

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

The Inspector General of the Social Security Administration,

Petitioner,

v.

Rosalie Smiley,

Respondent.

Docket No. C-14-258

Decision No. CR4799

Date: February 28, 2017

DECISION

In decisions dated September 23, 2011 and November 16, 2011, an Administrative Law Judge (ALJ) for the Social Security Administration (SSA) awarded Social Security disability insurance benefits to Respondent, Rosalie Smiley. A year later, however, a second ALJ reopened those decisions, finding that the benefits had been awarded because of Respondent's (and other's) fraudulent representations. The ALJ concluded that Respondent Smiley was not disabled.

In this case, the Inspector General (IG) for SSA charges that Respondent Smiley violated section 1129 of the Social Security Act (Act) because she knowingly misrepresented and withheld from SSA material information regarding her functional abilities and that she did so in order to obtain disability benefits. SSA proposes imposing against her a civil money penalty (CMP) totaling \$87,000 (\$42,000 penalty + \$45,000 assessment in lieu of damages).

For the reasons set forth below, I agree that Respondent Smiley knowingly misrepresented and withheld from SSA facts material to determining her eligibility for

disability insurance benefits. Based on her multiple deceptions and abuse of the administrative process, an \$87,000 CMP is not unreasonably high.

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,

(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.

Here, Respondent Smiley applied multiple times for disability insurance benefits, and her claims were denied until, on her fourth attempt, an SSA ALJ reopened two of her earlier applications and awarded her benefits. The IG, however, contends that, in pursuing her claims, she knowingly made false statements of material fact and deliberately withheld information regarding her functional abilities so that she would be awarded benefits.

By letter dated August 30, 2013, the IG advised Respondent Smiley of his determination and the proposed penalty. SSA Exhibit (Ex.) 8. Respondent requested a hearing.

On August 30, 2016, I convened a hearing, via video teleconference, from the offices of the Departmental Appeals Board in Washington, D.C. The parties and witnesses appeared from Kansas City, Missouri. Ms. Joscelyn Funnié appeared on behalf of the SSA IG and Mr. Lance Lowenstein appeared on behalf of Respondent Smiley. I have admitted into evidence SSA Exs. 1-16 (including four DVDs that are part of SSA Ex. 2), SSA Exs. 18-19, and Respondent (R.) Exs. 1-5. Transcript (Tr.) 5; Amended Summary of Prehearing Conference at 2 (August 11, 2016).

The parties have submitted pre-hearing briefs (SSA Br. and R. Br.). The IG submitted a post-hearing brief as well (SSA Post-hrg. Br.). Although directed to do so, Respondent did not file a post-hearing brief.

Issues

The issues before me are:

1. Did Respondent Smiley make, or cause to be made, to SSA, a statement or representation of a material fact that she knew or should have known was false or misleading, for SSA's use in determining her right to Social Security disability insurance benefits (title II) and/or the amount of those benefits, or did she omit a material fact or make such a statement with knowing disregard for the truth; and
2. if so, is the proposed penalty – \$87,000 (\$42,000 penalty + \$45,000 assessment in lieu of damages) – reasonable?

Discussion

1. ***Respondent Smiley violated section 1129 of the Act because, knowingly, she withheld material information and made false statements and misrepresentations to SSA for its use in determining her eligibility for Social Security disability insurance benefits.¹***

Title II of the Act governs the Social Security disability insurance program, an insurance program that pays benefits to individuals who are aged, blind, or disabled and are insured. Act § 223; 20 C.F.R. § 404.315. Respondent Smiley's insured status expired on

¹ My findings of fact/conclusions of law are set forth, in italics and bold, in the discussion captions of this decision.

March 31, 2009. SSA Ex. 1 at 11. Title XVI governs the Supplemental Security Income (SSI) program. SSI pays benefits to individuals who are aged, blind, or disabled and have limited income and resources. Act § 1601; 20 C.F.R. §§ 416.202; 416.1100.

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.

Respondent Smiley applied unsuccessfully for Social Security disability insurance and SSI benefits on November 25, 2008 and July 1, 2009, respectively. SSA Ex. 19 at 5; *see* SSA Ex. 13 at 1-6.² On May 24, 2010, she again applied for title II benefits, alleging that, since January 1, 2009, she had been unable to work because of her disabling condition: crushed pelvis, low back pain, tailbone/hip pain, knee pain, and depression. She said that she found it difficult to stand, sit, or walk for a long distance. She said that her sacrum was broken and that she had stomach ulcers. SSA Ex. 5 at 4; SSA Ex. 13 at 12-13; SSA Ex. 19 at 5. Her application was denied initially and on reconsideration, and she asked for a hearing before an ALJ. The hearing was held on September 9, 2011. SSA Ex. 19 at 5.

On the day of her scheduled hearing, Respondent Smiley wandered into the office of SSA’s Cooperative Disability Investigations Unit in Kansas City, Missouri, looking for her hearing site. Special Agent Jon Guilford, Investigator James Carmack, and others observed her. She carried a walker, but placed little or no weight on it. SSA Ex. 5 at 3, 25-27. Agent Guilford escorted Respondent to the building’s main lobby and over to the appropriate elevator bank. He testified that the walker “appeared to be more of a prop” for her because of the way she was holding, lifting, and carrying it. It also looked old and dated. Tr. 65, 69. Based on his observations, he assumed that she did not need a walker. Tr. 67.

Later that day, when her hearing was over and she had left the building, an investigator observed her lift the walker into the bed of a pickup truck. Their suspicions piqued, the investigators contacted the Office of Disability Adjudication and Review (the SSA component charged with hearing and deciding disability appeals) to report their observations, and they opened an investigation. SSA Ex. 5 at 3, 27.

The SSA ALJ assigned to hear the case refused to delay her decision so that she could consider the results of the investigation, calling it “inappropriate” to consider evidence from outside sources. She declared that she would “leave the OIG investigation to the

² These were not her first applications. Respondent Smiley applied in 2003, claiming that she was disabled because of a crushed pelvis, knee pain, and because she was legally blind. SSA Ex. 5 at 6, 21. The application was denied.

OIG investigators,” and, in a decision dated September 23, 2011, she reopened Respondent’s prior applications, found her disabled as of January 1, 2009 (and thus insured under title II), and awarded her disability benefits. SSA Exs. 11, 19.

The ALJ’s refusal to consider the investigators’ evidence is puzzling inasmuch as the regulations and SSA’s written policies require the ALJ to accept as evidence any documents that are “material to the issues.” 20 C.F.R. § 404.944; SSA Ex. 11 at 1, *citing* HALLEX Temporary Instructions No. 1-5-1-15. Evidence such as that produced by the investigators – of a claimant performing activities that she and her physician maintain she is unable to perform – must be considered material.

Reminded of her obligation to consider the evidence, the ALJ reopened the case and held a second hearing on November 9, 2011. SSA Ex. 11. She was apparently not persuaded by the investigators’ report and accepted Respondent’s explanations for her obvious ability to perform activities (as observed and recorded by the investigators) that far exceeded her claims of functional limitation. In a decision dated November 16, 2011, the ALJ again found Respondent disabled as of January 1, 2009. SSA Ex. 19. The decision refers to the investigators’ report and finds it “credible,” but does not explain why the ALJ rejected its contents except to say that “based on the record as a whole,” including the treating physician’s statement – which the physician himself disclaimed and then disclaimed his disclaimer (see below) – and the claimant’s testimony, she found the claimant disabled. SSA Ex. 19 at 9. The decision does not mention any of the compelling video evidence, discussed below, which gives lie to the claims of Respondent and her treating physician.

As authorized by regulation, SSA’s Appeals Council reviewed the ALJ decision and remanded the case, directing the ALJ to consider whether Respondent Smiley obtained her previous favorable ruling through fraud or similar fault. 20 C.F.R. § 404.969; *see* SSA Ex. 11 at 1. A newly assigned ALJ held a third hearing on October 2, 2012. SSA Ex. 1 at 4; SSA Ex. 18. In a final decision, dated November 2, 2012, the new judge reopened the earlier decisions and found that they were based on “fraud or similar fault.” She determined that Respondent Smiley was not disabled. SSA Ex. 1.

Review of the evidence establishes a significant disconnect between, on the one hand, the level of function Respondent Smiley (and others) claimed she had and, on the other hand, the level of function she repeatedly demonstrated.

Respondent’s representations:

- When she applied for benefits in 2010, Respondent Smiley claimed that she found it difficult to perform everyday activities like dressing, bathing, and picking up around the house. She said that it was “too painful” to stand, walk, or sit for longer than ten to fifteen minutes at a time. SSA Ex. 13 at 18. She also said that

her disability “has been constantly getting worse,” that her crushed pelvis affects all that she does, and that she could not enjoy any normal activities. She said that she obtained relief only when lying on her back. SSA Ex. 13 at 19; *see* SSA Ex. 5 at 7.

- With Respondent’s knowledge, her physician, S. R. Reddy Katta, M.D., told SSA that she could lift and carry less than five pounds frequently (i.e., one-third to two-thirds of an eight-hour day) and could lift and carry five pounds occasionally (i.e., up to one-third of an eight-hour day). He checked that she could stand and walk continuously for less than 15 minutes; that she could stand and walk for up to two hours in an eight-hour day; and that she uses a cane or walker “depending on the severity of her pain.” He checked that she could sit without break for less than 15 minutes, and, with breaks, could sit for up to two hours in an eight-hour day. He described her ability to push and/or pull as “very limited, if at all.” He said she could *never* stoop, kneel, crouch, or crawl. SSA Ex. 5 at 15, 16, 19; Tr. 18-20; *see* SSA Ex. 1 at 8; SSA Ex. 19 at 8.

Dr. Katta also wrote that, to alleviate her pain, Respondent Smiley needed to lie down for at least a few minutes every hour and sometimes she had to lie down for up to an hour, the duration depending on the severity of her pain. SSA Ex. 5 at 16. He wrote that she took narcotic pain medications on a regular basis. SSA Ex. 5 at 16.³

- In appealing the initial and reconsidered denials of her 2010 application, Respondent answered written questions about her limitations. She again claimed that her condition was “constantly getting worse month by month and year by year.” She said that she could not enjoy “any normalcies in my life at all.” She said that her crushed pelvis affected everything she did and that lying on her back was the only position that relieved her pain. SSA Ex. 5 at 23, 26; SSA Ex. 13 at 19.

After it became apparent that the investigators’ observations would be relevant to her case, Respondent seems to have altered her claims to account for the unmistakable fact that she has been performing the types of activities that she (and her physician)

³ It is also worth noting, as the investigators did, that Dr. Katta’s clinical records do not seem to support his original opinion as to Respondent’s functional limitations. SSA Ex. 5 at 4-5. Dr. Katta does not suggest that Respondent is disabled by a fractured pelvis and his records include no x-rays of her hips. SSA Ex. 18 at 8. He wrote that she has degenerative disc disease and degenerative joint disease affecting her lumbar spine “but *no clinical evidence* of ongoing lumbar radiculopathy” (emphasis added). R. Ex. 5 at 2 (Katta Decl. ¶ 6).

previously claimed she was incapable of performing. She no longer claimed that she could not sit, stand, or walk for more than 15 minutes. She allowed as how she could perform some “normal” activities:

- At her November 9, 2011 SSA hearing, Respondent Smiley testified that she suffers pain “every day and all day.” She said that medications helped to ease the pain, but did not eliminate it. If, on her “good days” she overextends herself, she claimed that she must spend the entire next day lying down. SSA Ex. 1 at 9; *see* SSA Ex. 6 at 1.

On November 9, 2011, she also testified that, while standing, she could hold her approximately 14-pound grandchild for just five to ten minutes. She could hold the child for 30 minutes, if she were sitting down. SSA Ex. 1 at 9.

- At her October 2, 2012 SSA hearing, Respondent testified that she has tendonitis in her wrists, so it hurts to use her walker or cane. Nevertheless, she testified that she uses them “periodically,” when she leaves the house. She said that she needs the assistance if she has to walk for more than five minutes. SSA Ex. 18 at 2.

She said that, when she takes her pain medications, her pain level is up to “around 6 and 7” (on a 10-point scale), and never falls below 4. SSA Ex. 18 at 5.

She claimed that her physicians, including Dr. Katta, told her that she should not stand, walk, or sit for more than 15 minutes; they told her not to lift more than five pounds; and no twisting, bending, pulling, or punching. SSA Ex. 18 at 3. She repeated that she is unable to walk for more than 15 minutes and must stop “about every hundred yards.” She said that she cannot stand or sit for more than 15 minutes and shifts constantly while sitting. SSA Ex. 18 at 5.

She also testified that she did not babysit for her granddaughter because she was not able to do so. SSA Ex. 18 at 3.

With respect to other activities, she testified that she sometimes needs help with her personal grooming needs. She is unable to get out of bed without assistance as often as two or three days a week, depending on her pain level and the weather. She said that she drives two to three times a week, generally for no more than 20 minutes. SSA Ex. 18 at 5. She said that she cannot prepare a full meal, cannot do the dishes or make a bed, and cannot dust. Incredibly, she said that *she does not pick up her grandchild*, and must be sitting down to hold her. Even then, she said that she could hold her for five minutes only. SSA Ex. 18 at 6.

During these proceedings, she made similar claims:

- In a letter dated November 3, 2013, she requested a hearing and repeated that her functional abilities “change daily, weekly, monthly, yearly.” She claimed that her ability to walk without assistance varies from day to day. Sometimes she “can’t walk for weeks at a time”; some days she can walk with assistance; and some days she can walk with no assistance. She wrote that “every single day is a day of pain,” and, because she previously broke her wrists, using a walker or cane is painful. SSA Ex. 6 at 1.
- During the hearing, she testified that she was aware that Dr. Katta wrote that she could never stoop or crouch, and that this statement was not accurate. Tr. 19-20. But she did not report the inaccuracy to SSA. This admission, by itself, establishes that she violated section 1129.

When asked what she told her physician about her ability to stand, walk, and lift, she was evasive, complaining that the question was “confusing” and, ultimately, denying that she told him anything about her functional limitations. Tr. 20-23. In fact, Dr. Katta’s treatment notes indicate that *she told him* that she could not stand, sit, or walk for more than ten minutes before the pain worsens. She said that the pain made it difficult for her to use the toilet, dress, bathe, eat, or get up from a bed or chair. She told him that she needed a cane or walker at times. SSA Ex. 5 at 6.

The video evidence of Respondent’s functional abilities:

The IG produced four DVDs, which show Respondent Smiley standing, walking unassisted, bending, crouching, lifting and carrying significantly more than five pounds, and, generally performing all of the activities that she and her physician told SSA she could not perform.

- When, on September 9, 2011, Respondent Smiley completed her ALJ hearing and left the building, Investigator James Carmack watched and recorded her movements. His video shows her standing across a busy street, leaning against a wall, with the walker in front of her. She is not holding on to it but appears to be dialing or texting on a cell phone. After about a minute, she puts the cell phone away and stands with her hands on the walker, but then removes them. She walks up the street, pushing the wheeled walker in front of her, for a distance of about 20-25 yards. She stands waiting at the corner for less than a minute, and then wheels the walker back down the street. She waits a minute and then walks back up the street. A pickup truck pulls up to the curb and the video shows her entering the truck’s cab, unassisted and without the walker. SSA Ex. 2, DVD #3, V-0001.AVI. Although not shown on the video, Investigator Carmack reported that she folded up the walker and, from several feet away, threw it into the cargo bed of the pickup. She then walked to the cab door, opened it, and got in, moving

“with a fluid motion and at a normal pace,” all without any assistance. Investigator Carmack’s observations are wholly consistent with the video. SSA Ex. 2 at 2; SSA Ex. 5 at 3, 27.

The investigators took their cameras to Respondent’s home, a farm in rural Kansas. On the days they were there, she and her family were moving the household. A moving van and multiple movers appear throughout the footage.

- A 20-minute DVD, recorded September 27, 2011, opens with Respondent Smiley sitting on a porch, partially obscured by a tree. She is holding a baby (who, she has conceded, weighed at least 11 pounds).⁴ After a couple of minutes, a man, identified as Special Agent Guilford, approaches her. She stands, lifting the baby. Carrying the baby, she walks down the three porch steps into the yard. She moves without apparent difficulty. She has no assistive devices, not even shoes. Holding the baby in one arm, she walks a short distance and pulls out a cell phone. She continues to engage Agent Guilford in conversation, occasionally jostling the baby. After about three to four minutes, she dials the phone and is on the phone for about three minutes. She returns to conversing with the agent, holding the baby in one arm, while pointing and gesturing. At the 15-minute mark, she again pulls out the phone and speaks for about four minutes, holding the baby in one arm, in no apparent discomfort. Shortly after the 20-minute mark, she shakes hands with the agent; he leaves; she walks unimpeded up a narrow, fairly unstable ramp (put up by movers) and enters the house, all the while carrying the baby. SSA Ex. 2, DVD #1, MOV023; SSA Ex. 5 at 30-33; *see* SSA Ex. 2 at 2. Note that, according to Agent Guilford, the activity would have continued, but *he* ended the conversation. SSA Ex. 5 at 10; Tr. 74.
- A second DVD, recorded September 28, 2011, shows Respondent Smiley, wearing flip flops, walking from her yard, up the short ramp, into her house. She walks through the house, bends slightly to speak to a parrot in a large cage, then exits through the back door, down the back steps, and outside. She walks out past a shed with farm equipment parked outside. She enters and walks through another large, cluttered shed. After speaking to people in there, she leaves, walks through the farmyard, stopping to talk. Throughout the 18-minute clip, she is walking, standing, gesturing, and talking to people. She uses no assistive device and displays no apparent discomfort or other impediment. SSA Ex. 2, DVD # 3, V-0007.AV1; *see also* DVD # 4; *see* Tr. 74.

⁴ Respondent testified in this case that her grandchild weighed 11 pounds when this DVD was recorded. Tr. 24. During her November 9, 2011 hearing before the SSA ALJ, she testified that the baby weighed 14 pounds. SSA Ex. 1 at 9. Following the October 2, 2012 hearing, the ALJ concluded that the child weighed between 12 and 16 pounds. SSA Ex. 1 at 8; *see* SSA Ex. 5 at 10 (estimating that the baby weighed 15-20 pounds).

- Additional footage, also recorded on September 28, shows Respondent Smiley approaching a large pickup truck. She climbs into the cab effortlessly, backs the truck up a distance, and steps out. She walks to the back of the truck, reaches into the cargo bed, standing up on her tip toes to see what's inside. She walks around and removes a baby's tray. She returns to the original side of the truck and pulls a baby walker out of the cargo bed, which she balances on the side of the truck as she attaches the tray. She then lifts the baby walker out of the truck, bends as she puts it on the ground and, still bending, bounces it up and down. SSA Ex. 2, DVD #2, MOV02B; SSA Ex. 5 at 38. After a break in the video, she has removed the tray, lifts the walker up above her shoulders and throws it into the back of the truck. She climbs back into the truck's cab and drives away. SSA Ex. 2, DVD #2, MOV02C. She is later in the front seat of the truck, bending to the side. She straightens up, backs up the truck, and drives off. SSA Ex. 2, DVD #2, MOV02D; *see* Tr. 74.
- The same DVD shows Respondent Smiley standing and walking around her property, without assistance. The terrain is uneven but she displays no apparent problems. SSA Ex. 2, DVD #2, MOV024, MOV025, and MOV026; *see* Tr. 74.
- The DVD also shows her, with her husband, bending over what appears to be a simple trailer (four wheels and a frame). She stands, takes out her cell phone, moves around the trailer, crouches down and appears to be taking pictures of one of the wheels. She stands back up and walks up a fairly steep incline, all unassisted and with no apparent discomfort. SSA Ex. 2, DVD #2, MOV028; SSA Ex. 5 at 36, 37; *see* Tr. 74.
- The investigators followed Respondent when she drove her truck to a tire repair shop. The DVD shows her standing (again, without assistance) and speaking to shop employees. She reaches into the cab of the truck, on her toes and bending from the waist. She walks around the truck and bends down, apparently picking something up off the ground. She watches the shop employee putting air into the truck tires and eventually squats to sit on a low curb (far lower to the ground than a chair would be). She then stands and walks, bending over to examine the truck tire. She straightens up and calls someone on her cell phone. SSA Ex. 2, DVD #2, MOV033; SSA Ex. 5 at 34, 35, 36. While still on the phone, she bends into the truck cab on the passenger side. Coming out of the truck, she bends down and touches her foot. SSA Ex. 2, DVD #2, MOV034; *see* Tr. 74.

The agents' additional findings:

Early in the move, the investigators observed Respondent's cane and walker being loaded on to a moving truck. SSA Ex. 2, DVD #1, MOV01B (in which the investigator declares

“for the record, [the movers] just loaded the walker; if she needs that, they wouldn’t be putting it on the [moving] truck.”). Respondent Smiley told Agent Guilford that “she wasn’t going to see the contents of that truck for some time.” Tr. 73. Respondent Smiley has not denied this, and I note that no assistive device is visible at any point in the September 2011 video footage.

On September 27, 2011, the investigators interviewed Respondent Smiley’s neighbor, who has lived next door to her for about three years. He told them that he had never seen her using a walker or any assistive device. In fact, she was able to walk and stand with no apparent difficulty. SSA Ex. 1 at 8; SSA Ex. 5 at 10; Tr. 74.

The investigators reviewed Respondent Smiley’s social networking site. They found a picture of her, which they opined was taken while she was sitting on a horse (based on her posture and the height at which she sat). SSA Ex. 5 at 9-10. Respondent Smiley admitted that, when the picture was taken, she *was* sitting on a horse. She denied that she was riding the horse. She testified that, while vacationing in Cabo San Lucas, Mexico (March 2011), she and her husband were on the beach when they came upon a group of strangers with horses who tried to get them to ride. She said that she told them she couldn’t ride, and so they insisted that she sit on the horse. When she did so, they took her picture. Tr. 27. I did not find her explanation credible.

Respondent’s Travels:

The investigators discovered that Respondent had taken some significant trips, which would have been incompatible with her claims of functional limitation:

- In March 2010, she drove with her daughter from Kansas to Corpus Christi, Texas, a 16-hour trip;
- In March 2010, Respondent Smiley also traveled to Mexico, re-entering the country by car, accompanied by her parents;
- In August 2010, she and her daughter drove to Arkansas, a 7.5-hour trip, and returned four days later;
- In March 2011, she flew from Dallas, Texas, to Cabo San Lucas, Mexico, and returned about a week later;
- In March 2012, she and her daughter drove from Kansas to Dallas to visit her husband; it was an 8.5-hour trip, and she stayed in Dallas for just three nights;

- In July 2012, she and her daughter again drove from Kansas to Dallas.

SSA Ex. 1 at 9-10; SSA Ex. 12 at 2.

Dr. Katta's changing and unreliable opinions:

Special Agent Guilford interviewed Dr. Katta on September 29, 2011. He showed the doctor the investigators' video clips. Dr. Katta conceded that Respondent did not appear disabled and told Agent Guilford that he had changed his mind about her physical limitations. He said that she did not appear to be in any distress (as is obvious from the videos). He wrote down this revised opinion and gave the written note to Agent Guilford. SSA Ex. 1 at 9; SSA Ex. 5 at 11-12.

Thereafter, it seems that Dr. Katta may have changed his mind again. On October 26, 2011, Respondent's attorney produced a letter, purportedly from the doctor, stating that, although Respondent is reluctant to use a cane or walker, she must sometimes do so when in distress. The letter also says that Respondent Smiley feels better when taking pain medication. To justify the activities she engaged in on the video, he writes that she is able to perform them so long as her pain is controlled by medication. SSA Ex. 1 at 9; SSA Ex. 19 at 9. To explain his earlier discrepant opinion, the letter alleges that he (Dr. Katta) was intimidated by the SSA investigator. But, during the hearing before me, Dr. Katta categorically denied ever telling Respondent's counsel or anyone else that he had been intimidated by the investigators: "I never said anything like that." Tr. 54-55.

In awarding Respondent benefits the second time, the SSA ALJ relied heavily on Dr. Katta's letter.

Dr. Katta has proven to be singularly unreliable. In these proceedings, Respondent submitted a written declaration that he purportedly swore to and signed. R. Ex. 5. The declaration again departs from Dr. Katta's earlier opinions, as it attempts to reconcile the incontrovertible video evidence with his earlier claims. In the declaration, Dr. Katta concedes that Respondent has been able to walk without a cane or walker for as long as he has treated her, but says that he advised her to use an assistive device. R. Ex. 5 at 1 (Katta Decl. ¶ 3). The declaration also says that Dr. Katta prescribed pain medication so that Respondent could be mobile. R. Ex. 5 at 1 (Katta Decl. ¶ 4). It alleges that Agent Guilford misrepresented the doctor's remarks during their September 29 meeting. According to the declaration, he told the agent that Respondent did not appear disabled because "she was likely using her pain medication." R. Ex. 5 at 2 (Katta Decl. ¶ 5).⁵

⁵ Agent Guilford has been completely credible and consistent in his written statements and his testimony. I have no doubt that he spoke truthfully when he said that, after viewing the videos, Dr. Katta changed his mind about Respondent Smiley's functional

Ultimately, however, Dr. Katta refused to defend any part of this declaration. He claimed that he could not remember signing it. Tr. 52-54.

Dr. Katta has offered multiple, inconsistent statements and opinions. He has demonstrated a willingness to change his opinion based on who asks him for it rather than on any underlying conviction. And, at the end of the day, he has refused to defend any of them. I therefore conclude that not one of his statements or opinions is credible.

Respondent's defenses:

Respondent defends herself by repeating the arguments she made to the SSA ALJs. She maintains that she was able to perform the activities the videos show her performing because she was heavily medicated. According to Respondent, when she has to be more active, she takes more pain medications than normal, but she “pays a dear price” for that activity: she has to “recover from the pain over a period of days, bedridden.” R. Ex. 3 at 1-2 (Rosalie Smiley Decl. ¶ 2); Tr. 28-29.

First, this defense represents a departure from her original statements to SSA. In those, she did not suggest that she was able to perform the activities she performs on the videos (stand and walk for significant periods of time; lift and carry at least ten pounds for significant periods of time; bend, stoop, and crouch), with or without medication. If, in fact, her pain medication was as remarkably effective as she suggests – allowing her to engage, with relative ease, in all of the activities she said she could not perform – she was required to disclose that information to SSA. Failing to do so violated section 1129.

Second, anyone with the level of pain and functional limitation she alleges could not have moved with the ease Respondent demonstrated throughout the videos and when otherwise observed by the investigators. Moreover, her other activities – the long-distance drives, mounting a horse on a Mexican beach – are simply incompatible with the level of dysfunction she described to SSA in her efforts to get benefits. And, if she regularly needed an assistive device, she would have kept one of them within reach, rather than shipping them both off with the movers, inaccessible to her for an indefinite period.

Third, she claims to have been heavily medicated, but her behavior shows that she had complete control of all of her faculties. She walked normally even while carrying a baby.

limitations and told him that Respondent did not appear to be in any distress. In any event, Dr. Katta has effectively disavowed the contents of his written declaration (R. Ex. 5), so Agent Guilford's testimony is unchallenged.

She demonstrated no problems with balance or coordination, even as she stooped and squatted. She spoke to Agent Guilford and others without any stumbling. She was able to enter and exit her truck and to drive the fairly large and unwieldy vehicle – forward and backward – without difficulty and on public streets.

Finally, she claimed that a day of exertion would be followed by days of pain and immobility. Yet the investigators observed and filmed her activities for two days in a row. She appeared just as capable on the second day as she did on the first. Indeed, to accept Respondent's arguments, I would have to surmise that she was extraordinarily unlucky in that the investigators happened to observe and record her movements on the only three days that she was fully functional. I do not find this plausible, particularly in light of her vacations, driving trips, and other evidence that she lived a fully functional life.

Thus, the IG presents compelling evidence that, contrary to her representations to SSA, Respondent Smiley was able to walk – and often walked – without any assistive device. She could lift and carry significantly more than ten pounds frequently and was able to bend, stoop, squat, and crouch. Because, in her efforts to obtain disability insurance benefits, she misrepresented her functional abilities and allowed (perhaps encouraged) others to misrepresent those abilities, she violated section 1129 and is subject to penalties.

2. The proposed CMP – \$87,000 – is not unreasonably high.

Penalty. The statute allows SSA to impose a penalty of not more than \$5,000 for each false statement or misrepresentation and \$5,000 for each receipt of benefits or payments while withholding disclosure of material facts. Each month an individual withholds a material fact counts as a separate instance of making a false statement and/or misrepresentation of a material fact. Act §1129(a)(1); 20 C.F.R. §§ 498.103(a), 498.103(b); *see* SSA Ex. 8.

Based on the false information she provided and her failure to disclose true information, SSA paid benefits to Respondent Smiley for 42 months (June 2009 – November 2012). The amount of the proposed penalty – \$42,000 – is thus significantly lower than the maximum authorized by the statute and regulations, which would have been \$210,000.

Assessment in lieu of damages. SSA may also impose an assessment in lieu of damages of not more than twice the amount of benefits or payments paid as a result of the false statements or misrepresentations or the withholding of disclosure. Act § 1129(a)(1); 20 C.F.R. § 498.104.

As a result of her deception, the IG determined that SSA overpaid Respondent Smiley \$44,599.60, which represents benefits paid from June 2009 through November 2012.

SSA Ex. 14; SSA Ex. 15 at 2, 3 (Weikal Decl. ¶¶ 6, 12). The IG's proposed assessment in lieu of damages – \$45,000 – is significantly lower than twice the amount of the benefits paid as a result of Respondent's misrepresentations and withholding of information (\$89,199.20)

The proposed penalty and assessment in lieu of damages are therefore well within statutory and regulatory limits.

Regulatory criteria. I now apply 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.

SSA does not contend that Respondent Smiley has a history of prior offenses.⁶

With respect to her financial condition, the respondent bears the burden of establishing that her financial condition prevents her 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.”). She has not met that burden. She has submitted no reliable evidence of her household income and expenses but provides confusing, contradictory, and unsupported statements. *See, e.g.*, Tr. 34-35.

I reject as unreliable and out-of-date her financial disclosure form and additional statement regarding her finances. SSA Ex. 6 at 3-5; SSA Ex. 9. In those, she lists as dependents her adult daughter and her granddaughter, although she is not legally responsible for them and concedes that she is not able to claim them as dependents for federal income tax purposes. SSA Ex. 6 at 3; SSA Ex. 9; Tr. 17. She claims no assets of any value (total assets \$400) and lists \$60,000 in debt, much of it attributable to her “dependents.” SSA Ex. 6 at 4. She testified that she pays all of her adult daughter's bills. Tr. 12. But during her October 2012 hearing, she testified that she “basically” lived off her daughter, who worked as a waitress. SSA Ex. 18 at 2. In these proceedings, her daughter denied that Respondent paid her bills; she testified that she works, contributes to the household, and pays all of her own bills. Tr. 86-87.

⁶ The investigators, at least, suspected fraud with Respondent Smiley's 2003 application for benefits. *See, e.g.*, SSA Ex. 15 at 2 (Weikal Decl. ¶ 8); Tr. 59. However, the IG has not pursued that issue.

Respondent currently lives with her husband, whose income is somewhere between \$80,000 and \$100,000 a year. Tr. 10. According to the SSA investigation, her husband's annual income was more than \$100,000. SSA Ex. 11 at 3. At her October 2012 hearing, Respondent testified that her husband made \$80,000 a year. SSA Ex. 18 at 2. During these proceedings she testified that her husband earns \$87,000 a year. Tr. 16.

Even if Respondent had reliably established a distressed financial condition, her misconduct was substantial and would justify a high CMP. For years – up to and including during these proceedings – she has misrepresented her functional abilities and authorized her physician to do the same. Indeed, rather than acknowledging the obvious discrepancies between the investigators' videos and her representations to SSA, Respondent doubled down and continued to maintain that she is unable to perform the tasks that the videos show her performing with relative ease. For this she is culpable.

Finally, the integrity of the disability program depends on each claimant accurately describing her functional abilities. It is no secret that the disability appeals process is at the breaking point, and the pressure on SSA's ALJs to adjudicate cases is enormous and unrelenting.⁷ As this case illustrates, so long as she can secure a physician's cooperation, it is all too easy for an unscrupulous claimant to game the system and obtain thousands of dollars in benefits to which she is not entitled. And the odds of discovery are relatively small. Here, but for some blind luck and the tenacity of a few investigators, an unqualified claimant would still be receiving benefits. Penalties must therefore be significant enough to deter such wrongdoing.

Conclusion

Respondent Smiley violated section 1129 of the Act because she knowingly withheld material information and knowingly made false statements and misrepresentations to SSA for its use in determining her eligibility for Social Security disability insurance benefits. Considering the nature of her misstatements, the circumstances surrounding her misconduct, and her culpability, \$87,000 is not an unreasonably high CMP.

_____/s_____
Carolyn Cozad Hughes
Administrative Law Judge

⁷ For example, in the year she awarded Respondent Smiley her benefits, the SSA ALJ personally adjudicated an astonishing 833 cases, 727 of them requiring decisions.