Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Michelle Valent
Docket No. A-14-92
Decision No. 2604
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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 monetary penalty (CMP) or an assessment in lieu of damages (assessment) against Michelle Valent (Respondent) under section 1129(a)(1) of the Social Security Act (Act). *Michelle Valent*, DAB CR3261 (2014) (ALJ Decision). The SSA I.G. proposed the CMP and assessment on the ground that Respondent failed to notify SSA about work she did while receiving Social Security Disability Insurance Benefits (DIB) when she knew or should have known that the work was material (and that such withholding was misleading) for purposes of determining her eligibility for, or the amount of, DIB. The ALJ found that she had failed to disclose information about her work but concluded that her 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 separate factual findings necessary to that conclusion, nor did he resolve issues related to the amount of the CMP and assessment. The record contains conflicting evidence relevant to these issues, including statements by

witnesses whom the ALJ observed at the hearing he held. Accordingly, we reverse the ALJ's conclusion that Respondent's work was not material information that she was required to report to SSA, and we remand the case to the ALJ to make the necessary findings relating to Respondent's liability and, if he finds her 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 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 the ALJ's conclusion that section 221(m)(1) precluded SSA from considering information about Respondent's work activity.

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. 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.

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[1]

Respondent, whose prior work was as a receptionist or administrative assistant, filed for DIB in October 2003 and was found disabled and entitled to DIB with a disability onset date of March 25, 2003 based on a primary diagnosis of affective disorders including depression. ALJ Decision at 8. The SSA I.G. stipulated that Respondent "had disabling medical conditions." SSA I.G. Br. at 3, n.1.

In January 2012 an informant who said he had worked for the "War Era Veterans Alliance" (WERA), an organization formed by Respondent's brother and owned by his wife, told the SSA I.G. that Respondent worked there answering phones and had been paid under the table while collecting DIB. The SSA began an investigation that lasted through June 2012. Special agents from the SSA I.G. interviewed Respondent, the informant and staff of WERA, reviewed materials including the WERA website, and conducted surveillance of Respondent. The SSA I.G. determined that Respondent started working at WERA in September 2008 and was paid $400 in cash per week, and that her earnings were considered substantial gainful activity.[2] SSA Exs. 1, at 15-17; 12, at 8; 16, at 3-4. Before the ALJ, the SSA I.G. relied on the statements of coworkers that Respondent worked at or for WERA or for her brother and the SSA I.G.'s findings that she was listed on the WERA website as an employee, had a phone that would ring when someone called WERA, had a WERA email address, and received regular payments of money from her brother.

On April 20, 2012, Respondent stated during a continuing disability review that she had not worked since 2004, and she completed forms listing no work since 2004 and stating "I have not worked since 2004" and that she had not received any employment income or wages since March 25, 2003. ALJ Decision at 8; SSA Exs. 8, at 1-2; 9, at 1, 7; 10, at 2, 10; 12, at 1. In the interview, she did not report having worked for WERA.

The SSA I.G. found that Respondent falsely reported to SSA in the April 2012 recertification interview that she had not worked since 2004 and that she had failed to report that she worked for WERA. SSA Exs. 4, 5. The SSA I.G. proposed a CMP of $100,000 (reduced from $205,000), based on Respondent's failure to report her work for

[1] 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.

[2] The determination that Respondent was paid $400 per week was based on her brother's statement to that effect to a special agent for the SSA I.G. SSA Ex. 16, at 3-4. Respondent's brother did not deny making that statement but said he might have meant that he had paid her $400 for that week, and he stated that he gave Respondent $12,000 per year as a gift. Tr. at 271-73.

the 41 months from September 2009 through January 2013.[3] SSA Ex. 4. The SSA I.G. also proposed an assessment of $68,547, the amount of benefits SSA determined Respondent was overpaid during those 41 months for herself ($52,938.90) and on behalf of her daughter ($15,608). *Id.*; SSA Ex. 3, at 6, 12. SSA also notified Respondent by letter dated January 14, 2013 that her entitlement to DIB payments ended beginning September 2009. SSA Ex. 3, at 6. Respondent requested an ALJ hearing on the SSA I.G.'s determination to impose the CMP and assessment. The ALJ received the parties' briefing and exhibits and held a hearing by video teleconference on January 14, and 15, 2014.

The ALJ Decision

The ALJ found "Respondent's argument . . . that she did no work for War Era Veterans Alliance" to be "not persuasive" because she and her brother "admitted in testimony that Respondent answered the phone for War Era Veterans Alliance and she did some scheduling, at least occasionally." ALJ Decision at 14. The ALJ thus found "that Respondent did engage in some work activity for the benefit of War Era Veterans Alliance" and that she failed to report her work activity to SSA. *Id*. at 7, 14, 16.

The ALJ noted Respondent's argument "that it was not explained to her what was considered work that had to be reported and, therefore, she did not intentionally or unintentionally omit to report a material fact" but concluded that "the broad reading of the regulation [20 C.F.R. § 404.1588(a)] to require reporting of all work is consistent with the purpose of the Act and the language of the regulation is sufficient notice to Respondent of what to report." *Id*. at 14. The ALJ stated that "normally I would conclude that Respondent's failure to report that she 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 her to a CMP and assessment under section 1129(a)(1)(C) of the Act." *Id*. at 15.

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 she was no longer disabled" and that "her work activity is not a fact that the Commissioner [of Social Security] may consider in evaluating whether

[3] 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). SSA determined that Respondent began working at WERA in September 2008, assigned her a 9-month trial work period of September 2008 through May 2009, and imposed CMPs and assessments beginning three months later, in September 2009. SSA Exs. 3, at 3; 12, at 8.

Respondent continued to be entitled to benefits or payments under the Act." *Id*. at 6-7, 16. "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 her "failure to report her work activity for War Era Veterans Alliance 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 16-17.

The SSA I.G.'s arguments

The SSA I.G. argues that the ALJ erred because section 221(m)(1) barring use of a 24-month DIB recipient's work activity as evidence he or she is no longer disabled does "not abrogate" a recipient's "obligation to report her 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 which "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 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 "her failure to disclose the work activity and earnings constitutes a material omission for purposes of Section 1129 of the Act." *Id*. at 4, 5. The SSA I.G. argues that Respondent was required to report her work to SSA by 20 C.F.R. § 404.1588(a) (recipient 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 SSA I.G. also argues that Respondent was aware of her "reporting responsibilities to SSA regarding work activity and knowingly withheld this information from SSA" and that the proposed penalty and assessment are reasonable. SSA I.G. Br. at 10.

[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* her 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 6 (emphasis in original), citing 20 C.F.R. § 404.1590(i) (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 SSA's argument that Respondent could be sanctioned for, in effect, failing to report to SSA that she had not reported her work.

Respondent declined to submit a response to the SSA I.G.'s appeal and brief. Board letter confirming phone conversations (Oct. 8, 2014).

Standard of review

The Board's review of an ALJ decision on the SSA I.G.'s proposal to impose a CMP or assessment 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 her work on his conclusion that section 221(m)(1) of the Act barred SSA from considering information about her 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 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 . . . ."

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] As noted earlier, SSA assigned Respondent a 9-month trial work period of September 2008 through May 2009, and imposed CMPs and assessments beginning three months later, in September 2009. SSA Exs. 3, at 3; 12, at 8.

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 her DIB payments.

The Act and regulations, as relevant here, define "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 15 ("[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).[6]

[6] This is true because 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.

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

2. We remand the case to the ALJ to 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 her work activity was an omission of material fact subjecting Respondent to a CMP and an assessment. ALJ Decision at 15. Respondent would be subject to a CMP and assessment, however, only if she 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).[7] The ALJ made no separate findings of fact about what Respondent knew or should have known. The SSA I.G. argues that Respondent "knew that she had yearly reporting responsibilities" and cites her testimony that she would go to the SSA office for "the yearly thing" and that "[e]very year, they send you papers, and you have to sign stuff." SSA I.G. Br. at 9; Tr. at 224. The SSA I.G. also states that "written communication with the Respondent provided frequent reminders to report work activity and earnings," but does not cite to any materials in the record to support this assertion. SSA I.G. Br. at 8.[8] The SSA I.G. does, however, cite a Work Activity Report Respondent completed on April 20, 2012 instructing her to report work activity "with as many details as you can." *Id*. at 9, citing SSA Ex. 9.

In any event, the ALJ found that Respondent had notice she should report her work. ALJ Decision at 14. Notice of the requirement to report work is relevant in determining whether Respondent knew or should have known that her work was material and that withholding information about her work would be misleading, but such notice is not determinative of these issues. Respondent argued in her post-hearing brief below that she did not meet the knowledge standard in the statute and regulation because of her

[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. The SSA I.G. determined that Respondent falsely stated during the continuing disability review on April 20, 2012 that she had not worked, but Counsel for the SSA I.G. testified that those false statements were not the basis for the CMP and may have been an aggravating factor, and that the basis of the penalty was "the 41 material omissions" from September 2009 through January 2013. SSA Ex. 4, at 1-2; Tr. at 361-62.

[8] The SSA I.G. does state that, when she "received her Award Notice for Title II DIB" SSA gave her "a pamphlet in plain language explaining her reporting responsibilities." SSA I.G. Br. at 8-9, citing SSA Publication No. 05-10153, What You Need to Know When You Get Social Security Disability Benefits. This pamphlet is not in the record.

disabling mental conditions and the side effects of her medications. R. Post-H'g Br. at 6 (citing testimony). In its post-hearing brief, the SSA I.G. pointed to inconsistencies in Respondent's testimony, and relied in part on the fact that Respondent had no representative payee and other admissions that the SSA I.G. said she made that show that she was able to handle her finances independently. SSA Post-H'g Br. at 5-6.

On remand, the ALJ should evaluate the evidence, including the testimony, to determine whether Respondent knew or should have known that the information she withheld from SSA was material to SSA's determination of her right to receive benefits or to the amount of benefits she received and that the withholding of the information was misleading.

The ALJ also stated that "the evidence . . . does not show that Respondent's work rose to the level of 'substantial gainful activity'" or "whether Respondent was actually paid for her work or . . . only received gifts from her brother." ALJ Decision at 14. He said he found it unnecessary to resolve those questions in light of his conclusion that Respondent's work activity was not material, but did not explain the relevance of these issues in determining whether Respondent is liable for a CMP. On remand, the ALJ should address such issues to the extent he needs to resolve them to determine whether Respondent knew or should have known that her work was material and that withholding disclosure about her work would be misleading.

In summary, although the ALJ found that Respondent had notice she should report her work, he did not determine whether she knew or should have known that the withheld information was material to the determination of her right to receive benefits or to the amount of benefits, and that her withholding 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:

● *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 her work from SSA for a period of 41 months, from September 2009 through January 2013. 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. 4 (SSA I.G. notice letter); Tr. at 361-62 (testimony of counsel to the SSA I.G. that basis for CMP was "the 41 material omissions" from September 2009 through January 2013 and not false statements made to

SSA in April 2012). Determining whether the SSA I.G. is correct that Respondent withheld information about her work for 41 months – or whether it was some other period –requires, at the least, determining when she began the work that she failed to disclose.

The SSA I.G. apparently based its determination that Respondent began working in September 2008 on a statement to the SSA I.G. of the informant who said he had worked for WERA, that his then-wife began working at WERA in September 2008, and that Respondent was working there at that time. SSA Ex. 1, at 6; *see also* Tr. at 100, 105. The informant testified at the hearing, and the ALJ found that his "credibility regarding his assertions as to Respondent's work activity is significantly limited by his . . . limited opportunity to observe Respondent and her activities." ALJ Decision at 10. The ALJ did not, however, state whether he gave any credence to the information about when Respondent was working that the informant attributed to his former wife. The ALJ also found that Respondent did not dispute that a WERA web page accessed in June 2012 stated that Respondent had been "taking calls and managing all War Era Veterans Alliance calendars for over four years." *Id*. at 12; SSA Ex. 13, at 58. The ALJ ultimately made no findings, however, about when Respondent began working or about the duration of the period during which she withheld information about her work from SSA. On remand, the ALJ should assess the evidence including the witness testimony and make findings of fact as to when Respondent began performing the work that he found she did not disclose to SSA.

● *Whether the SSA I.G. has shown that the CMP amount 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. 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, including that of Respondent, who testified to the effect that her mental impairments affect her ability to carry out activities of daily living. Tr. at 235-41. The ALJ on remand should assess the reasonableness of the CMP based on the factors in the regulations and make findings of fact necessary to that determination.

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 she 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