Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

The Inspector General of the Social Security Administration,

Petitioner,

v.

Mark S. Blankenship,

Respondent.

Docket No. C-14-783

Decision No. CR3785

Date: April 16, 2015

DECISION

I affirm the determination of the Inspector General (IG) of the Social Security Administration (SSA) and find that Respondent Mark S. Blankenship withheld material information from SSA regarding his work activity while receiving Title II, Disability Insurance Benefits (DIB), a violation of 20 C.F.R. § 498.102(a)(3). I find further that the $20,000 civil monetary penalty (CMP) and $133,848 assessment in lieu of damages that SSA IG proposed pursuant to section 1129 of the Social Security Act (Act) (42 U.S.C. § 1320a-8) are reasonable.

I. Case Background and Procedural History

The following facts are undisputed unless otherwise noted. Respondent applied for, and began receiving, DIB based on diagnoses of back and affective disorders in 1992. His wife and children also at times received benefits on his record. SSA Exhibits (SSA Exs.) 1; 15, at 2 ¶ 9; SSA Brief (Br.) at 5; Respondent's Br. (R. Br.) at 1. On July 30, 2010, SSA began investigating whether Respondent was still entitled to DIB based on an anonymous complaint. SSA Exs. 4; 15, at 1-2 ¶ 3. Following the investigation, SSA

reopened Respondent's DIB case and calculated that SSA had overpaid Respondent $133,848 in DIB from February 3, 2005 through March 2, 2012. SSA Ex. 8.

On August 27, 2012, the office of the SSA IG notified Respondent that it had information that he may have failed to report a change in status by withholding a material fact for use in determining his right to receive DIB. The SSA IG notified Respondent that his failure to report his work activity caused SSA to overpay him and his dependents in excess of $130,000. The office of the SSA IG stated that it intended to commence a civil action against Respondent pursuant to section 1129 of the Act and implementing regulations at 20 C.F.R. § 498.100-.224. The SSA IG offered Respondent the opportunity to submit mitigating information, including information regarding his financial condition. SSA Ex. 9. On September 10, 2012, Respondent, through counsel, responded to the SSA IG's notice. SSA Ex. 10. On January 6, 2014, the SSA IG issued a demand letter proposing to impose against Respondent a $20,000 CMP and a $133,848 assessment, stating the specific allegations against him and advising him of his right to appeal. SSA Ex. 11. The Civil Remedies Division received a hearing request from Respondent on March 11, 2014.

The case was assigned to me. On March 17, 2014, I acknowledged Respondent's hearing request and issued a Pre-hearing Order (Order) instructing the parties on what they must do to prepare for hearing. Specifically, I set dates for the parties to file pre-hearing exchanges. Their pre-hearing exchanges were to consist of pre-hearing written briefs presenting all of the parties' arguments, lists of proposed exhibits, copies of proposed exhibits, and a list of proposed witnesses. With regard to their proposed witnesses, I informed the parties that they must submit written direct testimony that would be subject to live cross-examination:

> Each party must also submit written direct testimony for each proposed witness that complies with 20 C.F.R. § 498.216(b). This written testimony will be in the form of an affidavit made under oath or as a declaration made under penalty of perjury and will be marked in the manner prescribed for exhibits. I will not accept oral direct testimony from any witness for whom written direct testimony could have been obtained but was not.
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> If a party wants to cross-examine a witness for whom written direct testimony was submitted, the party must affirmatively so state in writing to me with its final exchange. I will assume that a party does not wish to cross-examine a witness if the party fails to file such a request.
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> If a party is unable to obtain written direct testimony from a witness due to a lack of cooperation, or if the party believes that a witness is an adverse or hostile witness, then the party will inform me in its

> exchange for the legal and factual basis for concluding that a witness should be considered an adverse or hostile witness. That party may seek the issuance of a subpoena to compel that witness to testify at the hearing.

Order, ¶ 2.

SSA filed its pre-hearing exchange on June 30, 2014, which consisted of its brief, proposed exhibit and witness lists, and copies of 17 proposed exhibits (SSA Exs. 1-17), including the written declarations of its three proposed witnesses: the SSA IG Special Agent who investigated the allegations of fraud (SSA Ex. 15); an SSA Claims Representative who assisted in the investigation and calculated the overpayment based on Respondent's alleged withholding of information from SSA (SSA Ex. 16); and the Counsel to the SSA IG (SSA Ex. 17).

Respondent filed his pre-hearing exchange on August 1, 2014, which consisted of his brief, proposed exhibit and witness lists, and copies of 10 proposed exhibits (R. Exs. 1-10). Respondent's exhibits are duplicates of exhibits that SSA previously filed as SSA Exs. 1-3, 5, 6, 8-12. Respondent listed three proposed witnesses: Respondent, his wife, and his son. Respondent stated that all three were going to testify "regarding the Respondent's alleged work activities and involvement with Lowes and Jor Bay, LLC." Respondent did not, however, comply with my Order and submit written direct testimony for his proposed witnesses. Respondent did not submit a written declaration or affidavit himself, and he did not submit a declaration or affidavit from his wife or son. Respondent did not state he was unable to obtain their written direct testimony, nor did he assert they were adverse or hostile witnesses. Respondent also did not seek subpoenas for witness testimony.

Counsel for SSA IG informed me, on August 29, 2014, that she would not be filing a reply. Neither party objected to the opposing party's proposed exhibits as I directed in my Order. Therefore, I admit SSA Exs. 1-17 and R. Exs. 1-10 into the record. I do not need to hold a hearing by video-teleconference to take oral testimony considering, pursuant to my Order, Respondent did not request to cross-examine SSA's proposed witnesses, and there are no affidavits of direct testimony from Respondent that SSA can request to cross-examine. *See* Order, ¶ 2; *see also* 20 C.F.R. § 498.216(b), (c). Accordingly, I decide the case based on the written record, which includes the parties' written argument and the exhibits.

II. Discussion

A. Issues

1. Whether Respondent withheld disclosure of his work activity to SSA that could affect his eligibility for DIB;

2. Whether Respondent knew, or should have known, that such withholding could affect his benefits and was false or misleading; and

3. If so, whether the $20,000 CMP and the $133,848 assessment in lieu of damages the IG proposed against Respondent are reasonable.

B. Findings of Fact & Conclusions of Law

Section 1129 of the Act subjects a penalty to:

> (a)(1) Any person (including an organization, agency, or other entity) who –
> (A) makes, or causes to be made, a statement or representation of a material fact, for use in determining any initial or continuing right to or the amount of monthly insurance benefits under title II or benefits or payments under title VIII or XVI, that the person knows or should know is false or misleading,
> (B) makes such a statement or representation for such use with knowing disregard for the truth, or
> *(C) omits from a statement or representation for such use, or otherwise withholds disclosure of, a fact which the person knows or should know is material to the determination of any initial or continuing right to or the amount of monthly insurance benefits under title II*[1] *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.*

(Emphasis supplied). *See also* 20 C.F.R. § 498.102 (a) (authorizing the SSA 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 "[k]new, or should have known, that the statement or representation was false or misleading . . . [m]ade such statement with knowing disregard

[1] Title II of the Act governs the Social Security disability insurance program at issue here.

for the truth; or . . . [o]mitted 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)."

The Act and regulations define 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 title VIII, or eligible for benefits or payments under title XVI." Act § 1129(a)(2) (42 U.S.C. § 1320a-8(a)(2)); 20 C.F.R. § 498.101. An "otherwise withheld disclosure" is defined as "the failure to come forward to notify the SSA of a material fact when such person knew or should have known that the withheld fact was material and that such withholding was misleading for purposes of determining eligibility . . . ." 20 C.F.R. § 498.101.

SSA has the burden of proving all facts in a CMP case, with the exception of the affirmative defenses and mitigating circumstances that a respondent may raise. 20 C.F.R. § 498.215(b). The standard of proof is a preponderance of the evidence. 20 C.F.R. § 498.215(c). An administrative law judge must "determine whether the respondent should be found liable" for a CMP and assessment and issue a decision in which the administrative law judge "may affirm, deny, increase, or reduce the penalties or assessments proposed by" the SSA IG. 20 C.F.R. §§ 498.215(a), 498.220(b). There are other appeal processes for recipients to challenge the termination of their benefits. 20 C.F.R. Part 404, subpart J.

1. Respondent did not disclose his work activity to SSA while receiving DIB.

In SSA IG's demand letter of January 6, 2014, which proposed imposition of the CMP, the SSA IG informed Respondent that he:

> . . . failed to disclose your work activity to SSA while receiving Disability Insurance Benefits (DIB). Your SSA record indicates that you began receiving DIB in approximately August 1992, alleging that you could no longer work due to your disabilities. At the same time you applied for DIB, and in subsequent notifications, SSA notified you of your duty to report changes that could affect your eligibility to receive DIB, including your work activity.
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> However, an SSA OIG investigation reveals that you began working for Jor Bay LLC and as a contractor for Lowes in February 2005, yet you failed to report your work activity to SSA. The investigation further revealed that you attempted to minimize your work activity by claiming your son, whom you paid via an IRS 1099, completed

> the majority of work for Lowes. However, the payments you received from Lowes compared with the money you paid your son revealed that you earned the majority of payments. Your failure to report your work activity from February 2005 through March 2012 caused SSA to pay $133,848.00 in DIB to which you were not entitled.

SSA Ex. 11, at 1.

In support of its argument that Respondent operated Jor Bay and worked for Lowes (a home building center in Beaufort, South Carolina), SSA offers, among other evidence, the declarations of the SSA IG investigator (SSA Ex. 15) and the SSA claims representative (SSA Ex. 16), which are supported by three reports the SSA IG investigator prepared regarding his investigation into Respondent's work activity. SSA Exs. 7, 13, 14. Respondent was given the opportunity to cross-examine both of the SSA IG's witnesses with regard to their written direct testimony but chose not to do so. I find their testimony to be credible and supported by the exhibits.

The SSA IG investigation included reviewing Respondent's bank records and payment records relating to his work activity with Lowes, and interviewing a Lowes sales manager, Respondent, and Respondent's son. SSA Exs. 7, 13, 14, 15. The SSA IG investigation determined that Respondent had no earnings listed after 2000, as is reflected in his SSA earnings record. SSA Exs. 2; 15, at 3 ¶ 10. The SSA IG investigation also revealed that Respondent held both a current South Carolina home inspector license (#1894) and a current home builder's license (#19360). Jor Bay (also described as Jor-Bay) is the company name associated with these licenses. SSA Exs. 5; 6; 7, at 3; 15, at 3 ¶¶ 13, 14.

The SSA IG investigator testified that on July 8, 2011, he interviewed a Lowes sales manager who told him that Respondent had been a Lowe's installer for several years and that he regularly saw Respondent and his son at Lowes. The sales manager also told him that when an installation is complete the installer returns a certificate of completion signed by the installer. The manager recalls Respondent signed all the certificate of completion forms. SSA Ex. 15, at 5-6 ¶ 20; SSA Ex. 13; *see also* SSA Ex. 7.

The SSA IG investigator testified that he interviewed Respondent's son on July 8, 2011, who stated that he worked as an installer at Lowes with Respondent. Because Respondent had a contractor's license he was "always at each job." Respondent's son stated that while he did the majority of the labor, Respondent mentored and trained him. Respondent's son also reported that Respondent's wife handled the paperwork. SSA Ex. 15, at 6 ¶ 21; SSA Ex. 13.

The SSA IG investigator and the SSA claims representative interviewed Respondent on July 7, 2011. The SSA IG investigator testified that Respondent told him that he had applied for DIB after a car accident in December 1991. Respondent stated, among other things, that he started Jor Bay after being approached about managing construction of a new building. He began work as an installer at Lowes because his son wanted to learn about construction and was looking for work. His wife handled the installer application and their paperwork. Lowe's faxed him work orders; he, his wife or son would contact customers to arrange to give them an estimate; the estimate would be faxed to Lowes; Lowes would notify him to complete the work; he or his son, or both, would complete the work; Lowes paid his wife by an IRS 1099 and he paid his son by an IRS 1099. He admitted his signature was on a majority of the paperwork, which was reported under his wife's social security number. He explained that he did not report the work to SSA because it was "hit and miss work." SSA Ex. 15, at 4-5 ¶18; SSA Ex. 16, at 1 ¶ 3; SSA Ex. 13.

The SSA IG investigator and SSA claims representative interviewed Respondent on November 9, 2011. The SSA investigator testified he informed Respondent that a comparison of payments Respondent received from Lowes compared to payments he made to his son revealed Respondent earned the majority of the payment from Lowes. Respondent explained that he reported his income and work to the IRS on joint tax returns filed with his wife and thought SSA knew about the work. Respondent also stated that he attempted to call SSA on several occasions to report his work activity. SSA Ex. 15, at 6-7 ¶¶ 22-24; SSA Ex. 16, at 2 ¶ 4; SSA Ex. 14.

In his pre-hearing exchange, Respondent asserts that his wife owns Jor Bay, which was established in April 2001; Jor Bay did work for Lowes; and Respondent signed "much of the paperwork between Jor Bay and Lowes." R. Br. at 3. However, Respondent argues that his relationship with Lowes and Jor Bay should not be considered work activity, asserting that:

> Upon being contacted by the OIG's office, the Respondent cooperated fully and explained that Jor Bay was created by he and his wife in order to assist their son . . . who worked as a firefighter. As a firefighter [Respondent's son] worked one day on, and two days off. Since most of his time was "off" [Respondent's son], like most firefighters, desired to establish a second career and a second income stream, in order to supplement his firefighter income. Prior to his disability, the Respondent's primary occupation was as a contractor, and for many years he has had a home inspector license and a home builder license. He has always kept those licenses active. Since Respondent's son . . . is not licensed, almost all of the paperwork is handled in the Respondent's name. Respondent's wife

> . . . handles most of the other paperwork involved in running the business.
>
> In essence, Jor Bay itself is run by the Respondent's wife, who knows bookkeeping, billing, and the paperwork aspects of the running of business, and the actual labor and work is done by Respondent's son . . . . Respondent's contribution to the business is that he simply "lends" the business's license. From time to time, he has been reimbursed for expenses but he has not received any material income.
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> At some time in the past, Respondent informally contacted the SSA to inquire if this sort of arrangement violated any rules and was told it did not.
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> In short, the Respondent has not engaged in any substantial gainful employment, nor has he knowingly withheld any material acts from the SSA. His connection and role with Jor Bay can best be described as a facilitator, allowing his son to make some extra money by working under Respondent's license.

R. Br. at 3-4.

I do not find credible Respondent's assertion that the activity he engaged in is not work activity. The evidence shows that Respondent did more than simply "lend" his licenses to his son and wife. The SSA IG investigator and the SSA claims representative testified credibly from the results of the inspection of records and interviews with Respondent, his son, and the Lowe's sales manager that Respondent operated Jor Bay, Respondent maintained active contactor licenses, Respondent worked for Lowes as an installer, Respondent was regularly at Lowes with his son, Respondent was always at each job because he held the contractor licenses, Respondent signed the certificates of completion, and Respondent was paid by Lowes for the installation work and only gave part of the Lowe's payment to his son. Clearly Respondent was aware that his licenses were necessary to provide the contracting services Jor Bay provided. Respondent was ultimately responsible for the oversight of those jobs, which is a significant responsibility and does not comport with Respondent's justification that he could simply "lend" his license to others.

2. Respondent knew, or should have known, that his work activity was a material fact that could affect his entitlement to DIB, and his withholding from SSA that he was engaging in this work activity was misleading.

To satisfy the basic definition of a disability, an individual must have a severe impairment that makes him unable to perform his past relevant work or any other substantial gainful work. 20 C.F.R. §§ 404.1505(a), 416.905(a). Under the regulations substantial gainful work "means work that . . . [i]nolves doing significant and productive physical or mental duties . . . and . . . is done (or intended) for pay or profit. 20 C.F.R. § 404.1510. Work activity may be considered gainful "whether or not a profit is realized," and work activity may be substantial "even if it is done on a part-time basis or if [an individual] do[es] less, get[s] paid less, or ha[s] less responsibility than when [the individual] worked before." 20 C.F.R. § 404.1572(a), (b). This is why "[e]ven if the work [an individual has] done was not substantial gainful activity, it may show that [the individual is] able to do more work than [the individual] actually did. [SSA] will consider all of the medical and vocational evidence in [the individual's] file to decide whether or not [the individual] has the ability to engage in substantial gainful activity." 20 C.F.R. § 404.1571. Thus, work or work related activity engaged in by an individual after the onset of a disability is directly related to the criteria SSA uses to determine whether an individual is eligible to receive or to continue to receive disability benefits. Any concealment by an individual from SSA of work or work-related activities deprives SSA of material information it needs to properly evaluate an individual's eligibility for benefits.

Here, I have found Respondent was performing work activity, including as an installer for Lowes. I find further that Respondent knew or should have known that his work activity was material to his entitlement to DIB and that withholding the existence of this work activity was misleading to SSA. At the time of his original application, and through subsequent correspondence, SSA informed Respondent of his duty to notify SSA if his employment situation or his ability to work changed, including: whether he returned to work; if working, whether his job, pay, or work expenses changed; or whether his physician said his health was better. SSA Br. at 5; SSA Ex. 13, at 1, 2; SSA Ex. 15, at 3-4 ¶¶ 17, 18; R. Ex. 3; SSA Ex. 3. Respondent argues that he "informally contacted" SSA to inquire if his work activity "violated any rules and was told it did not." R. Br. at 4. I do not find Respondent's unsupported statement to be credible or persuasive, and I assign it minimal weight. Respondent submitted no evidence to corroborate his claim that he "informally contacted" SSA. Respondent does not state to whom he spoke, when he spoke to them, nor does he explain exactly what it was he told them. However, in making the argument that he tried to contact SSA, Respondent demonstrates that he knew that what he was doing as an installer for Lowes may constitute work activity.

3. The $20,000 CMP and the $133,848 assessment in lieu of damages the SSA IG proposed against Respondent are reasonable.

The SSA IG proposed the imposition of a $20,000 CMP based on those months within the statute of limitations that Respondent did not notify SSA of work activity related to his company Jor Bay and Lowes. The SSA IG also proposed an assessment of $133,848 based on benefits SSA paid to Respondent to which he was not entitled. I must consider the reasonableness of this proposal based on applicable statutory requirements.

A CMP may not be more than $5,000 for "each receipt of [Social Security] benefits or payments while withholding disclosure of such [a material] fact." Act § 1129(a)(1); 20 C.F.R. § 498.103(a).[2] Section 1129 of the Act also provides that, in any month within the previous six years that an individual withholds disclosure of a material fact, such omission is considered a false statement or misrepresentation subjecting the individual to the $5,000 penalty. Because I uphold the SSA IG's determination that Respondent withheld the material fact of his work activity between January 2008 and March 2012, Respondent could have been subject to a CMP of up to $255,000. SSA Ex. 17, at 2-3 ¶ 7.

SSA may propose an assessment in lieu of damages of up to twice the amount of benefits or payments paid within the past six years for benefits paid as a result of a material withholding. Act § 1129(a)(1); 20 C.F.R. §§ 498.104, 498.132. The SSA IG alleges that Respondent was not entitled to receive $82,335 in benefits from the operative time period within the statute of limitations, January 2008 through March 2012, and thus Respondent was subject to a potential maximum assessment in lieu of damages of approximately $165,000. SSA Ex. 17, at 2-3 ¶ 7.

In addition to establishing maximum CMP and assessment amounts, the Act requires that the following factors be taken into account when determining the amount of a CMP and assessment:

> (1) the nature of the statements, representations or actions referred to in subsection (a) and the circumstances under which they occurred;
>
> (2) the degree of culpability, history of prior offenses, and financial condition of the person committing the offense; and
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> (3) such other matters as justice may require.

Act, section 1129(c); *see also* 20 C.F.R. § 498.106(a).

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[2] CMPs can only be applied to a "failure to disclose [that] occurred after November 27, 2006." 72 Fed. Reg. 27,424, 27,425 (May 16, 2007). The SSA IG proposes only to impose a CMP from January 2008.

Respondent argues that the CMP and assessment proposed by the SSA IG is both "unreasonable" and "outrageous." R. Br. at 5. Respondent asserts that he simply failed to report to SSA that he was allowing his son to operate under his contracting licenses and that his wife was assisting their son with the bookkeeping aspects of the business. Respondent asserts his contribution to Jor Bay is that he "simply 'lends' the business's license." R. Br. at 4. Respondent asserts that he "informally" inquired at SSA regarding the propriety of this arrangement and was informed he did "nothing improper." R. Br. at 5. Respondent asserts that the degree of his culpability is low because he was assisting his son to earn extra income. Respondent asserts he has no history of prior offenses, his financial condition is poor, and he cooperated with SSA's investigation. R. Br. at 5. I do not, however, find Respondent's unsupported arguments persuasive.

a. The nature and circumstances of Respondent's withholding of information was long-term and egregious.

In the demand letter proposing the CMP and assessment (SSA Ex. 11) the SSA IG states that he considered the nature of Respondent's misconduct and the circumstances under which it occurred and determined that aggravating circumstances existed. Specifically, the SSA IG cited that Respondent purposefully attempted to minimize his work activity by claiming his son completed the majority of work for Lowes and that Respondent persisted in this work activity for over six years without reporting the work activity to SSA. I find that SSA has shown that while Respondent claims his son did the work for Lowes, and that his only action was lending his son his license, that claim is not credible given the evidence adduced by SSA and discussed above.

b. Respondent had a high level of culpability regarding his withholding of information to SSA.

In the demand letter proposing the CMP and assessment (CMS Ex. 11), the SSA IG acknowledges that Respondent had no prior offenses but asserts that the long-term nature of his misconduct justified the CMP and assessment the SSA IG proposed. The SSA IG also concluded that Respondent's culpability was substantial. Respondent knew he had a duty to report his work activity because he told SSA's investigators that he attempted to contact SSA on several occasions to find out if the activity he was engaging in constituted work activity. I agree with the SSA IG that, despite his having no prior offenses, Respondent engaged in work activity for years without reporting the work activity to SSA, which resulted in a substantial overpayment. I find Respondent's failure to report his work activity over a lengthy period supports my conclusion that his culpability is substantial and vastly outweighs the fact that he had no prior offenses.

c. Respondent does not present evidence showing that his financial condition precludes him from paying the CMP and assessment.

The SSA IG stated in the demand letter (CMS Ex. 11) that in the interests of justice he considered Respondent's financial condition and health in determining not to impose the maximum potential CMP and assessment. The SSA IG notes that he gave Respondent the opportunity to provide mitigating information, and Respondent provided the SSA IG with information regarding his health and financial condition. SSA Exs. 9, 10. Based on this, instead of a maximum allowable penalty of $255,000, the SSA IG proposed a penalty of $20,000; and, instead of a maximum allowable assessment of $165,270, the SSA IG proposed an assessment of $133,848, which simply equals SSA's overpayment of benefits to Respondent for the entire period of Respondent's failure to report. I find the SSA IG's mitigation substantial. Overall, I find the $20,000 CMP and $133,848 assessment that SSA proposed to be eminently reasonable given Respondent's failure to report his significant work activity to SSA over a prolonged period of time. Respondent's continued insistence that his actions with regard to Jor Bay and Lowes did not constitute reportable work activity is belied by the evidence the SSA IG presented, which Respondent did not persuasively rebut.

III. Conclusion

I affirm the SSA IG's determination to impose a CMP of $20,000 and an assessment of $133,848 against Respondent for withholding information about his work activity while receiving benefits.

/s/
Joseph Grow
Administrative Law Judge