

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

The Inspector General of the Social Security Administration,

Petitioner,

v.

Javier Bonilla,

Respondent.

Docket No. C-14-1677

Decision No. CR4434

Date: November 17, 2015

**DECISION**

The Inspector General (IG) for the Social Security Administration (SSA) charges that Respondent, Javier Bonilla, violated section 1129 of the Social Security Act (Act) because he knowingly made false statements and misrepresentations of material fact regarding his wife's alleged disability, functional abilities, and activities so that she would continue receiving disability insurance benefits. SSA proposes imposing against him a \$25,000 civil money penalty (CMP).

For the reasons set forth below, I agree that Respondent Javier Bonilla knowingly misrepresented material facts to SSA for its use in determining his wife's continuing eligibility for disability insurance benefits, and I consider \$25,000 a reasonable penalty.

**Background**

Section 1129(a)(1) of the Act subjects to penalty any person (including an organization, agency, or other entity) who:

(A) makes, or causes to be made, a statement or representation of a material fact, for use in determining any initial or continuing right to or the amount of monthly insurance benefits under title II . . . that the person knows or should know is false or misleading,<sup>1</sup>

(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 . . . 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) (authorizing the IG to impose a penalty against any person who has made a statement or representation of a material fact for use in determining any initial or continuing right to or amount of title II benefits, and who knew, or should have known, that the statement or representation was false or misleading, or who omitted a material fact, or who made such a statement with “knowing disregard for the truth.”)

The Act defines a material fact as one that “the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under title II . . . .” Act § 1129(a)(2); 20 C.F.R. § 498.101.

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

In this case, Respondent Javier Bonilla’s wife, Denisse Del Pilar Bonilla, was awarded Social Security disability insurance benefits in April 2008. SSA Ex. 2. The IG contends that, in responding to questions that SSA posed on a “Third Party Function Report,” Respondent Javier Bonilla deliberately and repeatedly misrepresented his wife’s functional abilities so that she could continue receiving those benefits.<sup>2</sup> By letter dated June 5, 2014, the IG advised Respondent Javier Bonilla of his determination and the proposed penalty. SSA Ex. 5. Respondent requested a hearing.

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<sup>1</sup> Title II of the Act governs the Social Security disability insurance program.

<sup>2</sup> Denisse Del Pilar Bonilla’s appeal, docketed as C-14-1678, was heard in tandem with this case.

On April 28, 2015, I heard jointly this appeal and the related appeal of Denisse Del Pilar Bonilla (C-14-1678). Ms. Erin Justice appeared, representing the SSA IG. Respondent Javier Bonilla and his wife, Denisse, represented themselves. We convened via video teleconference from the offices of the Departmental Appeals Board in Washington, D.C. Ms. Justice, the parties, and their witnesses appeared from Tampa, Florida.

The parties have filed pre-hearing briefs (SSA Br.; R. Br.) and post-hearing briefs (SSA Post-hrg. Br.; R. Post-hrg. Br.). I have admitted into evidence SSA Exhibits (SSA Exs.) 1-16 and Respondent's Exhibits (R. Exs.) 1-4. Order Following Prehearing Conference at 2 (March 20, 2015); Transcript (Tr.) at 6.

## Issues

The issues before me are:

1. Did Respondent Javier Bonilla make, or cause to be made, to SSA a statement or representation of a material fact that he knew or should have known was false or misleading, for SSA's use in determining Denisse Bonilla's right to Social Security Disability Insurance benefits (title II) and/or the amount of those benefits, or did he omit a material fact or make such a statement with knowing disregard for the truth; and
2. if so, is the \$25,000 proposed penalty reasonable?

## Discussion

***1. Respondent Javier Bonilla violated section 1129 of the Act because he knowingly made false statements and representations to SSA for its use in determining Denisse Bonilla's ongoing eligibility for Social Security disability insurance benefits.***<sup>3</sup>

To satisfy the basic definition of "disability," an individual must have a severe medically determinable physical or mental impairment that makes her unable to perform her past relevant work or any other substantial gainful work. 20 C.F.R. § 404.1505.

In April 2008, Respondent Javier Bonilla's wife, Denisse, was awarded disability insurance benefits, effective April 2006. SSA Ex. 2.

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<sup>3</sup> My findings of fact/conclusions of law are set forth, in italics and bold, in the discussion captions of this decision.

After finding someone disabled, SSA must occasionally reevaluate the individual's impairments to determine if she is still eligible for benefits, a process referred to as a "continuing disability review." If medical or other evidence establishes that the recipient is no longer disabled, her benefits will end. 20 C.F.R. §§ 404.1589, 404.1590. In this case, SSA sent forms to the beneficiary, Denisse Bonilla, and it sent Respondent Javier Bonilla a third party function report, SSA form 3380, with instructions that he complete and return it to SSA. He filled out the form on August 22, 2013, and submitted it. SSA Ex. 3. Among his representations were the following:

- He claimed that he spent 14 hours per day with Denisse Bonilla and that they did everything together. SSA Ex. 3 at 1.
- He said that Denisse Bonilla could not work; she was afraid of the outside world and had been since the bombing of the World Trade Center on "9/11/01." SSA Ex. 3 at 1.
- He said that the first thing she did in the morning was to check the windows to make sure they were closed. She remained inside all day and checked the windows again at night. SSA Ex. 3 at 2.
- He said that she was no longer able to be social. SSA Ex. 3 at 2.
- He said that she lacked concentration. SSA Ex. 3 at 2. Her inability to concentrate impaired her ability to dress, take her medication, complete her daily chores, or cook. SSA Ex. 3 at 2, 3. He marked that she was unable to even prepare a frozen dinner or sandwich for herself. SSA Ex. 3 at 3.
- **He said that she did no outside work but stayed indoors and cleaned all the time.** SSA Ex. 3 at 3.<sup>4</sup>
- He said that she went outside to go to her doctor's appointments. SSA Ex. 3 at 4.
- **He claimed that, when going out, she rode in a car but did not walk, drive, or use public transportation.** SSA Ex. 3 at 4.
- He said that she could not drive because she lacked concentration and lost focus. SSA Ex. 3 at 4.

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<sup>4</sup> Although Respondent Javier Bonilla made numerous false statements, the IG bases the CMP on just five of them. *See* I.G. Ex. 5 at 1. I highlight in bold those statements that the IG specifically points to as false and relies on to justify the CMP.

- **He said that she could not go outside alone because of her fear of the outside world.** SSA Ex. 3 at 4.
- He claimed that she shopped only by computer. SSA Ex. 3 at 4.
- He claimed that she was not capable of using a checkbook and that he handled “all financial needs.” SSA Ex. 3 at 4.
- **He claimed that his wife “doesn’t go anywhere”; and that he took her to her doctor’s appointments.** SSA Ex. 3 at 5.
- **He said that, whenever she went out, she went with him and needed him to accompany her.** SSA Ex. 3 at 5.
- He said that Denisse did not do social activities. SSA Ex. 3 at 6.
- He claimed that she could pay attention for only about three minutes and was not good at following written instructions. SSA Ex. 3 at 6.
- He claimed that she was not good at handling stress or changes in routine and was afraid of the outside. SSA Ex. 3 at 7.

Overwhelming evidence gives lie to these claims.

Denisse Bonilla’s school involvement. Investigators spoke to the principal and teacher of the school that the Bonilla children attended during the 2012-2013 academic year.

In a written statement, the (then) school principal confirmed that, from August 2012 through June 2013, the Bonilla children attended her school. During that time, she observed Ms. Bonilla. SSA Ex. 15. The principal “regularly did the car line” and observed Respondent there. She also saw her as a “walk-in” (walking her child into the classroom). Tr. 11. According to the principal, Denisse Bonilla also attended parent-teacher conferences and communicated effectively in English.<sup>5</sup> She was “friendly,

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<sup>5</sup> Respondent’s actions in support of his wife’s benefits were not limited to his misrepresentations on the third party function report. An individual’s proficiency in English can affect her eligibility for disability benefits. *See* 20 C.F.R. Part 404, subpart P, Appendix 2. Respondent’s wife, Denisse (at one point) claimed she was not fluent in English and Respondent Javier’s actions played a role in those assertions. For example, Respondent Javier acted as Denisse’s Spanish-English interpreter for the SSA-required psychological examination conducted to determine if Denisse qualified for ongoing benefits. Although he did not press the issue, in his closing brief Respondent Javier offers inconsistent defenses. He denies telling the psychologist that his wife spoke

sociable and her behavior appeared appropriate.” She dressed appropriately and maintained good hygiene. SSA Ex. 15; SSA Ex. 11 at 2-3 (Montgomery Decl. ¶¶ 11, 12, 13, 14, 15); Tr. 10, 12.

One of the teachers at the school told investigators that the Bonillas’ son was in her class and that she saw Denisse Bonilla weekly from October 2012 through June 2013. Denisse Bonilla dropped her child off at school “most mornings.” She was not accompanied by her husband or anyone else (other than her child). The two women engaged in conversation about once or twice a month. Those conversations were in English. (The teacher does not speak Spanish). The teacher agreed that Ms. Bonilla appeared to be “a socially interactive person,” and their interactions were “normal.” SSA Ex. 11 at 2 (Montgomery Decl. ¶¶ 7, 8, 9, 10); Tr. 15-19.

Respondent’s automobile. As noted above, the school principal observed Denisse Bonilla “in the car line.” Other compelling evidence undercuts Javier Bonilla’s claim that Denisse was unable to drive.

Throughout the time Denisse was supposedly disabled by panic attacks, she had a Florida driver’s license, which was originally issued in January 2004 (SSA Ex. 8 at 7) and renewed in November 2009 (SSA Ex. 8 at 2, 6). In obtaining the license, she denied that she suffered from any mental disorder or disease and declared that she had no physical or mental disabilities that would affect her driving. SSA Ex. 10 at 8. No evidence in her state driving records suggests that she ever reported to the State Department of Motor Vehicles any such disability. SSA Ex. 8. In renewing her license, she would have been required to affirm that she had no disabilities that would affect her driving. SSA Ex. 4 at 4; *see* SSA Ex. 8 at 6.

On July 23, 2013, Denisse Bonilla purchased a white 2013 Kia Optima. SSA Ex. 9. According to the Bonillas, she made the purchase because Javier Bonilla’s poor credit rating precluded him from obtaining financing. Her credit was better. Tr. 25. The dealership sales manager told Tom Montgomery, financial crime investigator for the Florida Cooperative Disability Investigative Unit, that Denisse Bonilla was the sole purchaser; she completed and signed all necessary financial and sales documents, which were written in English. He agreed that she was a “socially interactive” person. She and Javier Bonilla drove the car away, although the sales manager was not certain who was driving. SSA Ex. 11 at 1-2 (Montgomery Decl. ¶¶ 2, 3, 4, 5, 6); *see* SSA Ex. 9; Tr. 21-25.

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limited English but also claims that he translates for her because she speaks limited English. But then says “We never claimed that Denisse didn’t speak English” and admits that her SSA doctor’s appointments and this hearing were conducted in English. R. Post-hrg. Br. at 1. SSA does not base Javier’s CMP on his role in this ruse.

Investigator Montgomery testified, credibly, that, on September 25, 2013, he observed Denisse Bonilla driving a white 2013 Kia Optima, which was registered in her name. He saw her drive to her residence and park the car in her driveway. She then left the car and entered her home. SSA Ex. 11 at 3 (Montgomery Decl. ¶¶ 16, 17); SSA Ex. 4 at 5 (offering a more detailed description of the investigator's observations); SSA Ex. 16 (video surveillance of Denisse Bonilla, taken September 25, 2013); *see* SSA Ex. 8 at 4, 11 (indicating vehicle registration).

Travel. During this time that Respondent Javier Bonilla was claiming that his wife was disabled because her anxiety and panic attacks confined her to her home, she, along with Javier and their children, were vacationing at Disney Quest, Busch Gardens, and in New York City, as well as other locations, and posting pictures from these excursions on the Bonillas' personal Facebook account. SSA Ex. 10. The pictures show an active and engaged woman vacationing with her family.

Respondent Javier Bonilla's explanations. Respondent Javier Bonilla offers minimal defenses to the overwhelming evidence against him, continuing to claim that his wife suffers from a disabling mental impairment.

He criticizes the evidence that Denisse purchased and drove a car, pointing out that neither their child's teacher nor the dealership sales manager saw her driving. But other un rebutted evidence establishes that she was able to drive and drove: the school principal testified that she saw Denisse Bonilla "in the car line"; Investigator Montgomery testified that he saw her driving the car she had purchased. Consistent with his testimony, a video shows Denisse Bonilla walking from the car to her home. SSA Ex. 16.

Moreover, Respondent Javier offers no rebuttal to the compelling evidence that he, his wife, and children vacationed at amusement parks, in New York City, and elsewhere, evidence that is wholly inconsistent with the notion that she was unable to leave her house. SSA Ex. 10. Although Denisse Bonilla suggested that most of these trips occurred prior to her disability onset date, I found her testimony not credible, given the ages of the children in the photographs of those trips that the family posted on Facebook. Moreover, one of the photographs shows the Bonillas standing next to the subway sign for the Times Square/42<sup>nd</sup> Street subway station. SSA Ex. 10 at 12. That picture must have been taken sometime in or after July 2011. In the picture's background is a billboard advertising the movie, *Cowboys and Aliens*, which was released in July 2011. SSA Ex. 10 at 12; May 18, 2015 Post-hearing Order. Denisse Bonilla holds a shopping bag and admitted that she had been shopping that day. Tr. 57. This is surprising for someone who is only able to shop on-line with Respondent's assistance.

Finally, Respondent Javier Bonilla tacitly acknowledges that SSA witnesses observed and spoke to Denisse Bonilla and detected no signs of mental illness or other abnormal

behavior, but he points out that they are not physicians and not qualified to determine whether she suffered from a disabling mental impairment. R. Post-hrg. Br. The issue here is not Mrs. Bonilla's medical diagnosis; the issue is whether Respondent Javier Bonilla misrepresented his wife's daily activities and abilities. The credible testimony of SSA's witnesses, along with other compelling evidence, establishes that he did. Denisse Bonilla could not have stayed home all day if she regularly took her child to school. She was not having panic attacks when she went outside if she regularly took her child to school, engaged the teacher in normal conversation, participated normally in the purchase of a car, and went on trips and vacations, including to amusement parks and even New York City. Someone who is afraid of crowds would not be shopping in and around Times Square. Further, someone who is afraid of crowds would not select frequent vacations to amusement parks (at least 6 trips since the onset of her disability) and New York City nor attend stadium events. Tr. 51, 53, 54; SSA Ex. 10.

Compelling evidence thus establishes that Respondent Javier Bonilla made false statements and representations to SSA for its use in determining Denisse Bonilla's ongoing eligibility for Social Security disability benefits.

***2. The IG proposes a reasonable penalty, \$25,000, against Respondent Javier Bonilla.***

The IG may impose a CMP of not more than \$5,000 for each false statement or misrepresentation. Act §1129(a)(1); 20 C.F.R. §§ 498.103(a), 498.104.

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

I note that Respondent Javier Bonilla has no history of prior offenses.

With respect to his financial condition, the respondent bears the burden of establishing that his financial condition prevents him from paying the penalty. *SSA v. Clara Sloan*, DAB CR1081 (2003), *Recommended Decision to Decline Review*, App. Div. Dkt. No. A-04-03 at 2 (Feb. 9, 2004) (finding "no basis to disturb the ALJ's . . . legal conclusions."). Respondent Javier Bonilla submitted a financial disclosure form for its use in determining his ability to pay a penalty. *See* SSA Ex. 7. According to the form, he is employed by the county government, earning \$2,200 per month, has few savings and little equity in his



