evidence to justify the proposed Civil Money Penalty (CMP) in the sum of $12,000. 20 C.F.R. § 498.215

I. Background

Respondent Bobbie Carol Smith, filed an application for a period of disability and disability insurance benefits under Title II of the Social Security Act (Act) claiming disability as of August 13, 2003. After a denial of her application initially and on reconsideration, she requested a hearing before an administrative law judge (ALJ) of the Office of Disability Adjudication and Review (ODAR).[1] The CMP remedy subject of

[1] Previously the Office of Hearings and Appeals (OHA).

this request for hearing stems from representations made by Respondent during the prosecution of her request for hearing, and when she appeared before ALJ Roger Reynolds on May 17, 2006. Based on those misrepresentations, the IG imposed a CMP of $12,000. Not satisfied with the IG's determination to impose a monetary penalty, Respondent filed an undated request for a hearing before an administrative law judge of the Departmental Appeals Board (DAB). Therefore, this case came before, me pursuant to 20 C.F.R. §§ 498.109 and 498.202.

On December 5, 2006, I held a prehearing conference to discuss with the parties the manner in which I proposed to dispose of this matter. During the conference I advised Ms. Smith of her right to representation, and she indicated that she understood her right to be represented, and that she would try to retain counsel. Also, during the conference, counsel for the IG requested my recusal inasmuch as I was familiar and possibly worked with one of the primary witnesses in the case. Inasmuch as I failed to see how any of the parties would be prejudiced by that fact, I denied the request. Moreover, I am not persuaded that a prior working relationship with one of the I.G.'s witnesses in this case, without more, would result in bias with respect to any of the parties, and thus prevent me from issuing a fair and impartial decision.[2]

As a result of the prehearing conference, I established a schedule for the parties to simultaneously exchange exhibit lists and proposed witnesses by January 19, 2007. Pre-hearing briefs were to be simultaneously filed also by February 9, 2007. I set the case for hearing in Lexington, Kentucky commencing May 11, 2007.

Consistent with my directive, Petitioner filed his exhibits and witness list on January 18, 2007. Petitioner also timely filed his prehearing brief on February 8, 2007. Respondent chose to ignore my directives, and to date has not complied with any of the submission requirements. Consequently, the in person hearing could not be held as projected. I infer that respondent has abandoned the prosecution of her request for hearing. However, I have chosen not to dismiss the case, but rather have decided to close the record and issue a decision based on the written arguments and documentary evidence submitted by the parties. Petitioner has proffered, and I have admitted into evidence, six exhibits identified as I.G. Exhibits (Exs.) 1 through I.G. Ex. 6. Respondent has proffered no exhibits.

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[2] The only primary witness I could conceivably have had a prior relationship with is ALJ Roger Reynolds. However, I have never worked with that ALJ nor do I have a recollection of ever having met him.

II. Applicable Law and Regulations

Section 1129 of the Act subjects to penalty any person (including an organization, agency, or other entity) who

> 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 . . . benefits or payments under titles II, VIII or XVI, that the person knows or should know is false or misleading,
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> ***
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> makes such a statement or representation for such use with knowing disregard for the truth, or
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> 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 . . . benefits or payments under title II, 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 . . . .

20 C.F.R § 498.102(a) authorizes the IG to impose a penalty against any person who has made a statement or representation of a material fact for use in determining any initial or continuing right to or amount of Title II or Title XVI benefits, and who knew, or should have known, that the statement or representation was false or misleading, *or* who omitted a material fact, *or* who made such a statement with "knowing disregard for the truth."

The Commissioner of Social Security has delegated to the IG the authority to impose penalties under section 1129 pursuant to 20 C.F.R. § 498.102.

A party sanctioned under 20 C.F.R. § 498.102(a) may request a hearing before an administrative law judge. 20 C.F.R. § 498.202.

III. Issues

The issues in this case are:

1) whether Respondent Smith made, or caused to be made, to SSA, a statement or representation of a material fact for use in determining her entitlement to Title II benefits, that she knew or should have known, was false or misleading, or did she omit a material fact or make such a statement with knowing disregard for the truth; and

2) if so, is the $12,000 proposed penalty reasonable.

IV. Discussion

A. Respondent Smith made statements or representations to SSA that she knew or should have known were false or misleading.

Following an investigation, the IG determined that Respondent Smith made false and/or misleading statements to SSA in connection with her application for a period of disability and disability insurance benefits. By letter dated August 29, 2006, the I.G. advised Respondent Smith of his determination and the proposed penalty. P. Ex. 6.

On May 17, 2006, respondent appeared before ALJ Roger Reynolds, for a *de novo* review of the reconsideration denial of her application for a period of disability and disability insurance benefits under Title II of the Act. P. Ex. 4.

During the prosecution of her appeal before ODAR, Respondent submitted the following three sets of documents that the IG concluded to constitute material representations to SSA:

- *Medical Assessment of Ability to do Work Related Activities (Mental)* with the signature of Rob Harrell, Mental Health Specialist, dated May 15, 2006. P. Ex. 1.

- *Medical Assessment of Ability to do Work Related Activities (Mental)* with the signature of Marc Cruser, Medical Doctor, dated May 11, 2006. P. Ex. 2.

- *A Medical Source Statement (Mental)* with the signature of Stephen B. Lamb, dated July 6, 2004. P. Ex. 3.

Respondent submitted the above listed documents as proof of the severity of her mental impairments. However, Mr. Harrell, Dr. Cruser, and Dr. Lamb reviewed the documents in question and each denied having completed or signing them. P. Exs. 1, 2, and 3.

I find that Respondent Smith made, or caused to be made, to SSA, statements or representations of a material fact for use in determining her entitlement to Title II benefits, that she knew or should have known, were false or misleading, with disregard for the truth. The statute defines a material fact as one that "the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under title II . . . or eligible for benefits or payments under title XVI." Act, section 1129(a)(2). Regulations governing disability eligibility under Title II of the Act are found at 20 C.F.R. Part 404. An individual is disabled if he/she is unable to perform any "substantial gainful activity"

because of a "medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 20 C.F.R. 404.1505(a).

To satisfy the basic definition of disability, the individual must have a severe impairment that makes him/her unable to perform his/her past relevant work or any other substantial gainful work that exists in the national economy. 20 C.F.R. 404.1505(a). If the individual is not working and meets or medically equals one of the listings in 20 C.F.R., Part 404, Subpart P, Appendix 1, he/she is considered disabled and may be entitled to title II benefits.

Respondent, used the medical report allegedly prepared by the three health care professionals indicated above, in an attempt to establish entitlement to Social Security disability benefits. The areas of compromised mental functioning reflected on those reports are significant in that an individual who is unable to make social or occupational adjustments by reason of a mental impairment would meet the definition of disability pursuant to 20 C.F.R. 404.1505(a). Thus, Respondent Smith's purported inability to deal with the public, relate predictably in social situations, follow work rules, maintain attention and concentration, deal with work stresses, and function independently are facts that SAA would consider in determining her eligibility for Title II benefits and are factors that are material to the determination of whether she would be entitled to disability benefits. P. Exs. 1, at 2-3; 2, at 3-4; 3, at 5.

During the Prehearing conference held on December 5, 2006, Respondent asserted that she did not obtain the forged medical reports. Those reports, she stated, were given to her in a sealed envelope on the morning of the hearing before ALJ Reynolds by a friend, Rosemary Preston.[3] Ms. Smith further indicated that she did not know Ms. Preston's address and telephone, but would call counsel for the I.G. later on in the day with that information. She failed to do so, and on December 11, 2006, Petitioner filed a motion to compel the production of that information. In response, I issued an order on December 21, 2006, directing Respondent to provide the telephone and address of Rosemary Preston within 10 days. Failure to comply would result in her inability to rely on the aforementioned defense. She never provided the information.

[3] The medical assessments offered as evidence at Respondent's disability hearing on May 17, 2006, were those of Mr. Harrell and Dr. Cruser.

The medical assessment of Dr. Lamb had been provided by Respondent in 2004, that is, approximately two years prior to the May 17, 2006 hearing before the ALJ. As to the source of those documents she was silent. See P. Ex. 3. It is worthy of note, however, that a comparison of the three medical assessments in question, reveal that they appear to have been completed using the same typewriter.

In view of the foregoing, I find that Respondent Smith made statements or representations to SSA that she knew or should have known were false or misleading.

B. The IG proposes a reasonable penalty against Respondent Smith.

The statute authorizes imposition of a CMP of "not more than $5,000 for each such statement or representation," and an "assessment, in lieu of damages . . . of not more than twice the amount of benefits or payments paid as a result of such a statement or representation." Act, section 1129(a)(1); 20 C.F.R. 498.103(a).

Respondent's misrepresentations did not result in receipt of Social Security cash benefits. Nonetheless, her deceitful conduct warrants the imposition of a penalty consistent with the nature and seriousness of her misrepresentations.

In her effort to qualify for disability insurance benefits, Respondent Smith made multiple misrepresentations of her mental functional capacity. Specifically, she submitted false medical evaluations and forged or caused to be forged the signature of mental health providers on those evaluations. Given the egregious representations, I find that the proposed penalty falls within the statutory maximum of $5,000 per representation. I now apply the regulatory criteria to assess the appropriateness of the penalty.

I am authorized to affirm, deny, increase, or reduce the penalties proposed by the I.G. 20 C.F.R. 498.220 (b). In determining the appropriateness of the penalty, I must take into account: 1) the nature of the statements and representations and the circumstances under which they occurred; 2) the degree of culpability of the person committing the offense; 3) the history of prior offenses of the person committing the offense; 4) the financial condition of the person committing the offense; and 5) such other matters as justice may require. 20 C.F.R 498.106.

In considering whether the $12,000 CMP imposed by the I.G. is reasonable, I must consider Respondent's financial condition. In her request for hearing she alleges that currently she receives no income of any sort. I have no reason to believe otherwise. But, I do note that on June 19, 2006, the I.G.'s office sent Respondent a financial disclosure form that she failed to complete and return. Her denial of receipt of such forms is refuted by the U.S. Postal Certfied Mail Receipt attesting to delivery, over her signature on June 27, 2006. P. Ex. 5, at 2,3. However, Respondent's financial condition is not the only

relevant factor for assessing the reasonableness of the CMP. I must also consider the nature of Respondent Smith's representations, the circumstances under which they occurred, and her degree of culpability. Her actions cannot be attributed to simple error or misunderstanding. She deliberately and knowingly created or caused to be created falsified and forged medical evaluations in order to persuade an ALJ to rule favorably in her disability application for Title II benefits under the Act. Her continuing lack of veracity and her refusal to acknowledge the deceit, as can be gleaned from her request for hearing before an ALJ of the DAB, justify a significant penalty.

Moreover Respondent Smith has a significant history of falsifying documents and engaging in deceitful conduct. In a letter to the I.G. dated June 1, 2006, ALJ Reynolds noted that she was a registered nurse until she became a multi-drug addict in the mid-1990's. She was caught doctor shopping and forging prescriptions in November 1997, and pleaded guilty to a felony charge. ALJ Reynolds went on to point out that when he confronted Respondent at the hearing concerning the procurement of multiple prescriptions for Lortabs from one doctor while obtaining Methadone from another doctor, she admitted to selling of Lortabs on the street to get money to pay for the Methadone. P. Ex. 4, at 1.

I conclude that the nature of the representations, the circumstances under which they occurred; the degree culpability; as well as Respondent's history of prior offenses, supports the reasonableness of the $12,000 penalty proposed by the I.G.

V. Conclusion

Respondent Smith violated section 1129 of the Act when she knowingly represented material facts to SSA for its use in determining her eligibility for Title II benefits. I, thus, consider reasonable the imposition of a $12,000 CMP.

/s/
Jose A. Anglada
Administrative Law Judge