**Department of Health and Human Services**
**DEPARTMENTAL APPEALS BOARD**
**Appellate Division**

Salvatore Cappetta
Docket No. A-14-91
Decision No. 2606
December 10, 2014

# REMAND OF ADMINISTRATIVE LAW JUDGE DECISION

The Social Security Administration Office of Inspector General (SSA I.G.) appeals a June 11, 2014 decision by an Administrative Law Judge holding that there was no basis to impose a civil money penalty (CMP) or an assessment in lieu of damages (assessment) against Salvatore Cappetta (Respondent) under section 1129(a)(1) of the Social Security Act (Act). *Salvatore Cappetta*, DAB CR3260 (2014) (ALJ Decision). The SSA I.G. proposed the CMP and assessment on the ground that Respondent withheld disclosure of information about work he performed while receiving Social Security Disability Insurance Benefits (DIB) that he knew or should have known was material to his right to receive benefits and that such withholding was misleading. The ALJ found that Respondent had failed to disclose information about his work but concluded that his work was not material (that is, not a fact SSA was permitted to consider in determining a right to or amount of benefits). The ALJ relied on a provision of section 221(m) of the Act precluding SSA from using work activity as evidence that an individual who has received DIB for at least 24 months is no longer disabled.

For the reasons explained below, we conclude that Respondent's work was material for purposes of determining liability under section 1129(a)(1) of the Act. In concluding that section 221(m)(1) of the Act barred SSA from considering Respondent's work activity, the ALJ failed to correctly consider other provisions in section 221(m) of the Act and in the implementing regulations that permit SSA to terminate DIB payments to a 24-month DIB recipient based on the amount of the recipient's earnings. Under these provisions, SSA evaluates earnings **derived from work** and therefore may consider work in determining whether a recipient's income constitutes earnings at a level that shows the recipient has engaged in substantial gainful activity despite any mental or physical impairments the recipient has, a determination that affects the recipient's right to benefits.

Although the ALJ suggested that, but for section 221(m) of the Act, he would find Respondent liable for a CMP, he did not make clear whether he inferred from the facts he found with regard to Respondent's failure to disclose information about his work that Respondent knew or should have known that the undisclosed information was material to SSA's determination of his right to receive benefits and that withholding it was

misleading. The ALJ also did not resolve issues related to the amount of the CMP and assessment. Accordingly, we reverse the ALJ's conclusion that Respondent's work was not a material fact for purposes of section 1129(a)(1), and we remand the case to the ALJ to clarify his findings relating to Respondent's liability (and to make any additional findings necessary to that issue) and, if the ALJ finds Respondent liable, to then address issues about the amount of the CMP and assessment.

## Legal background

1. SSA determines eligibility for Social Security Disability Insurance benefits by considering, among other things, whether an individual has engaged in substantial gainful activity.

The DIB program at title II of the Act pays benefits to insured individuals who are aged, blind, or disabled. 20 C.F.R. Part 404. Section 223(d)(1) of the Act defines "disability" in part as including "inability to engage in any **substantial gainful activity** by reason of any 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; . . . ." (Emphasis added.) Section 223(d)(2) states that an "individual shall be determined to be under a disability only if his . . . impairment or impairments are of such severity that he is not only unable to do his previous work but cannot . . . engage in any other kind of substantial gainful work which exists in the national economy . . . ." Section 223(d)(4)(A) requires SSA to issue regulations that "prescribe the criteria for determining when **services performed or earnings derived from services** demonstrate an individual's ability to engage in substantial gainful activity" and states that "an individual whose services or earnings meet such criteria shall . . . be found not to be disabled," notwithstanding the severity of the impairment. (Emphasis added.)

The DIB regulations at 20 C.F.R. Part 404, subpart P (§§ 404.1501-404.1599) define "substantial gainful activity" as work that "(a) Involves doing significant and productive physical or mental duties;" and "(b) Is done (or intended) for pay or profit." 20 C.F.R. § 404.1510; *see also* § 404.1572 (describing some activities that are not considered substantial gainful activity, such as hobbies, self-care, household tasks, therapy, and school attendance).

As we discuss below, the regulations SSA adopted to prescribe the criteria for determining when services performed or earnings derived from services demonstrate an individual's ability to engage in "substantial gainful activity" permit SSA to discontinue DIB payments to a recipient without having to review whether the recipient no longer has a medically determinable impairment. The regulations provide that the work a person has done may show that person is able to work at the substantial gainful activity level and is no longer disabled. They also, however, specify the amount of monthly earnings from

work that show substantial gainful activity, and they permit SSA to terminate DIB payments to a recipient, including a 24-month DIB recipient, whose earnings show substantial gainful activity. We address these provisions in our analysis of the ALJ's erroneous conclusion that section 221(m) of the Act barred SSA from considering information about Respondent's work.

2. Recipients must report information about work they do to SSA, which periodically reviews entitlement to benefits.

DIB recipients must inform SSA of changes in disability or employment status. Section 404.1588, "Your responsibility to tell us of events that may change your disability status," states:

> (a) *Your responsibility to report changes to us.* If you are entitled to cash benefits or to a period of disability because you are disabled, you should promptly tell us if—
> (1) Your condition improves;
> (2) You return to work;
> (3) You increase the amount of your work; or
> (4) Your earnings increase.

The regulations do not define "work" but several provisions describe the type of activities SSA will consider in determining whether a person has engaged in or is able to engage in substantial gainful activity. *See, e.g.*, 20 C.F.R. §§ 404.1571, 404.1573, 404.1574(b)(3)(ii).

SSA periodically reviews a DIB recipient's "continued entitlement to such benefits" including whether "there has been any medical improvement in your impairment(s) and, if so, whether this medical improvement is related to your ability to work." 20 C.F.R. § 404.1594(a). SSA conducts "continuing disability reviews" at intervals ranging from 6 months to 7 years and also if (among other reasons) a DIB recipient reports having recovered from his disability or that he is working, or if SSA receives sufficiently reliable information that a DIB recipient is not disabled or has returned to work. 20 C.F.R. §§ 404.1589, 404.1590(a), (b), (d).

3. Section 221(m) of the Act limits SSA's ability to review the disability of a person who has received DIB for at least 24 months and provides exceptions to those limits.

Section 221(m) of the Act states:

> (1) In any case where an individual entitled to disability insurance benefits under section 223 . . . based on such individual's disability (as

> defined in section 223(d)) has received such benefits for at least 24 months—
>
> (A) no continuing disability review conducted by the Commissioner may be scheduled for the individual solely as a result of the individual's work activity;
>
> (B) no work activity engaged in by the individual may be used as evidence that the individual is no longer disabled; and
>
> (C) no cessation of work activity by the individual may give rise to a presumption that the individual is unable to engage in work.
>
> (2) An individual to which paragraph (1) applies shall continue to be subject to—
>
> (A) continuing disability reviews on a regularly scheduled basis that is not triggered by work; and
>
> (B) termination of benefits under this title in the event that the individual has earnings that exceed the level of earnings established by the Commissioner to represent substantial gainful activity.

We address the provisions of section 221(m), and the implementing regulations, more fully in our analysis of why the ALJ's conclusion that section 221(m)(1) precluded SSA from considering information about Respondent's work activity is erroneous.

4. <u>The SSA I.G. may impose CMPs and assessments for certain false statements about or failures to report a material fact to SSA.</u>

Section 1129(a)(1) of the Act authorizes SSA to impose CMPs and assessments on any person who –

> (A) makes, or causes to be made, a statement or representation of a material fact, for use in determining any initial or continuing right to or the amount of monthly insurance benefits . . . 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 . . . **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** . . . .

*See also* 20 C.F.R. § 498.102(a) (implementing regulation).

A "material fact" as relevant here is a fact that SSA "may consider in evaluating whether an applicant is entitled to benefits under title II" of the Act (DIB). Act § 1129(a)(2); 20 C.F.R. § 498.101. "Otherwise withhold disclosure" means "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 or Social Security benefit amount" for that or another person. 20 C.F.R. § 498.101.

Section 1129(a)(1) authorizes CMPs of up to $5,000 for each covered false or misleading statement or representation or "each receipt of such benefits or payments while withholding disclosure of such fact," and the regulations authorize CMPs of up to "$5,000 for each false statement or representation, omission, or **receipt of payment or benefit while withholding disclosure of a material fact**." 20 C.F.R. § 498.103(a) (emphasis added). Benefits are paid monthly. 20 C.F.R. Part 404, subpart D; Act § 1129(a)(1). Thus, SSA may impose a CMP for each month during which material information is withheld and DIB payments are received. The Act and regulations also authorize an "assessment, in lieu of damages" of up to "twice the amount of benefits or payments paid as a result of such a statement or representation or such a withholding of disclosure." Act § 1129(a)(1); *see* 20 C.F.R. § 498.104.

In determining the amount of the CMP and assessment to impose, the SSA I.G. must consider: (1) the nature of the statements, representations, or actions 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 person's financial condition; and (5) such other matters as justice may require. 20 C.F.R. § 498.106(a).

Any person against whom the SSA I.G. imposes a CMP or assessment under section 1129(a) may request a hearing before an ALJ, and that person and the SSA I.G. may appeal the ALJ's decision to the Board.[1] Act § 1129(b); 20 C.F.R. §§ 498.109(a), (b); 498.202; 498.221. The Board may remand a case to an ALJ for further proceedings, or may issue a recommended decision to the Commissioner of Social Security to decline review or affirm, increase, reduce, or reverse any penalty or assessment determined by the ALJ. 20 C.F.R. § 498.221.

[1] We note that whether SSA has grounds to terminate benefit payments is not before ALJs in appeals of CMPs and assessments that the SSA I.G. imposes. An ALJ's role in a proceeding under 20 C.F.R. Part 498 is to "determine whether the respondent should be found liable [for CMPs and assessments] under this part" and the ALJ may only "affirm, deny, increase, or reduce the penalties or assessments proposed" by the SSA I.G. 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.

Before the ALJ in CMP cases, the "respondent has the burden of going forward and the burden of persuasion with respect to affirmative defenses and any mitigating circumstances" and the "Inspector General has the burden of going forward and the burden of persuasion with respect to all other issues." 20 C.F.R. § 498.215(b)(1), (2). "The burden of persuasion" in a case before an ALJ "will be judged by a preponderance of the evidence." 20 C.F.R. § 498.215(c).

**Case background**[2]

Respondent, whose prior work was doing construction, was determined to be disabled and entitled to DIB with an onset of disability on January 15, 1997, due to rheumatoid arthritis, heart condition, and headaches. ALJ Decision at 11-12, citing SSA Ex. 1, at 1-2, 6. The SSA I.G. stipulated that Respondent "had disabling medical conditions." SSA I.G. Br. at 3, n.1.

On June 16, 2009, SSA received an anonymous allegation that Respondent had worked for a construction company for about 10 years and had been paid "under the table" while receiving disability benefits. ALJ Decision at 12; SSA Exs. 2; 3, at 1-2. The SSA I.G. began an investigation that lasted through March 2012. SSA Exs. 3; 5-12; 13, at 1; 14. SSA I.G. special agents interviewed the owner of the construction company, Respondent and members of his family, reviewed medical evidence and financial records, and conducted surveillance of Respondent and the construction company where he was reported to have worked. The SSA I.G. determined, based on information that included an interview with the construction company owner on November 6, 2009, that Respondent had worked "off and on" for eight years and had been paid $1,500 per month. SSA Exs. 7, at 1-2; 11, at 3; 14, at 4-5. The SSA I.G. determined that between November 2002 and April 2011, Respondent was overpaid $85,352.10 in DIB and his family was overpaid $24,377 for a total overpayment of $109,729.10. SSA Ex. 12, at 2-3, 5-12.

The SSA I.G. informed Respondent, by letter dated July 26, 2012, that he had "failed to report to SSA that you worked while you and your children collected [DIB] from November 2002 through April 2011" and that "[a]s a result of your failure to disclose the material fact that you worked [at the construction company], you and your children improperly received $110,558 in DIB payments to which you were not entitled."[3] SSA

[2] The information in the background section and in our analysis is from the ALJ Decision and the record before him and should not be treated as new findings.

[3] SSA also determined that the actual amount Respondent was overpaid in DIB for himself and his children "between November 2002 and April 2011" was $109,729.10, and that the higher amount noted in the notice letter ($110,558) did not account for a check SSA issued to Respondent but recovered before it could be deposited. SSA Exs. 12, at 2;14, at 5; SSA I.G. Pre-H'g Br. at 8, citing SSA Ex. 12, at 5-12.

Ex. 17, at 1. However, due to "the effective date of the material withholding provision of Section 1129 [Act § 1129(a)(C)]," the SSA I.G. informed Respondent, "only your misconduct and the resulting overpayment that occurred between December 2006 and April 2011 are actionable." *Id*. The SSA I.G. determined that Respondent and his children improperly received $47,583.60 in benefits during that time, and that Respondent's failure to report his work activity "constitutes 53 separate violations." *Id*. The SSA I.G. proposed a CMP of $106,000 and an assessment in lieu of damages of $95,167.20, for total of $201,167.20. *Id*. Respondent requested an ALJ hearing on the SSA I.G.'s determination to impose the CMP and assessment. The ALJ received the parties' briefs and exhibits (and sustained objections to some exhibits) and held a hearing by video teleconference on September 25 and November 20, 2013.

Before the ALJ, the SSA I.G. relied on the report of a special agent of two interviews that she and another special agent conducted with the construction company owner on November 6, 2009 and February 23, 2010. SSA I.G. Post-H'g Br. at 4-5; SSA Exs. 7; 9, at 2. According to the special agent's reports, the company owner stated that Respondent had worked for him off and on for the prior eight years and had, among other things, tiled, placed backsplashes, and done trim work and had done substantial work on his own (Respondent's) home. *Id*. The special agent also reported that the construction company owner also stated that he had paid Respondent for the work in cash in amount of $50 to $100 and $500 per job or $150 to $1,500 per week depending on the job, but did not pay him $20,000 to $30,000 per year, and that Respondent had stopped working for him after the special agents first interviewed him on November 6, 2009. *Id*. According to the special agent's report, the construction company owner further told them that Respondent had said he was permitted to earn $1,200 to $1,500 per month while receiving benefits. SSA Ex. 7, at 2. The SSA I.G. also cited the special agent's reports that Respondent stated in an interview on November 6, 2009 that he had done work for the construction company owner every once in a while and had worked remodeling his own home. SSA I.G. Post-H'g Br. at 6, citing SSA Ex. 7. The special agent also reported that Respondent, in a second interview on November 9, 2009, stated that he stopped working in 1998 and had not gone back to work since but did work every once and awhile doing little things. SSA I.G. Post-H'g Br. at 6-7; SSA Ex. 8, at 1-4. On November 9, 2009, Respondent completed and submitted several SSA forms in which he either stated he had not worked since 1998 or omitted his work for the construction company. SSA Ex. 8, at 8-31.

Respondent before the ALJ argued that he was unable to work and had neither worked for the construction company owner nor been paid in cash by him, and that the construction company owner had given false statements to the special agents and had later testified at the hearing that Respondent did not work for him. R. Post-H'g Br.

**The ALJ Decision**

The ALJ found that the evidence "does not show that Respondent was actually informed about what activities amounted to work within the meaning of the regulation for which reporting was required by 20 C.F.R. § 404.1588(a)," but also found that Respondent "does not defend on the basis that he did not know what activity qualified as work that he had to report" and "admitted at hearing that he knew if he worked, he was supposed to report to SSA." ALJ Decision at 17, citing Tr. at 301-02. The ALJ found "Respondent's argument . . . that he did no work for" the construction company or its owner to be "not persuasive" because he "admitted that he ran errands" for the company's owner "and that he received money, items of value, or in kind labor on his house from" the owner. ALJ Decision at 17, citing Tr. at 253-55, 315. The ALJ thus found "that Respondent did engage in some gainful work activity for" the owner and that he failed to report his work activity to SSA as required. ALJ Decision at 10, 17. The ALJ also found, however, that the evidence "does not support a finding that Respondent actually earned more than the substantial gainful activity amount or an equivalent in any month" and is "insufficient to show that Respondent's work . . . was substantial gainful activity based on either earnings or level of activity." *Id*. at 15. Moreover, the ALJ stated that the SSA I.G. "failed to offer any admissible evidence of the monthly or total amount of DIB payments to Respondent or the . . . payments for his children for . . . the period in issue." *Id*. The ALJ nonetheless stated that "normally I would conclude that Respondent's failure to report that he engaged in work activity, no matter how minimal that work activity or how infrequent, was an omission or failure of Respondent to report a material fact subjecting him to a CMP and assessment under section 1129(a)(1)(C) of the Act." *Id*. at 18.

However, the ALJ held that because Respondent "was entitled to receive DIB . . . for at least 24 months," section 221(m)(1) of the Act "prohibited consideration of Respondent's work activity as evidence that he was no longer disabled" and that "his work activity is not a fact that the Commissioner [of Social Security] may consider in evaluating whether Respondent continued to be entitled to benefits or payments under the Act." *Id*. at 10, 19. "Therefore," the ALJ concluded, "Respondent's work activity is not material within the meaning [of] section 1129(a)(2) of the Act and 20 C.F.R. § 498.101" and his "failure to report his work activity" for the construction company "is not, as a matter of law, a failure to report a material fact for which a CMP or assessment is authorized under section 1129(a)(1)." *Id*. at 19.

**The parties' arguments**

The SSA I.G. argues that the ALJ erred because the provisions of section 221(m)(1) barring use of a 24-month DIB recipient's work activity as evidence he or she is no longer disabled "do not abrogate" a recipient's "obligation to report his work activity to SSA," and "does not preclude SSA from evaluating a recipient's work activity to determine *earnings* or income to calculate whether the earnings exceed the substantial

gainful activity (SGA) dollar limits for eligibility to receive benefits." SSA I.G. Br. at 3 (emphasis in original). The SSA I.G. cites section 221(m)(2)(B) of the Act that "expressly states that, where section 221(m)(1) applies, recipients 'shall continue to be subject to – termination of benefits under this title in the event that the individual has ***earnings*** that exceed the level of earnings established by the Commissioner to represent substantial gainful activity.'"[4] *Id*. at 3-4 (emphasis in original). The SSA I.G. argues that Respondent's work activity "is material because it is a fact that the SSA Commissioner 'may consider' in evaluating an individual's *earnings* in accordance with section 221(m)(2)(B) of the Act – to determine whether the individual is 'entitled to benefits or payments under the Act'" and that that "his failure to disclose the work activity and earnings constitutes a ***material*** omission for purposes of Section 1129 of the Act." *Id*. at 4, 5 (emphasis in original). The SSA I.G. argues that Respondent was required to report his work to SSA by 20 C.F.R. § 404.1588(a) (recipient must "promptly tell us if . . . (1) Your condition improves; (2) You return to work; (3) You increase the amount of your work; or (4) Your earnings increase"). *Id*. at 3.

The SSA I.G. thus argues that "[b]etween December 2006 and April 2011, the Respondent withheld material information from SSA, while receiving benefits," authorizing the SSA I.G. to impose a CMP and assessment under section 1129(a)(1)(C) of the Act, and that the proposed CMP and assessment are reasonable. *Id*. at 8.

Respondent did not respond to the SSA I.G.'s appeal and brief within the time period provided in the regulations. The Board notified Respondent's counsel that it would close the record unless counsel could show either that he did not receive the Board's letter setting out the appeal procedures or that he had filed a timely response. Respondent then submitted a three-page response and a cover letter requesting a 45-day extension of time to file a supplemental brief if necessary and to obtain the assistance of counsel "who specializes in this area." R. Letter (Oct. 10, 2014). The Presiding Board Member ruled that Respondent had not alleged or shown good cause for not filing a timely response to the SSA I.G.'s appeal of the ALJ Decision. Ruling (Oct. 16, 2014). The Presiding Board Member denied the request for an extension of time to file either a supplemental response or the response submitted with the request for an extension and informed Respondent that the response would not be part of the record for decision.

[4] The SSA I.G. also argues that even if Respondent's work activity was not material as the ALJ held, "the Respondent's *failure to report* his work activity is clearly material" because "failure to report work activity is a fact that SSA may consider in determining Respondent's continued eligibility for benefits, as it provides an independent basis to initiate a continuing disability review for development of earnings or medical improvement review." SSA I.G. Br. at 5-6 (emphasis in original), citing 20 C.F.R. § 404.1590(i)(3) (SSA may start a continuing disability review of a 24-month DIB recipient "if you failed to report your work to us."). In light of our conclusion that the ALJ erred in holding that Respondent's work activity is not material, it is not necessary to address the SSA I.G.'s argument that Respondent could be sanctioned for, in effect, failing to report to SSA that he had not reported his work.

**Standard of review**

The Board's review of an ALJ decision on the SSA I.G.'s proposal to impose CMPs or assessments is limited "to whether the ALJ's initial decision is supported by substantial evidence on the whole record or contained error of law." 20 C.F.R. § 498.221(i).

**Analysis**

1. The ALJ's conclusion that section 221(m)(1) of the Act renders information about Respondent's work not material is legally erroneous.

The ALJ based his determination that the SSA I.G. could not impose a CMP or assessment on Respondent for withholding information about his work on his conclusion that section 221(m)(1) of the Act barred SSA from considering information about his work, making such information not "material." The ALJ did so despite the fact that neither party cited section 221(m) to the ALJ, and without asking the parties to address the effect of that section.

The ALJ's reliance on section 221(m)(1) of the Act is misplaced. He failed to correctly consider the effect of the language in section 221(m)(2), even though he quoted the language, and he did not consider how the section was implemented in the DIB regulations. The statute and regulations permit SSA to discontinue DIB payments to a 24-month recipient based on the amount of the recipient's earnings. Section 221(m)(2)(B) states that "[a]n individual to which paragraph (1) applies" – that is, a 24-month DIB recipient – "shall continue to be subject to . . . termination of benefits . . . in the event that the individual has earnings that exceed the level of earnings established by the Commissioner to represent substantial gainful activity." The plain language of section 221(m)(2)(B) clearly permits SSA to discontinue DIB payments to a 24-month DIB recipient who has earnings that, under the regulations, show that he or she has engaged in substantial gainful activity.

As we explain below, the law and regulations generally permit SSA to terminate DIB payments to a recipient who has engaged in "substantial gainful activity." The regulations state that earnings will constitute substantial gainful activity resulting in the termination of benefits when (as relevant here) the earnings derive from work and exceed monthly amounts established by regulation. Since work is relevant in determining whether amounts paid to a recipient are earnings from work, work is a fact SSA may consider in determining whether a 24-month recipient is entitled to benefits.

First, the Act and regulations permit SSA to terminate DIB payments to recipients who engage in substantial gainful activity. In addition to the language to that effect in section 221(m)(2)(B) of the Act, section 223(e) states that "[n]o benefit shall be payable" under the DIB program "to an individual for any month, after the third month, in which he

engages in substantial gainful activity during the 36-month period following the end of his trial work period . . . ."[5] Section 404.1592a(a) of 20 C.F.R. states that when a recipient with "a disabling impairment" works after the nine-month trial work period, "we may decide that your disability has ceased because your work is substantial gainful activity and stop your benefits" but that "if . . . you stop engaging in substantial gainful activity, we will start paying you benefits again; you will not have to file a new application." Section 404.1590(i)(4), "*Reviews to determine whether the work you have done shows that you are able to do substantial gainful activity*," states that section 404.1590(i)(1), which implements the 24-month rule from Act § 221(m)(1), "does not apply to reviews we conduct . . . to determine whether the work you have done shows that you are able to do substantial gainful activity and are, therefore, no longer disabled."

Second, the regulations state that earnings may show that a DIB recipient has engaged in substantial gainful activity and specify the amount of monthly earnings that constitutes substantial gainful activity. Section 404.1574(a)(1) of 20 C.F.R. states that "[t]he amount of your earnings from work you have done . . . may show that you have engaged in substantial gainful activity" and that "[g]enerally, if you worked for substantial earnings, we will find that you are able to do substantial gainful activity." Section 404.1574(b)(2), entitled "*Earnings that will ordinarily show that you have engaged in substantial gainful activity*," applicable to DIB recipients who are employees, sets out a formula establishing the level of earnings based on which "your earnings from your work activity as an employee . . . show that you engaged in substantial gainful activity . . . ."[6]

Third, the regulations specify that earnings must derive from work activity in order to show that the recipient has engaged in substantial gainful activity. Section 404.1574(b)(2) states that SSA "will consider that your earnings **from your work activity** . . . show that you engaged in substantial gainful activity," and section 404.1574(a)(1) states that "in evaluating your work activity for substantial gainful activity purposes, our primary consideration will be the **earnings you derive from the work activity**." (Emphasis added.) Section 404.1574(a)(2) states that "[w]hen we decide whether your earnings show that you have done substantial gainful activity, we do not consider any income that is not directly related to your productivity." SSA cannot decide whether earnings derive from work activity without considering work.

[5] A DIB recipient may work while receiving benefits during a 9-month "period of trial work." Act § 222(c); 20 C.F.R. § 404.1592(a). A recipient who performs substantial gainful activity after the end of the trial work period is paid benefits for three more months, after which SSA stops benefits in any month in which the recipient does substantial gainful activity. 20 C.F.R. § 404.1592a(2)(i).

[6] A claims representative from SSA testified that the "substantial gainful activity amount" of earnings was $940 per month in 2008, and $980 per month in 2009. Tr. at 375-76.

The legislative history of section 221(m) also shows that SSA may consider a 24-month DIB recipient's earnings to determine whether the recipient has engaged in substantial gainful activity. The history explains that section 221(m) "is intended to encourage long-term [DIB] beneficiaries to return to work by ensuring that work activity would not trigger an unscheduled **medical review of their eligibility**" but that "like all beneficiaries, long-term beneficiaries **would have benefits suspended if earnings exceeded the substantial gainful activity level**, and would be subject to periodic continuing disability reviews." H.R. Rep. 106-393(I), at 45 (1999) (emphasis added).

The preamble to the final rule implementing section 221(m) of the Act, like the legislative history, distinguishes between reviewing a 24-month DIB recipient's medically determinable **impairment** based on what work activity shows about a recipient's abilities, which section 221(m)(1) prohibits, and considering whether the recipient's earnings show substantial gainful activity, which section 221(m)(2) permits. SSA stated in the preamble that "if section 221(m) of the Act applies to you, we may not be able to start a medical continuing disability review, but we can still start a work continuing disability review to determine if you are doing substantial gainful activity." 71 Fed. Reg. 66,840, 66,848 (Nov. 17, 2006); *see also id*. at 66,850 (an effect of the 24-month rule is that SSA will "disregard information about your work that would otherwise be evidence about your physical and mental abilities"). SSA further explained that "[w]e may still consider your earnings from [your] work under the earnings guidelines to decide whether your earnings show that you have engaged in substantial gainful activity for the purpose of determining whether your disability has ceased." *Id*. at 66,846. Thus, we conclude that SSA could consider information about Respondent's work to determine whether Respondent had earnings from work that showed substantial gainful activity, authorizing SSA to discontinue his DIB payments.

The Act and regulations, as relevant here, define a "material fact" as one that SSA "may consider in evaluating whether an applicant is entitled to benefits under title II" of the Act. Act § 1129(a)(2); 20 C.F.R. § 498.101. As the ALJ observed, the definition of "material fact" (one that SSA "may consider" in evaluating entitlement to DIB) does not require that SSA actually evaluate the material fact or cite it as a basis to terminate benefits. *Id*; ALJ Decision at 18 ("[w]hether a statement of fact or omitted fact is material does not depend on whether . . . any decision would have been different" on Respondent's entitlement to benefits).

Since we conclude that section 221(m) did not preclude SSA from considering Respondent's work for purposes of determining whether he had earnings from that work at the substantial gainful activity level, we further conclude that the ALJ's determination that his work was not material for purposes of section 1129(a)(1) was legally erroneous.

2. We remand the case to the ALJ to clarify his findings and make findings on factual issues necessary to resolve the case.

The ALJ stated that, but for section 221(m)(1) of the Act, he would "normally" find that Respondent's failure to report his work activity was an omission of material fact subjecting Respondent to a CMP and an assessment. ALJ Decision at 18. Respondent would be subject to a CMP and assessment, however, only if he knew or should have known that the withheld fact was material and that such withholding was misleading for purposes of determining eligibility or benefit amount. Act § 1129(a)(1)(C); 20 C.F.R. § 498.102(a)(3).[7]

The SSA I.G. argued to the ALJ that Respondent "by his own admission . . . acknowledged the need to report work to SSA." SSA I.G. Pre-H'g Br. at 8, citing Tr. at 302 (Respondent's acknowledgment that he was aware while receiving disability benefits that he should report to SSA if he worked). The SSA I.G. also argued that Respondent should have been alerted "to the import[ance] of work and reporting the same" by SSA's "line of questioning" of Respondent when SSA contacted him before initially awarding him benefits. SSA I.G. Pre-H'g Br. at 8, citing SSA Ex. 1. The SSA I.G. argues that "[a]s the Respondent knew he had to report work, it logically follows that he knew, or should have known, withholding this information was false or misleading." SSA I.G. Post-H'g Reply Br. at 4 (unnumbered). Respondent before the ALJ argued that he had not worked, and therefore did not expressly address whether he knew or should have known any work that he did was a material fact and that withholding that fact was misleading.

While the ALJ found that the evidence "does not show that Respondent was actually informed about what activities amounted to work within the meaning of the regulation for which reporting was required by 20 C.F.R. § 404.1588(a)," he also found that Respondent "does not defend on the basis that he did not know what activity qualified as work that he had to report" and "admitted at hearing that he knew if he worked, he was supposed to report to SSA." ALJ Decision at 17, citing Tr. at 301-02. Notice of the requirement to report work is relevant in determining whether Respondent knew or should have known that his work was material and that withholding information about his work would be misleading, but such notice is not necessarily determinative of these issues.

[7] Section 1129(a)(1)(A) of the Act by contrast imposes CMPs and assessments on any person who makes a statement of material fact that the person knows or should know is false or misleading, without the additional requirement present in section 1129(a)(1)(C) that the person know or should know that the fact is material. Counsel for the SSA I.G. testified that the SSA I.G. based the CMP on Respondent's failure to disclose the material information of his work activity, and not on his having made false statements or material misrepresentations. Tr. at 396-97, 405-08.

Further, the ALJ found "not persuasive" Respondent's argument that what he did for the construction company or its owner did not amount to work, explaining as follows:

> Respondent admitted that he ran errands for [the construction company owner] and that he received money, items of value, or in kind labor on his house from [the construction company owner]. [citations omitted] Therefore, I conclude that Respondent did engage in some gainful work activity for [the construction company owner].

ALJ Decision at 17. The ALJ also found, however, that the evidence "does not support a finding that Respondent actually earned more than the substantial gainful activity amount or an equivalent in any month" and is "insufficient to show that Respondent's work . . . was substantial gainful activity based on either earnings or level of activity." *Id.* at 15. The amount of Respondent's earnings might bear on determining whether Respondent knew or should have known that his work was material, but is also not necessarily dispositive on that question.[8] Because the ALJ's analysis was cut short by his erroneous failure to recognize that section 221(m) permits SSA to consider work in the context of determining whether earnings exceed the substantial gainful activity level, the ALJ did not make clear whether he would have inferred that Respondent knew or should have known that information about his work activity was "material."

On remand, the ALJ should clarify how he evaluates the evidence, including the testimony, and what inferences he draws from the evidence, in order to apply the correct legal standards set out above. He should then expressly determine whether Respondent knew or should have known that the information he withheld from SSA was material to SSA's determination of his right to receive benefits and that the withholding of the information was misleading.

If the ALJ answers those questions in the affirmative, and concludes that Respondent is, therefore, liable for a CMP and assessment under section 1129(a)(1) of the Act, the ALJ should address the following:

● *Whether the SSA I.G. has established the duration of the period for which CMPs and assessments may be imposed.* To support the full amount of the proposed CMP and assessment, the SSA I.G. had to show, by a preponderance of the evidence, that Respondent withheld information about his work from SSA for a period of 53 months,

[8] As noted, whether information is material does not depend on whether it would ultimately provide grounds for SSA to terminate benefits. Thus, information about work which generated earnings might be material even if, in the end, SSA might have determined the total amount of earnings did not establish substantial gainful activity. To establish that Respondent knew the information about his work was material and that withholding the information was misleading, the SSA I.G. does not need to establish that Respondent knew the earnings reached an amount that would support a determination of substantial gainful activity.

from December 2006 through April 2011.[9] Act § 1129(a)(1) and 20 C.F.R. §§ 498.103(a), 498.104 (CMPs based on each monthly benefit payment received while withholding disclosure of material fact, assessments based on amount of benefits paid as a result of withholding disclosure); 20 C.F.R. § 498.215(b), (c) (SSA I.G. has "the burden of going forward and the burden of persuasion" on all issues other than Respondent's affirmative defenses and mitigating circumstances; burden of persuasion "judged by a preponderance of the evidence"); SSA Ex. 17 (SSA I.G. notice letter); Tr. at 396-97, 405-08 (testimony of counsel to the SSA I.G. that CMP based on Respondent's failure to disclose the material information of his work activity, and not on his having made false statements or material misrepresentations). On remand, if the ALJ concludes that Respondent is liable, the ALJ should make findings of fact as to when that liability began and ended.

● *Whether the SSA I.G. has shown that the amount of CMP is reasonable based on the factors in the regulations.* The ALJ did not review the factors in 20 C.F.R. § 498.106(a) that the SSA I.G. must consider in determining the amount of the CMP and assessment. Applying some of the factors, such as the circumstances under which false statements occurred, the degree of culpability of the person committing the offense, and such "other matters as justice requires," entails assessing witness testimony and credibility. In this case, Respondent and the construction company owner gave testimony that differed from, and sometimes contradicted, the statements the SSA I.G. special agent reported. The ALJ noted some of this testimony but made no determinations as to its credibility or reliability. If the ALJ on remand finds Respondent liable, he should assess the reasonableness of the amount of the CMP based on the factors in the regulations and make findings of fact necessary to a determination about the amount of the CMP to be imposed.

● *Whether the SSA I.G. has shown that the assessment is reasonable based on the amount of benefits Respondent received during the period in which he withheld information about his work.* The SSA I.G. may impose an assessment of up to twice the amount of benefits paid as a result of the withholding of material information. Act § 1129(a)(1); 20 C.F.R. § 498.104. The ALJ stated that the SSA I.G. "failed to offer any admissible evidence of the monthly or total amount of DIB payments to Respondent or the . . . payments for his children for . . . the period in issue." ALJ Decision at 15. Based on our review of the record, however, it appears that Respondent may not have timely raised any dispute of fact regarding the amount of benefits received. Although ordinarily the SSA I.G. has to prove the amount of benefits received, the Board has recognized in other types of cases that an evidentiary burden applies only with respect to disputed facts. *St. Catherine's*

[9] The SSA I.G. acknowledges that Respondent may have stopped working for the construction company owner after the SSA I.G. special agents interviewed the owner in November 2009, but asserts that Respondent continued to withhold information about the work he had done so that his benefits would continue. SSA I.G. Br. at 6-7.

*Care Ctr. of Findlay, Inc.*, DAB No. 1964, at 8 (2005) (citations omitted) (federal agency in nursing facility enforcement action not required to present evidence to support prima facie case of noncompliance with respect to factual findings facility does not dispute); *see also* 20 C.F.R. § 498.202(c) (request for ALJ hearing must state the basis for the respondent's contention that the specific issues or findings and conclusions in the SSA I.G.'s determination were incorrect); ALJ Scheduling Order & Notice of Hearing at 3 (Nov. 5, 2012) (prehearing briefs must set forth undisputed facts and specify the issues remaining for hearing).

Here, in discussing whether the SSA I.G.'s evidence supported the amount of benefits received as identified in the notice letter, the ALJ said that Respondent "does not concede that either his DIB or the [children's] payments were improper." ALJ Decision at 16. Respondent's dispute about the **propriety** of the payments is not the same as a dispute about the **amount** of benefits received, however.

Thus, on remand, if the ALJ finds Respondent liable, the ALJ should determine whether Respondent timely raised a dispute of fact regarding the amount of benefits received, and, if not, should accept the SSA I.G.'s finding about the amount regardless of whether the key evidence the SSA I.G. offered to support its finding on that issue was admissible.

In addition, we note that SSA Exhibit 3, at 3 (which the ALJ admitted) identifies $829 as the amount of DIB payments per month Respondent was receiving as of June 24, 2009. Respondent's statement attached to the continuing disability review form he filled out during his second interview (November 9, 2009) identifies the same amount as his DIB benefit. SSA Ex. 8, at 30; *see also* SSA Ex. 12, at 2 (referring to the check for Respondent's May 2011 DIB payment in the amount of $829 that SSA took back before it could be deposited). If the ALJ concludes that Respondent did timely dispute the SSA I.G.'s factual finding regarding the amount of benefits received, but that the SSA I.G. did not provide sufficient evidence to support the full amount of the assessment the SSA I.G. proposed, the ALJ should either use the $829 per month amount for the period starting July 2009 as the amount of benefits received or explain why he does not accept the evidence regarding that amount as meeting SSA I.G.'s burden with respect to the minimum amount of benefits per month Respondent received during the period beginning that month and ending in April 2011.

**Conclusion**

For the reasons stated above, we reverse the ALJ's conclusion that under section 221(m)(1) of the Act information about Respondent's work was not material information that he was required to disclose to SSA. We remand the case to the ALJ for further proceedings consistent with this decision.

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan

/s/
Judith A. Ballard
Presiding Board Member