Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Mark S. Blankenship
Docket No. A-15-67
Decision No. 2655
September 8, 2015

RECOMMENDED DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Mark S. Blankenship (Respondent) appeals the April 16, 2015 decision of an Administrative Law Judge (ALJ). *Mark S. Blankenship*, DAB CR3785 (2015) (ALJ Decision). The ALJ upheld the determination of the Office of the Inspector General of the Social Security Administration (SSA I.G.) that Respondent violated section 1129(a)(1)(C) of the Social Security Act (Act)[1] and 20 C.F.R. § 498.102(a)(3) by withholding from the Social Security Administration (SSA) material information concerning his work activity while receiving title II Disability Insurance Benefits (DIB). The ALJ determined that the $20,000 civil monetary penalty (CMP) and $133,848 assessment in lieu of damages that the SSA I.G. imposed on Respondent under section 1129 of the Act were reasonable.

As explained more fully below, the Board recommends that the Commissioner of Social Security sustain the ALJ Decision because it is supported by substantial evidence and is consistent with applicable authorities.

Authorities

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

[1] The current version of the Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact-toc.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp. Table.

cannot . . . engage in any other kind of substantial gainful work which exists in the national economy . . . ." Section 223(d)(4)(A) requires the 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.

The implementing regulations define the term "substantial gainful activity" as "work that . . . [i]nvolves doing significant and productive physical or mental duties; and . . . is done (or intended) for pay or profit." 20 C.F.R. § 404.1510. *See also id.* §§ 404.1572(a) (explaining that "substantial work activity" is "work activity that is both substantial and gainful" and that "work may be substantial even if it is done on a part-time basis or if you do less, get paid less, or have less responsibility than when you worked before"); 404.1572(b) ("Gainful work activity is work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized."). The regulations also explain the meaning of the term "substantial gainful activity" as it relates to the SSA's determination of whether an individual may be considered disabled and thus may be entitled to DIB. Section 404.1571 states, in part:

> The work, without regard to legality, that you have done during any period in which you believe you are disabled may show that you are able to . . . . engage in substantial gainful activity . . . Even if the work you have done was not substantial gainful activity, it may show that you are able to do more work than you actually did. We will consider all of the medical and vocational evidence in your file to decide whether or not you have the ability to engage in substantial gainful activity.

See also id. §§ 404.1573, 404.1574.

Individuals receiving DIB must report to the SSA changes in their disability or employment status. *Id.* § 404.1588. As relevant here, a DIB recipient must inform the SSA if he or she "return[s] to work" or "increase[s] the amount of . . . work"; or, his or her "earnings increase." *Id.* § 404.1588(a)(2), (a)(3), (a)(4). The applicable SSA regulations do not define the term "work." But, as noted above, the regulations define "substantial gainful activity" and provide further explanation of what "substantial gainful activity" means relevant to determining disability.

The Act authorizes the SSA to impose sanctions against individuals who make false statements about or fail to report a material fact to the SSA. Section 1129(a)(1) of the Act authorizes the imposition of CMPs against any person who –

> (A) makes, or causes to be made, a statement or representation of a material fact, for use in determining any initial or continuing right to or the amount of monthly insurance benefits under 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 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 added); *see also* 20 C.F.R. § 498.102(a)(3).

The Act defines "material fact" as "one which the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under title II . . . ." Act § 1129(a)(2); *see also* 20 C.F.R. § 498.101 (defining, among other terms, "[m]aterial fact"). An "[o]therwise withheld 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 person or another person." 20 C.F.R. § 498.101.

Section 1129(a)(1) of the Act authorizes a CMP of "not more than $5,000 for each such statement or representation or each receipt of such benefits or payments while withholding disclosure of such fact." *See also* 20 C.F.R. § 498.103(a). Section 1129(a)(1) also authorizes, in addition to the CMP, 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 or such a withholding of disclosure." *See also* 20 C.F.R. § 498.104. In determining the amount or scope of any CMP and assessment to be imposed in cases brought under section 1129, the SSA I.G. considers:

> (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 any prior offenses of that person;
> (4) the financial condition of that person; and
> (5) such other matters as justice may require.

20 C.F.R. § 498.106(a)(1)-(5).

In cases brought under section 1129 of the Act, the SSA I.G. may initiate a proceeding for the purposes of imposing a penalty and assessment within six years from the date of the violation. *Id.* § 498.132. An individual against whom the SSA I.G. proposes to impose a CMP and/or assessment, as applicable, may request a hearing before an ALJ to challenge the proposal. *Id.* § 498.109(b). The SSA I.G. bears the burden of going forward and the burden of persuasion, to be judged by the preponderance of the evidence, with respect to all issues, with one exception. A respondent bears the burden of going forward and the burden of persuasion, to be judged by a preponderance of the evidence, with respect to any affirmative defenses and mitigating circumstances. *Id.* § 498.215(b), (c). The ALJ may affirm, deny, increase, or reduce the SSA I.G.'s proposed CMP and assessment, as applicable. *Id.* § 498.220(b). If the ALJ's decision is appealed to the Board, the Board may remand the case to the ALJ for further proceedings or may issue a recommended decision to decline review or affirm, increase, reduce, or reverse any penalty or assessment determined by the ALJ. *Id.* § 498.221(h).

Background[2]

Respondent began receiving DIB in the early 1990s based on diagnoses of disorders of the back and affective disorders. From time to time since then, his wife and children also received benefits based on Respondent's earnings record. SSA Exhibit (SSA Ex.) 1; SSA Ex. 15, at 2.[3] On July 30, 2010, the SSA I.G. began an investigation based on an anonymous complaint that Respondent was working full time. The investigation determined that Respondent began working for Jor-Bay, LLC (Jor-Bay),[4] and as a contractor-installer for Lowe's, a home improvement center, in February 2005, but failed to report his work activity to the SSA, whose records on Respondent disclosed no earnings after 2000. The investigation also determined that Respondent had attempted to conceal his work activity by claiming that his son, whom he had paid using Internal

[2] The factual information in this section, unless otherwise indicated, is drawn from the ALJ Decision and the record and is presented to provide a context for the discussion of the issues raised on appeal. Nothing in this section is intended to replace, modify, or supplement the ALJ's findings of fact.

[3] The ALJ noted, and Respondent acknowledges, that Respondent's exhibits are duplicate copies of the SSA I.G.'s exhibits 1-3, 5, 6, and 8-12. ALJ Decision at 3; Respondent's brief in support of appeal to the Board (Respondent's Brief) at 2 n.1. Accordingly, all of the citations to the exhibits herein are to the SSA I.G.'s exhibits.

[4] Jor-Bay, LLC, is a South Carolina limited liability company formed in April 2001. SSA Ex. 5. Respondent's wife is Jor-Bay's organizer and registered agent for service of process. SSA Ex. 10, at 20-22 (Articles of Organization for Jor-Bay, bearing the signature of an individual identified elsewhere in the record as Respondent's wife); Respondent's Brief at 3 (identifying Respondent's wife by name). According to November 16, 2010 printouts of licensing information from South Carolina Department of Labor, Licensing & Regulation's web database, Respondent, affiliated with Jor-Bay, held home inspector and home builder licenses that were scheduled to expire on June 30, 2012. SSA Ex. 6, at 1-4.

Revenue Service (IRS) Form 1099,[5] had completed most of the work for Lowe's. The SSA I.G. also found that a comparison of Respondent's earnings and the amount of money Respondent had paid his son revealed that Respondent had earned the majority of the payments, which it found inconsistent with Respondent's claim that his son had earned most of the money. SSA Exs. 2, 4, 7, 13, 14. Based on the investigation findings, the SSA I.G. determined that SSA had overpaid Respondent $133,848 in DIB from February 3, 2005 through March 2, 2012. SSA Ex. 8; SSA Ex. 15, at 8; SSA Ex. 17, at 3.

By letter dated August 27, 2012, the SSA I.G. notified Respondent that it had information that he may have failed to report a change in status by withholding a fact material to determining entitlement to receive DIB, i.e., he allegedly was engaged in paid work activity. SSA Ex. 9. The letter asserted that, as a result of this failure to report, Respondent caused the SSA to pay him and his dependents over $130,000 to which they were not entitled. *Id*. The letter further stated:

> Section 1129 of the Act authorizes the imposition of a [CMP] of up to $5,000.00 for each false or misleading statement, representation of a material fact, omission or, for every payment received after November 2006, failure to report a change in status made in connection with the determination of an initial or continuing right to, or amount of, monthly insurance benefits under Title II . . . . In your case, every month since December 2006 you received DIB without informing SSA of your work activity[,] [which] may be considered a false statement subject to a $5000.00 penalty. Section 1129 also authorizes the imposition of an assessment in lieu of damages of up to twice the amount of benefits or payments paid as a result of the false or misleading statement or representation. Based upon the investigation conducted thus far, it appears that you may be subject to a [CMP] and/or assessment.

[5] "Form 1099" is a term commonly used to refer to a series of IRS tax forms the IRS considers as "information returns" and which are used to report various types of payments. For example, a financial institution would report to the IRS interest on savings and dividends on investments paid to an account holder using Forms 1099-INT (interest) and 1099-DIV (dividends). *See generally* http://www.irs.gov/uac/About-Form-1099-Related-Forms. We presume that the references to IRS Form 1099 in the record here are to IRS Form 1099-MISC, which is used to report, among other things, payments made in the course of a trade or business to an independent contractor or a person who is not an employee. *See* http://www.irs.gov/form1099misc and http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Am-I-Required-to-File-a-Form-1099-or-Other-Information-Return.

Id. at 1.[6] The SSA I.G. informed Respondent that it intended to take civil action against him pursuant to section 1129, and that he would have thirty days to respond. *Id.* at 2 (citing and listing the five factors in 20 C.F.R. § 498.106(a)). Respondent filed a response. SSA Ex. 10.

In a notice of proposed determination dated January 6, 2014, the SSA I.G. stated that, within the last six years (referring to the limitations period in 20 C.F.R. § 498.132),[7] Respondent had withheld disclosure of a material fact concerning his work activity "for 53 months, between January 2008 and March 2012[,]" for which he could be subject to a penalty of $255,000 under section 1129 of the Act. SSA Ex. 11, at 1. The SSA I.G. also stated that Respondent could be subject to $165,270 in assessment in lieu of damages (i.e., double the amount of DIB paid during the same period). *Id.* at 1-2. The SSA I.G. explained that, in consideration of Respondent's financial condition and health,[8]

[6] The SSA I.G.'s reference to the date December 2006 is consistent with changes to regulations concerning, *inter alia*, penalties for false or misleading statements to, or withholding of information from, the SSA. *See* 71 Fed. Reg. 61,403 (Oct. 18, 2006); 72 Fed. Reg. 27,424 (May 16, 2007). Relevant here, the SSA stated, "A person is subject to a sanction for failing to disclose information that is material to determining title II . . . benefit eligibility or amounts if: . . . [t]he failure to disclose occurred after November 27, 2006." 72 Fed. Reg. at 27,425. *See also* ALJ Decision at 10 n.2, *citing* 72 Fed. Reg. at 27,425.

[7] SSA Exhibit 3, page 1, is the SSA's December 14, 2006 letter to Respondent, which informed him, in part: "We sent you a letter telling you that we were going to review your disability case. However, we do not need to review your case at this time. Therefore, we will not contact your doctor now." Respondent appears to have construed the SSA's notice to mean that the SSA determined that he was still entitled to DIB as of December 14, 2006. *See* Respondent's Brief at 2 ("On or about December 14, 2006 [Respondent's] disability case was reviewed by the SSA and his benefits were continued."), 6 (similar statement). The SSA I.G. does not raise a dispute on this issue. In any case, the SSA I.G. considered the period from January 2008 to March 2012 (consistent with the limitations period), to calculate the possible penalties despite evidence that Respondent began receiving DIB to which he was not entitled as early as in February 2005.

[8] Respondent's submittal to the SSA I.G. included medical records dated in 2007 and 2008, which mainly concern stenting procedures for coronary artery disease. SSA Ex. 10, at 1, 6-13, 16.

Respondent would be assessed $133,848 (the total DIB amount he wrongfully received for the period from February 3, 2005 through March 2, 2012) in lieu of damages, and a penalty of $20,000. *Id.* at 2 (discussing the application of the five factors in 20 C.F.R. § 498.106(a)).[9]

Respondent appealed. The ALJ upheld the SSA I.G.'s determination and the CMP based on the written record.[10] The ALJ determined that Respondent withheld disclosure of his work activity, which was information that could affect his eligibility to receive DIB (ALJ Decision at 5-8, 9), and that he knew or should have known that withholding disclosure of his work activity could affect his eligibility to receive DIB and would be false or misleading (*id.* at 9). The ALJ further found that the $20,000 CMP and the $133,848 assessment in lieu of damages the SSA I.G. proposed against Respondent were reasonable. *Id.* at 10-12.

Respondent requests review of the ALJ Decision by the Board.

[9] The SSA I.G.'s January 6, 2014 notice erroneously referred to a period of "53 months" between January 2008 and March 2012. SSA Ex. 11, at 1. *See also* SSA I.G.'s brief to the ALJ at 1 n.1 (referring to "53 months"). SSA Exhibit 8 is a three-page list of dates of payment and monthly payments made to Respondent, for every consecutive month beginning February 3, 2005, through March 2, 2012, for a total payment of $133,848. There is no dispute as to the accuracy or completeness of the contents of this exhibit. The period from (including) January 2008 to (including) March 2012 covered 51, not 53, monthly payments. *See* SSA Ex. 8, at 2-3. The SSA I.G. also erroneously stated the amount of DIB paid. *See* SSA Ex. 11, at 2 (twice referring to $82,335 in payments, e.g., "[Respondent] received $82,335.00 in benefits from January 2008 through March 2012; therefore, [Respondent] could be subject to an assessment of $165,270.00."). Based on our calculation, the total of all monthly payments made during this period was $82,635, not $82,335. *See* SSA Ex. 8, at 2-3.

Notwithstanding the reference to "53 months," the SSA I.G. correctly calculated the total possible penalty of $255,000 for 51 months ($5,000, for each payment received while withholding a material fact, multiplied by 51 is $255,000) and imposed less than $255,000. Similarly, notwithstanding the references to $82,335, the SSA I.G. correctly calculated $165,270 as the total assessment that could have been proposed, i.e., up to double the payment made during the period in question ($82,635 multiplied by 2 is $165,270), and the SSA I.G. imposed less than $165,270. In fact, the combined total assessed, $153,848, is less than either the CMP or assessment in lieu of damages that could have been imposed. Moreover, as noted earlier, the SSA I.G. considered the period from January 2008 to March 2012 (consistent with the six-year limitations period), to calculate the CMP and assessment despite evidence that Respondent began receiving DIB to which he was not entitled as early as in February 2005.

[10] The ALJ explained that he need not hold an in-person hearing because Respondent had not requested to cross-examine the SSA I.G.'s three proposed witnesses, whose written direct testimony the SSA I.G. had submitted pursuant to the ALJ's March 17, 2014 Acknowledgment and Pre-hearing Order, and Respondent had not submitted the written direct testimony of his proposed witnesses pursuant to the ALJ's Order. *See* ALJ Decision at 2-3. Neither party asserts error in the ALJ's decision to rule based on the written record.

Standard of Review

The regulations governing section 1129 appeals provide that the Board "will limit its review 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). The standard of review on a disputed factual issue is whether the ALJ's initial decision is supported by substantial evidence on the whole record. The standard of review on a disputed issue of law is whether the ALJ's initial decision is erroneous. *See id.*; *Guidelines – Appellate Review of Decisions of Administrative Law Judges in Social Security Administration Cases to Which Procedures in 20 C.F.R. Part 498 Apply* (section headed "Completion of the Review Process," ¶ (c)). The *Guidelines* are available at http://www.hhs.gov/dab/divisions/appellate/guidelines/ssa.html.

Substantial evidence is "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971), *quoting Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Under the substantial evidence standard, the reviewer must examine the record as a whole and take into account whatever in the record fairly detracts from the weight of the evidence relied on in the decision below. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

The Board will review only those parts of the record before the ALJ which are cited by the parties or which the Board considers necessary to decide the appeal. The Board will not consider issues not raised in the notice of appeal or in the opposing party's response, nor issues which could have been presented to the ALJ but were not. 20 C.F.R. § 498.221(f).

Analysis

Respondent asserts that the ALJ erred as a matter of fact and law in upholding the SSA I.G.'s decision that Respondent withheld material information about his work activity while receiving DIB and in determining that the combined amount of the CMP and assessment, $153,848, was reasonable. We address below Respondent's arguments. None have merit. We agree with the ALJ's determinations that (1) Respondent performed work while he was receiving DIB; (2) he knew, or should have known, that the fact that he was engaged in work was information material to determining entitlement to DIB and that withholding such information from the SSA would be misleading, but withheld that information from the SSA; and (3) the combined amount of the CMP and assessment, $153,848, is reasonable.

1. *The ALJ's finding that Respondent performed work while he was receiving DIB is supported by substantial evidence and is free of legal error.*

Respondent asserts the ALJ erred in finding that Respondent did not disclose his work activity to the SSA while he was receiving DIB because the finding is "unsupported by the evidence, which is speculative, at best." Respondent's Brief at 6. Respondent's chief contention is that he himself did not perform the work. Stated differently, his position is that the activity he had engaged in, or the extent of his involvement in the Lowe's work, was not work for SSA disclosure purposes. According to Respondent, his involvement with Lowe's was limited to assisting his son, a firefighter who wanted to establish a second career and another source of income, to learn the home improvement business. *Id.* at 6, 7. He reports that he accomplished this goal by accompanying his son to Lowe's, being present while his son performed the installation work, and imparting to his son the knowledge and experience he had gained through years of prior work in the construction business. *Id.* at 9, 10. He writes that he "was doing nothing more than any other father would do for his son." *Id.* at 10. Respondent denies that any evidence shows that he himself performed work for Lowe's through Jor-Bay, or that he worked for Jor-Bay, or even that Jor-Bay did work for Lowe's. *Id.* at 6. He asserts, "The record in this case is devoid of any contract" between Lowe's and Respondent. *Id.* at 7. He further maintains that the evidence "[a]t best" indicates that he was "frequently seen with his son, sometimes in Lowe[']s and sometimes on job sites" as a "mentor," but that he himself did not earn money for the installation work his son had performed pursuant to "contracts" signed only by his wife and son. *Id.* at 7, 8.

We do not question that Respondent (and his wife) wanted to help their son in gaining experience in home improvement work as a second career. But neither that desire, nor any actual benefit to Respondent's son, is necessarily inconsistent with evidence that Respondent was performing work in the process. The SSA I.G. submitted written declarations of the SSA I.G. investigator and the SSA claims representative (SSA Exs. 15, 16), as well as the investigator's three reports detailing findings concerning Respondent's work activity (SSA Exs. 7, 13, 14). *See* ALJ Decision at 6. The investigation included, among other things, review of Respondent's bank records and payment records related to his work for Lowe's, and interviews of a Lowe's sales manager, Respondent (two interviews), and Respondent's son. *Id.* at 6-7; SSA Ex. 15, at 4-5; SSA Ex. 16, at 1-2. The ALJ found, based on this extensive documentation, that the record demonstrates that Respondent himself performed at least some of the installation work for Lowe's and that he himself earned (and that he and his wife accepted) money for that work. We agree with the ALJ that substantial evidence supports the finding that Respondent engaged in work for SSA disclosure purposes. *See* ALJ Decision at 7-8, 9.

As the ALJ noted, Respondent chose not to cross-examine the investigator and claims examiner. ALJ Decision at 6; SSA Exs. 15, 16. Respondent offered no testimony or other evidence to contradict the information in the three investigative reports. *See* SSA Exs. 7, 13, 14. Indeed, he did not even proffer his own testimony or that of his family members, despite originally indicating that he planned to do so. The ALJ found the SSA I.G.'s written direct testimony and investigator's reports credible. ALJ Decision at 6. Respondent merely asserts in argument that he did not perform work for the purposes of SSA disclosure requirements. We see no evidence that undercuts the ALJ's well-grounded finding that Respondent performed work, and did so for pay.

The investigator and claims representative testified that, during an interview of Respondent, Respondent admitted that he or his son, or both, completed the installation work; that Respondent's signature was on a majority of the "paperwork" associated with the Lowe's jobs; and that Lowe's paid his wife using IRS Form 1099, the earnings from the Lowe's jobs were deposited into his bank account, and he then paid his son using IRS Form 1099. ALJ Decision at 7; SSA Ex. 15, at 4-5, 6. The investigator and claims representative further stated that Respondent was informed, during another interview, that a comparison of the payments he had received from Lowe's compared to the payments he had made to his son revealed that Respondent had earned the majority of the payments from Lowe's. ALJ Decision at 7; SSA Ex. 15, at 6-7; SSA Ex. 16, at 2. Respondent then reportedly stated that he disclosed his income to the IRS and attempted to call the SSA "on several occasions" to report the activity, and also admitted that he knew that he had a responsibility to disclose work activity to the SSA. SSA Ex. 16, at 2. The investigator also testified that a Lowe's sales manager asserted in an interview that Respondent had performed work for Lowe's for several years, that the manager regularly saw Respondent and his son at Lowe's, and that the manager recalled Respondent himself signing all of the "certificate of completion" forms for the installation work. ALJ Decision at 6; SSA Ex. 15, at 5-6. Respondent also informed the investigator that he returned to work to supplement his DIB payments, but did not report the work because he knew that the SSA would reduce or terminate the DIB payments. SSA Ex. 14, at 3; SSA Ex. 15, at 7. Respondent's son reportedly stated when interviewed that his father was "always at each job" because only his father held a contractor license (ALJ Decision at 6; SSA Ex. 13, at 4; SSA Ex. 15, at 6) and that his father paid him using IRS Form 1099 (SSA Ex. 15, at 6).

Respondent argues, as he did before the ALJ, that no evidence exists of a work-for-pay relationship between him and Lowe's. *See* Respondent's Brief at 6-7. Respondent asserted before the ALJ that his wife, who "owned" Jor-Bay, handled most of the "paperwork" (e.g., book-keeping, billing) involved in running the business; that Jor-Bay worked for Lowe's; and that his son provided the labor. Respondent's Brief to the ALJ at 3-4. His role, he stated, was as a "facilitator" who merely lent his home building and inspector licenses to the business operated by his wife and son. *See* ALJ Decision at 7-8, *quoting* Respondent's Brief to the ALJ at 3-4.

We see no need for proof of a direct work-for-pay relationship between Respondent and Lowe's, such as a contract or signed work order. We find it sufficient that credible, unrebutted evidence shows that Respondent personally performed at least some of the work, that he undertook responsibility for the completion of the work, and that he was paid for that work. We thus agree with the ALJ's assessment of the evidence, as showing that Respondent "did more than simply 'lend' his licenses to his son and wife." ALJ Decision at 8. Respondent, as the ALJ stated, worked for Lowe's "as an installer," "was always at each job . . ." and "signed the certificates of completion," and was "paid by Lowe[']s for the installation work." *Id.*

Respondent also asserts that "all of the contracts" were made between Lowe's and Respondent's wife and son. Respondent's Brief at 7, *citing* SSA Ex. 10, at 23, 24 and 25. The implication that the agreements or work orders for all of the specific installation jobs were made with Respondent's wife and son is not supported by the documents to which he cites. Pages 23 and 24 of SSA Exhibit 10 are copies of forms entitled "Statement of Business Ethics" and "Installed Sales Contractor's Insurance Requirements" that Lowe's apparently requires installer-contractors to sign before providing installation services for its customers. SSA Exhibit 10, page 25, also appears to be a standard form which installer-contractors must sign, agreeing to certain uniform procedures (e.g., installer will have the customer sign a "certificate of completion" form when the job is completed; installer will refer all leads for jobs obtained in the course of performing work to the Lowe's installation office). These forms appear to have been signed by Respondent's wife (apparently on behalf of Jor-Bay) and son, but they fail to establish that Respondent was not performing work for Jor-Bay on work orders from Lowe's. The mere absence of Respondent's signature on form documents as a Lowe's installer thus does not rebut other credible evidence that Respondent personally performed installation work or that he supervised and signed off on completion of installation work undertaken by Jor-Bay.

Finally, we ultimately need not determine how much or little Lowe's paid for the work, how much net pay or profit Respondent retained for the work, or whether Respondent paid some of the money earned to his son. *Cf.* Respondent's Brief at 8 (stating that the "gross amounts paid by Lowe[']s" were "certainly modest" and that Respondent's wife had to pay his son, as well as his son's expenses (e.g., supplies, materials), out of the gross receipts). Respondent asserts that "'substantial gainful activity' must be 'done (or intended) for pay or profit.'" *Id.* at 9 (quoting 20 C.F.R. § 404.1510). As we have found, Respondent performed work and received pay. That remains true regardless of whether

he realized any profit from the Lowe's jobs. *See* 20 C.F.R. §§ 404.1510, 404.1572.[11] His work activity and his receipt of payment amounted to events that triggered the reporting requirement. *See id.* § 404.1588(a)(2), (a)(3), (a)(4).

2. *The ALJ's conclusion that Respondent knew, or should have known, that the information that he was engaged in work was material to determining entitlement to DIB and that withholding it from the SSA would be misleading, and nevertheless withheld that information from the SSA, is supported by substantial evidence and free of legal error.*

Respondent does not directly dispute that information about engagement in work activity, if true, would be material to determining entitlement to DIB, or that withholding such information, if true, from the SSA would be misleading. Rather, he broadly asserts that the ALJ erred, stating, again, that his involvement was limited to assisting his son to learn the installation business. Respondent's Brief at 9-10. He writes, "In short, there is nothing to support the ALJ's finding that [Respondent] knew or should have known that failing to tell the SSA that he was simply being a good father was a material fact affecting his entitlement to disability benefits." *Id.* at 10.

First, the premise of Respondent's argument is that the only information he withheld was that he was supportive of his son. As discussed above, substantial evidence supports the ALJ's findings to the contrary. *See* ALJ Decision at 7-8. Respondent's role in the work done for Lowe's was, as the ALJ found, more substantial than his mere presence or his lending of his business licenses to his wife and son. Respondent was personally involved in performing, facilitating, and vouching for completion of the jobs as well as accepting and retaining payment. *Id*. Moreover, during an interview with the investigator, Respondent reportedly admitted that he did not inform the SSA that he had returned to work. *See* SSA Ex. 14, at 3; SSA Ex. 15, at 7.

Second, the ALJ found, and we agree, that the record includes ample credible evidence that Respondent knew, or should have known, that this work activity was material to determining (continuing) entitlement to DIB, and that withholding such information from the SSA would be misleading. *See* ALJ Decision at 9, *citing*, *inter alia*, SSA Ex. 13, at 1 and SSA Ex. 3. The SSA I.G. investigator's report indicates that Respondent signed his original application for DIB, agreeing to notify the SSA if he returned to work. SSA Ex. 13, at 1. Respondent himself admitted when interviewed that he was aware of his reporting responsibility. *Id.* at 2. Also, during an interview, Respondent informed the investigator that he had returned to work in 1999 or 2000, which Respondent stated

[11] To the extent Respondent suggests that he was not performing "significant and productive physical or mental duties" for the purposes of the section 404.1510 definition of "substantial gainful activity" because his involvement was limited to being present at the job sites as a facilitator and to mentor his son, *see* Respondent's Brief at 9, he cites no authority for the position that such roles do not constitute productive duties.

triggered an SSA review of his entitlement to DIB. *Id*. These events, which presumably occurred sometime between 1999 and the early 2000s, would have reinforced Respondent's prior knowledge that the SSA would consider information about his return to work material information, since he had experienced that information about work activity did trigger action by the SSA. *Id.* at 1-2; SSA Ex. 15, at 4. Also, more recently, by letter dated December 14, 2006, the SSA instructed Respondent that he must report to the SSA if he "return[s] to work" or his "job, pay or work expenses change, if [he is] working now." SSA Ex. 3, at 1.

We also agree with the ALJ that Respondent's statement that he "informally contacted" the SSA to ask if his installation activity violated any SSA rules, and reportedly was told that it did not, indicates Respondent's awareness that his activities at least could constitute work and should be reported to the SSA. ALJ Decision at 9, *citing* Respondent's Brief to the ALJ at 4. Also, as noted earlier, Respondent admitted he returned to work to supplement his DIB payments and did not report the work because he knew that the SSA would reduce or terminate the DIB payments. SSA Ex. 14, at 3; SSA Ex. 15, at 7.

Third, the record shows that Respondent knowingly withheld information about his work activity from the SSA. The ALJ found, and Respondent does not dispute, that Respondent told the SSA I.G. investigator that he did not report the work activity to the SSA because it was "'hit and miss work.'" ALJ Decision at 7; SSA Ex. 13, at 3; SSA Ex. 15, at 5. This statement amounts more to a confession of withholding information than to an excuse or explanation for having done so.[12] Respondent acknowledged that he performed some jobs and failed to report that work activity. SSA Ex. 13, at 3; SSA Ex. 15, at 5; *see also* SSA Ex. 14, at 3. Indeed, when asked by the investigator whether he knew all along that SSA did not know about his work activity, Respondent reportedly replied, "Yes, or you wouldn't be here." SSA Ex. 15, at 7. This statement suggests that Respondent knew that material information about his work activity was not shared with SSA since he chose not to disclose it to the SSA.

[12] As a factual matter, the record does not include evidence concerning the volume or frequency of Lowe's work. We do not construe the characterization of the work as "hit and miss" as an assertion that Respondent may not be held to the disclosure requirement based on the "hit and miss" nature of the work. Even if we were to assume that Respondent is asserting as much, he did not, and does not now, articulate any authority that would support such an assertion.

3. *The ALJ's conclusion that the $20,000 CMP and the $133,848 assessment in lieu of damages are reasonable is supported by substantial evidence and free of legal error.*

Respondent acknowledges that the maximum possible CMP is $255,000 and that the maximum possible assessment in lieu of damages also exceeds the assessment imposed. Respondent's Brief at 10 (although he erroneously states $164,670 instead of $165,270). He asserts, however, that the imposition of a combined amount of $153,848 is nevertheless unreasonable when the factors in section 498.106(a) are applied, and that the ALJ erred in concluding otherwise. *Id.* at 11.

In regard to the first two factors in section 498.106(a), i.e., the nature and circumstances of the actions and the degree of culpability, the ALJ found Respondent's misconduct both long-term and egregious. ALJ Decision at 11. Respondent's claim that he did not work and only mentored his son, which he now repeats (Respondent's Brief at 11), is less than credible. The ALJ found instead, and the record supports the finding, that Respondent consciously failed to disclose material information about his work activity for at least six years while receiving DIB. ALJ Decision at 11. We agree with the ALJ that Respondent's misconduct is culpable.

Disputing the ALJ's finding about his culpability, Respondent takes issue with what he asserts was the SSA I.G.'s and the ALJ's "attempt to infer" that Respondent tried to conceal his work activity by using Jor-Bay as a "shell" or "intermediary[,]" stating that "Jor-Bay had absolutely nothing to do with Lowe[']s." Respondent's Brief at 11-12. Respondent also states, apparently in support of further reduction of the CMP and assessment under subsections 498.106(a)(1) and/or (a)(2), that he conducted all of his activities "in the open" (apparently meaning that he was not using Jor-Bay to hide his work activity or earnings) and fully cooperated with the SSA I.G.'s investigation. *Id.* at 12.

We find Respondent's portrayal of Jor-Bay as unrelated to Respondent and his claims that the ALJ improperly treated Jor-Bay as a shell company to be disingenuous. Respondent submitted to the SSA I.G. Jor-Bay's Articles of Organization, which do show his wife as the organizer and registered agent. SSA Ex. 10, at 1 (September 10, 2012 letter from Respondent's attorney to SSA I.G., stating that a copy of Jor-Bay's Articles of Organization, among other items, is enclosed, and that "it is clear that [Respondent's wife] is the owner of the company."), 20-22 (Articles of Organization). He also submitted what he characterizes as "contracts" between Jor-Bay and Lowe's. Respondent's Brief at 7 (referring to "contracts"), citing SSA Ex. 10, at 23, 24 and 25 (which are the standard Lowe's forms that were discussed earlier). *See also* SSA Ex. 10, at 1 (attorney's letter to the SSA I.G., enclosing copies of these forms and referring to the forms as the "Installer Contract"). We understand Respondent to have been trying to prove that only his wife, as business operator, and his son, as installer, were responsible

for Jor-Bay's activities and relationship with Lowe's. Ultimately, however, ownership and control of Jor-Bay are not probative of any issues material to this case; and the ALJ did not, and we need not, make any finding about whether Respondent used of Jor-Bay as a "shell" company to hide his work activity or earnings. *See* ALJ Decision at 10-12. It is sufficient that substantial evidence before the ALJ supported the findings that Respondent personally engaged in work activity for which he received pay.

Respondent also asserts that he fully cooperated with the SSA I.G.'s investigation. Respondent's Brief at 12. Even if we assumed the assertions to be true and agreed that such cooperation might sometimes be relevant to the amount of a CMP and/or assessment, we would not agree that the kind of cooperation claimed by Respondent could outweigh the evidence already discussed that shows a long-standing and culpable arrangement to withhold information from SSA. Certainly, we would not find such cooperation to be relevant given that the CMP and assessment imposed are already so much below the maximum.

Respondent also states that the ALJ "completely ignore[s]" the factor concerning the history of any prior offenses (section 498.106(a)(3)), asserting that he has no such history, and no criminal record. Respondent's Brief at 12.[13] The ALJ did not set out a separate sub-section or heading for this factor as he did with the factors in sections 498.106(a)(1), (a)(2), and (a)(4) (financial condition). ALJ Decision at 11-12. He did, however, consider this factor, stating, "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." *Id.* at 11 (last paragraph). We find no cause to disagree with the ALJ's weighing of these factors.

The ALJ also considered Respondent's financial condition (fourth factor), and the Respondent's health (under the fifth factor of "such other matters as justice may require"). ALJ Decision at 12; 20 C.F.R. § 498.106(a)(4), (a)(5). Respondent asserts to us, however, that a combined amount of CMP and assessment of $153,848 is simply unreasonable in light of his poor health and limited financial circumstances. Respondent's Brief at 12. He does not offer any additional or different rationale, however, why his financial condition and health status warrant further reduction of $153,848, which represents a sum significantly less than the maximum possible. We discern no such rationale and decline to alter the ALJ's findings on these aspects.

Respondent also objects to the following description by the ALJ of the basis for the assessment amount. Respondent's Brief at 12.

[13] Respondent cites 20 C.F.R. § 498.106(b). Respondent's Brief at 12. We assume he intended to cite section 498.106(a)(3). Section 498.106(b) sets out factors to be considered in determining the penalty for violations of sections 498.103(c) and 498.103(d), which are not at issue here.

> [I]nstead 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 . . . .

ALJ Decision at 12 (italics added). Respondent contends that the ALJ's statement is "incorrect," because "$133,848.00 represents the total amount of disability insurance benefits paid to [Respondent] commencing from February 3, 2005," rather than the "$153,848.00 assessment." Respondent's Brief at 12 (underline added), *citing* SSA Ex. 8 (three-page list of monthly DIB paid to Respondent from February 3, 2005, through and including March 2, 2012, totaling $133,848).

Respondent apparently misunderstood the ALJ's explanation. The ALJ correctly stated that $133,848 was the total amount of DIB paid during the period the SSA I.G. determined Respondent had withheld disclosure of material information about his work activity. *See* SSA Ex. 8, at 1-3; SSA Ex. 11, at 1 ("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."). The amount of $153,848 represents the total of the CMP and assessment in lieu of damages imposed on Respondent.

Respondent also cites the fifth factor (justice) as supporting a further reduction based on the timing of Lowe's payments based on the following reasoning:

> The first payment made by Lowe[']s to any of the Blankenships was $590.00 in February 2006, almost exactly a year later [i.e., after February 2005]. See Report of Investigation of Michael Chlebda dated October 13, 2011, pg. 2. Accordingly, the disability insurance benefits received by [Respondent] between February 2005 and February 2006 (totaling $16,942.00) were received by [Respondent] prior to any work being performed for Lowe[']s by any of the Blankenships or any company with which they were affiliated. At a minimum, this sum, accordingly, should be deducted from the assessment against [Respondent].

Respondent's Brief at 12-13.

Respondent appears to be asserting that the combined CMP and assessment of $153,848 should be reduced, dollar for dollar, by the amount of DIB he received during the period from February 2005 (earliest date of the period the SSA I.G. determined Respondent had

withheld material information about his work activity) to the earliest date on which he claims that he (or his wife or son) received money from Lowe's. First, Respondent cites no applicable authority that the Board, the ALJ, or the SSA I.G. must or should consider to entertain his request. He simply asserts, unconvincingly, to the effect that "justice" requires further reduction of the imposed amount. *See id.* at 12. Again, we agree with the ALJ that this case presents egregious, highly culpable, long-term misconduct for which the SSA I.G. made an "eminently reasonable" decision to reduce the total penalty to an amount much lower than the maximum possible amount. ALJ Decision at 12.

Furthermore, lack of support for or merit in the request for further reduction aside, Respondent could have, and should have, made such a request earlier and, in our view, before the SSA I.G. issued its January 6, 2014 decision. By letter dated August 27, 2012, the SSA I.G. informed Respondent that he would have a thirty-day opportunity to submit any mitigating information in support of reduction of the proposed penalty. SSA Ex. 9 (stating the section 498.106(a) factors). Respondent should have availed himself of the opportunity to submit to the SSA I.G. any specific evidence in support of the request. At the latest, he should have done so during the ALJ proceedings, in accordance with the ALJ's March 17, 2014 Acknowledgment and Pre-Hearing Order. The state of the evidentiary record – in which all of Respondent's exhibits are duplicates of the SSA I.G.'s exhibits – is in no small measure due to Respondent's inaction below.[14]

Finally, we note Respondent's statements to the effect that he is, and was during the time period in question, disabled due to his heart problems. Respondent's Brief at 6. *See also id.* at 8 (last paragraph, citing disability case law). The record shows that Respondent began receiving DIB in the early 1990s, based on disorders of the back and affective disorders. The record does not show subsequent SSA determination as to Respondent's disability based, entirely or in part, on his heart problems, let alone a determination on continuing eligibility to receive DIB based on heart problems. In any case, Respondent's disability, whether due to heart problems, back disorders, and/or affective disorders, is not now at issue. To the extent Respondent believes his health problems are relevant to the issues presented in this appeal, other than for the purposes of possible reduction of $153,848 imposed, Respondent should have articulated why. He has not done so.

[14] Moreover, Respondent merely avers that Lowe's first paid $590 in February 2006. He cites page 2 of the SSA I.G. investigator's October 13, 2011 report in his brief at 12 (and also at 8), but none of the three reports of the investigator are dated October 13, 2011. *See* SSA Exs. 7 (November 2010), 13 (July 2011), and 14 (November 2011). More to the point, none of the reports include support for Respondent's assertion; none discuss any specific amount Lowe's paid or the date of payment. If Respondent has any specific evidence relevant to possible reduction of the penalty and within his control, he should have submitted it to the SSA, or at the latest, to the ALJ.

Conclusion

The Board recommends that the Commissioner of Social Security affirm the ALJ Decision.

/s/
Constance B. Tobias

/s/
Leslie A. Sussan

/s/
Susan S. Yim
Presiding Board Member