

The Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the case of:)	
)	
Social Security Administration,)	Date: March 9, 2010
)	
Petitioner,)	
)	
- v. -)	Docket No. C-09-149
)	Decision No. CR2087
Steven Getchell.)	
_____)	

DECISION

In applying for disability benefits under the Social Security program, Respondent Steven Getchell claimed to suffer from a plethora of disorders, including bi-polar disorder, depression, chronic fatigue, fibromyalgia, arthritis, and irritable bowel syndrome. He claimed to be in constant pain, which precluded him from engaging in any significant physical activity. The Inspector General (IG) for the Social Security Administration (SSA) now charges that Respondent Getchell violated section 1129 of the Social Security Act (Act) because he repeatedly and knowingly made to SSA false statements and misrepresentations of material fact regarding his alleged disability, functional abilities, and activities. SSA proposes imposing against Respondent Getchell a \$60,000 civil money penalty (CMP).

For the reasons set forth below, I agree that Respondent Getchell knowingly misrepresented material facts to SSA for its use in determining his eligibility for disability insurance and Supplemental Security Income (SSI) benefits, and I consider \$60,000 a reasonable penalty.

I. Background

Section 1129 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 or benefits or payments

under title . . . XVI, that the person knows or should know is false or misleading,¹

(B) makes such a statement or representation for such use with knowing disregard for the truth, or

(C) omits from a statement or representation for such use, or otherwise withholds disclosure of, a fact which the person knows or should know is material to the determination of any initial or continuing right to or the amount of monthly insurance benefits under title II or benefits or payments under title . . . XVI, if the person knows, or should know, that the statement or representation with such omission is false or misleading or that the withholding of such disclosure is misleading

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 or Title XVI 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 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, the IG contends that, in pursuing his applications for disability insurance and/or SSI benefits, Respondent Getchell knowingly made false statements of material fact and misrepresentations regarding his alleged disability, his functional abilities, and his activities. By letter dated December 11, 2007, the IG advised Respondent Getchell of his determination and the proposed penalty. IG Ex. 23. Respondent Getchell requested a hearing.²

After the parties submitted their prehearing briefs and proposed exhibits, the IG moved for summary judgment. I denied the motion. I agreed with the IG that Respondent Getchell had produced little evidence suggesting material facts in dispute, but, drawing

¹ Title II of the Act governs the Social Security disability insurance program, and Title XVI governs the SSI program.

² I initially dismissed Petitioner’s hearing request as untimely because it was not filed within 60 days of his receipt of the IG’s notice letter. However, on appeal, Respondent successfully argued that good cause justified extending the time permitted for filing, and the matter is now before me on remand.

all reasonable inferences in the light most favorable to Respondent, I could not conclude that *no* material facts were in dispute.

I convened a hearing on November 16, 2009, in Tampa, Florida, at which Respondent Getchell was represented by Mr. N. Albert Bacharach, Jr. The IG was represented by Ms. Debbie Shaw and Ms. Erin Justice.

I have admitted into evidence IG Exhibits 1-27 (IG Exs. 1-27) and Respondent's Exhibits 1-7 (R. Exs. 1-7).

II. Issues

The issues before me are: 1) Did Respondent Getchell make, or cause to be made, to SSA a statement or representation of a material fact for use in determining his entitlement to Social Security Disability Insurance benefits (Title II) and/or SSI benefits (Title XVI) that he knew or should have known was false and misleading, or did he omit a material fact or make such a statement with knowing disregard for the truth; and 2) if so, is the penalty imposed -- \$60,000 -- reasonable?

III. Discussion

A. Respondent Getchell repeatedly made statements or representations to SSA that he knew or should have known were false or misleading.³

In on-line applications filed in January 2004, Respondent Getchell applied for disability insurance benefits and/or SSI benefits, claiming that, since October 9, 2002, he had been unable to work because of his physical and mental condition. IG Exs. 1, 2. In a questionnaire he completed and signed on February 16, 2004, he admitted that he performed some household chores (laundry, dishes, yard work and other chores), but said that he was not capable of handling finances, showered only every few days, and often wore the clothes he slept in. He said that he exercised less, had no social activities, and "limited, controlled activities." He specifically denied being active in church groups, claiming that he stopped going to church because "the large amount [sic] of people in such a confined space is difficult to handle." IG Ex. 3, at 2. He denied visiting friends or relatives; he said that he was unable to remember things, had a short attention span, had trouble finishing simple jobs, and could not follow written or spoken instructions ("Sometimes I forget what I need to do."). He said that he could not deal with deadlines or schedules. IG Ex. 3 at 3-4.

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

In a separate questionnaire, Respondent Getchell described “constant” pain throughout his body (toes, feet, knees, hips, lower and upper back, shoulder, right elbow, wrists, fingers, neck, and muscles) “all day, every day.” IG Ex. 4, at 1. He said that he was “always in pain.” He claimed that massage and physical therapy did not relieve the pain, and that medication worked only temporarily. With respect to daily activities, he said that he needed to rest after long periods of housework, that long periods of walking, lying down, and sitting caused him severe pain, and that he needed rest after and during physical work. IG Ex. 4, at 2-3.

In his subsequent submissions to SSA, Respondent Getchell repeated that he could “no longer exercise much” and that “golf, tennis [and] softball have been taken from my daily routine.” He said that “doing any physical activity is hard – very painful,” that he could walk “maybe a few hundred yards,” and that he used a cane, which was prescribed for him in 1997. IG Ex. 7 at 5-7 (September 22, 2004 function report); *see also* IG Ex. 8, at 2-4.

His applications were denied initially and on reconsideration, and, as allowed by statute and regulations, Respondent Getchell requested a hearing before an Administrative Law Judge (ALJ). IG Exs. 6, 9. His hearing was held on October 23, 2006, before ALJ Richard E. Ouellette. At the hearing, Respondent Getchell testified, under oath, that his physical and mental impairments significantly limited his abilities to walk, stand, sit, and use his hands. He claimed that his impairments caused him to tire easily and significantly limited his social interaction. He said that he had trouble walking “for a few minutes.” IG Ex. 10.

He also testified that two weeks prior to the hearing he started a part-time job (three days per week, four and a half hours per day), but that job only required that he ride in a golf cart for 15-20 minutes at a time. IG Ex. 10, at 12-13. Otherwise, he had not worked since October 2002, when he stopped working as a tennis instructor because “I wasn’t able to run around, I wasn’t able to play, I wasn’t able to stand for any length of time and teach.” IG Ex. 10, at 10.

When the judge asked specifically about his exercise – tennis, golf, softball, kayaking, he said:

In 2003 I guess we had just moved here, and to get some exercise we bought a kayak, but I injured my shoulder using the kayak, so it sat next to my house for the best of – you know, almost three years now. And I used to play tennis quite a bit, but I don’t anymore. And I played softball for a season when we moved down here, but I can’t do it. It’s just -- it’s too difficult on my legs and my back.

IG Ex. 10, at 33-34.

Judge Ouellette then told Respondent Getchell that, shortly before the hearing, he received written statements and other evidence suggesting that, at best, Respondent Getchell was exaggerating his impairments. The judge said that he received pictures of Respondent Getchell playing third base, and a 2005 DVD showing him performing in skits at his church. IG Ex. 10, at 37-39; IG Ex. 26, at 2 (Ouellette Decl. ¶ 4, ¶ 8); Tr. 60-61; *see also* IG Ex. 19, 20, 21.

Thereafter, Respondent Getchell withdrew his hearing request. In dismissing the case, Judge Ouellette pointed out what he characterized as “some of the inconsistencies within the record,” and advised Respondent Getchell that he was referring the matter “to the proper component of [SSA] for further inquiry with regard to the issue of fraud.” IG Exs. 16, 17.

As the following discussion shows, overwhelming evidence establishes that, throughout the time he was claiming significant limitations, Respondent Getchell regularly engaged in a wide variety of physically demanding activities, including tennis, golf, bicycle-riding, softball, volleyball, and kayaking. He attended church regularly, and participated in church activities. As the church’s drama director, he wrote, directed and acted in weekly skits illustrating themes from his pastor’s sermons. He played fantasy baseball on his computer. He acted as the primary care-giver for his two small children.

Most dramatic among the evidence establishing that Respondent Getchell misrepresented his activities and limitations are a DVD and a videotape. The charts below set forth multiple discrepancies between the claims he made to SSA and his actual capabilities.

The nine-minute videotape from summer/fall 2006 shows Respondent Getchell, tennis racquet in hand, apparently giving a tennis lesson to an older gentleman. IG Ex. 21; Tr. 37.

Respondent Getchell’s Claims to SSA	Videotape (IG Ex. 21)
<p>Problems using his hands</p> <ul style="list-style-type: none"> • He has weakness in his hands. IG. Ex. 10, at 19. • When he is holding something in his hands, they stiffen and tire very quickly. His hands and knuckles become very stiff and cannot hold a pen or pencil with any pressure. IG Ex. 10, at 20. • He is only able to hold a pen for 5 to 10 minutes. IG Ex. 10, at 20. 	<ul style="list-style-type: none"> • He held the tennis racket for 9 minutes and used it to hit the ball over 10 times without noticeable difficulty. • He picked up the tennis ball from the ground with no apparent problem.

<ul style="list-style-type: none"> • He has problems lifting a gallon of milk because his hands and fingers stiffen and it feels like it is going to slip out of his hand. IG Ex. 10, at 29. 	<ul style="list-style-type: none"> • Without any apparent difficulty, he repeatedly used hand gestures in conversation with an older man (apparently a tennis student). He made several rapid, wide swings of his tennis racket, serving the ball without difficulty. He swung his arms up and down while serving the ball more than 8 times.
<p>Problems standing and walking</p> <ul style="list-style-type: none"> • Standing hurts his back, legs and neck. IG Ex. 10, at 14. • He has trouble with his legs and can only stand for a few minutes without leaning on something. IG Ex. 10, at 10, 28. • He has pain in his right foot and his heel is sore and painful. IG Ex. 10, at 16-17. • He uses a cane to walk. IG Ex. 7, at 7. 	<ul style="list-style-type: none"> • He stood for 9 minutes on the tennis court with no sign of difficulty. • He walked across the tennis court several times without difficulty, even breaking into a slight jog to pick up a ball.
<p>Difficulty bending over</p> <ul style="list-style-type: none"> • It is impossible to bend over because of the numbing pain. IG Ex. 10, at 15-16. 	<ul style="list-style-type: none"> • He slightly bent over to pick up the ball and served it without difficulty.
<p>Problems with thinking and memory</p> <ul style="list-style-type: none"> • His memory and ability to concentrate are bad. IG Ex. 10, at 23, 24. • He has difficulty thinking of words or staying focused. IG Ex. 10, at 23, 24. 	<ul style="list-style-type: none"> • He instructed his student.

<p>Difficulty turning neck</p> <ul style="list-style-type: none"> • He has difficulty turning his neck to the right. IG Ex. 10, at 30. 	<ul style="list-style-type: none"> • He turned his head from left to right without difficulty.
<p>Low Energy</p> <ul style="list-style-type: none"> • His energy is low and he gets tired very often. IG Ex. 10, at 21; IG Ex. 4, at 2-3. 	<ul style="list-style-type: none"> • He stood and actively played tennis for 9 minutes with no sign of exhaustion (although his older student is plainly tired).

Similarly, Respondent Getchell appears in a couple of skits on the DVD, which was shot in his church in 2005. IG Ex. 20; Tr. 37. The DVD's existence belies Respondent's repeated assertions that he neither attended nor participated in church groups. *See, e.g.*, IG Ex. 3, at 2 (Respondent claimed that he stopped going to church). Further, the chart below highlights additional discrepancies between his representations to SSA and the capabilities he demonstrated in one 7-minute performance:

Respondent Getchell's Claims to SSA	The Church Play (IG Ex. 20)
<p>Problems using his hands</p> <ul style="list-style-type: none"> • He has weakness in his hands. IG Ex. 10, at 19. • When he is holding something in his hands, they stiffen and tire very quickly. His hands and knuckles become very stiff and cannot hold a pen or pencil with any pressure. IG Ex. 10, at 20. • He is only able to hold a pen for 5 to 10 minutes. IG Ex. 10, at 20. • He has problems lifting a gallon of milk because his hands and fingers stiffen and it feels like it is going to slip out of his hand. IG Ex. 10, at 29. 	<ul style="list-style-type: none"> • He pulled a golf club out of a golf bag without any difficulty and held the club for 7 minutes without dropping it. • He switched the golf club from his right to left hand and held the club horizontally behind his back and against the back of his neck for a few seconds without any sign of difficulty. • He swung the golf club at least 4 times, without any sign of difficulty, showing no limitations in hand and wrist movements. He took small "putts" and a complete full swing.

	<ul style="list-style-type: none"> • He picked up a golf club bag full of golf clubs, placed it over his left shoulder, then walked down the stage steps without any sign of difficulty. • He used hand gestures while acting in the skit, even making a fist with his right hand at one point while gesturing forcefully with his right arm.
<p>Problems standing and walking</p> <ul style="list-style-type: none"> • Standing hurts his back, legs and neck. IG Ex. 10, at 14. • He has trouble with his legs and can only stand for a few minutes without leaning on something. IG Ex. 10, at 10, 28. • He has pain in his right foot and his heel is sore and painful. IG Ex. 10, at 16-17. 	<ul style="list-style-type: none"> • He stood in the scene for 7 minutes without any sign of difficulty.
<p>Difficulty bending over</p> <ul style="list-style-type: none"> • It is impossible to bend over because of the numbing pain. IG Ex. 10, at 15-16. 	<ul style="list-style-type: none"> • Slightly bent over and swung the golf club at least 4 times without any sign of difficulty. • Bent over to pick up the golf club bag without any sign of difficulty.
<p>Problems with thinking and memory</p> <ul style="list-style-type: none"> • His memory and ability to concentrate are bad. IG Ex. 10, at 23, 24. • He has difficulty thinking of words or staying focused. IG Ex. 10, at 23, 24. 	<ul style="list-style-type: none"> • He memorized and recited over 20 lines while acting in the scene without any difficulty.
<p>Difficulty turning neck</p> <ul style="list-style-type: none"> • He has difficulty turning his neck to the right. IG Ex. 10, at 30. 	<ul style="list-style-type: none"> • He turned his head from left to right while swinging the golf club with no sign of difficulty.

<p>Low Energy</p> <ul style="list-style-type: none"> • His energy is low and he gets tired very often. IG Ex. 10, at 21; IG Ex. 4, at 2-3. 	<ul style="list-style-type: none"> • He stood for 7 minutes in a play without any sign of exhaustion. • He carried the golf club bag with no sign of exhaustion. • He swung the golf club without any problems.
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Other convincing evidence establishes that Respondent Getchell repeatedly misled SSA in describing his activities and his capabilities. Photographs dated 2006 show him playing softball. IG Ex. 19.

The testimony of reliable witnesses establishes that, contrary to his representations to SSA, Respondent Getchell was active and athletic. Joan Morgan met Respondent Getchell in late 2003 or early 2004. They attended the same church and her grandchildren were in preschool with Respondent Getchell's daughter. IG Ex. 11, at 3 (Morgan Decl. ¶ 2); Tr. 39. She testified, credibly, that she saw him regularly at preschool activities, birthday parties, soccer games, church, and church activities. IG Ex. 11, at 3 (Morgan Decl. ¶ 4), Tr. 39-40. She often saw him at the children's play group. Tr. 39-40, 41, 55-56. She described Respondent Getchell as "the life of the party." Tr. 41. "He would stand there for long periods of time and talk with the other parents . . . chatting and eating." Tr. 41, 42.

Respondent Getchell was the Director of Communications at the church, and Ms. Morgan testified that he wrote, directed, and performed in church skits. IG Ex. 11, at 3 (Morgan Decl. ¶ 4); *see also* IG Ex. 11, at 6.⁴

She observed him sit, stand and walk for extended periods of time; he engaged in sports, including volleyball and bicycle riding. He often challenged others to race him, running and bicycling. He brought his kayak to a church picnic. IG Ex. 11, at 3-4 (Morgan Decl. ¶ 5); Tr. 51.

Ms. Morgan described several other incidents. On one occasion, her adult daughter "who was a pretty avid runner" (she ran in the Peachtree Marathon) tried to race Respondent Getchell down the beach. Tr. 46. At the children's soccer games, "he'd want someone to throw a ball at him or just say, you know, throw me a pass or whatever kind of like showing off." Tr. 46-47.

According to Ms. Morgan, Respondent Getchell mowed a lawn for someone and helped several people move, lifting heavy boxes and furniture. IG Ex. 11, at 4 (Morgan Decl. ¶ 6); Tr. 52-54. He "often" went biking with Ms. Morgan's son-in-law; Ms. Morgan

⁴ IG Ex. 11, page 6 is incorrectly marked IG Ex. 6.

accompanied them once, but was not able to keep up because she could not go faster than 15 mph. IG Ex. 11, at 4 (Morgan Decl. ¶ 7); Tr. 47.

Similarly, Michael Risley was a member of Respondent Getchell's church. He also testified, credibly, that they met in 2004, and that, between 2004 and 2005, he and Respondent Getchell played volleyball at church outings, and played golf together once in early 2005 (both hit in the 80s). IG Ex. 13, at 1 (Risley Decl. ¶¶ 3, 4, 5); Tr. 75-77. According to Mr. Risley, Respondent Getchell was a "tennis pro and an athlete" who "outplayed me" in both volleyball and golf. "He hit the ball further and more accurately." IG Ex. 13, at 1 (Risley Decl. ¶ 4). He confirmed that Respondent Getchell participated in church activities, including writing and acting in church skits. Tr. 77. When Mr. Risley expressed surprise at Respondent Getchell's having filed applications for disability benefits, Respondent replied "Yeah, but they don't know [that I don't look disabled]." IG Ex. 13, at 1 (Risley Decl. ¶ 5).

The pastor of Respondent's church, Reverend Edward DeJesus, testified that Respondent Getchell began attending his church in 2004 and they became friends. Between 2004 and 2006, Respondent Getchell attended church every Sunday and played volleyball at church outings. IG Ex. 27, at 1 (DeJesus Decl. ¶¶ 4, 5); Tr. 81. Reverend DeJesus confirmed that from October 2004 until April 2005, Respondent Getchell was the church's Director of Communications, a volunteer position. In that capacity, he wrote, created, directed, and acted in church skits. IG Ex. 27, at 2 (DeJesus Decl. ¶ 6). Reverend DeJesus would tell Respondent Getchell the theme for his sermon, "and then he would run with it." Tr. 86.

A member of the church videotaped many of the skits, and, in October 2006, the church provided a copy of the DVD to Respondent's estranged wife, with the understanding that it would be shown to an SSA Judge. IG Ex. 27, at 2 (DeJesus Decl. ¶¶ 7, 9); IG Ex. 20.

According to Reverend DeJesus,

Steve is an incredibly gifted individual. His creativity doing dramas, organizing people, doing skits, writing them down, has been, was a tremendous help for us as a church. And were there times where I observed him getting frustrated in his role? Yeah, absolutely. There isn't anybody in church I haven't experienced eventually gets frustrated [sic] when you're dealing with volunteers and timing and trying to organize something and people don't make their appointments. . . . I see a lot of people get frustrated over the course of time and life and pressure and so I didn't take that [his bipolar disorder] was a hindrance for him doing his role. If I thought it was I would have removed him or anybody in

the church if I felt that they had a problem that they couldn't function.

Tr. 85-86. I found Reverend DeJesus's testimony completely credible. Not only was it wholly consistent with the testimony of the IG's other witnesses, but Reverend DeJesus showed particular concern for the respondent's welfare, and he unquestionably took no pleasure in causing injury to his former parishioner.

Finally, the medical evidence, which is sparse, establishes virtually no physical limitations, and a mental impairment that was well-controlled. Respondent Getchell consulted a physician on September 29, 2003, about four months before he applied for benefits. The report of his initial office visit describes his "biggest complaint" as a toothache. He also complained of "generalized body aches" and a potentially broken toe caused by his toe hitting a door when he fell on wet tile. IG Ex. 18 at 12, 13. He reported a history of arthritis, bipolar disorder, migraines, hypertension, "chronic fatigue," and depression. IG Ex. 18, at 12. Nevertheless, he told the doctor that he exercised "by playing tennis, golfing, softball, and kayaking." IG Ex. 18, at 13. He also complained of sleep problems, and significant weight gain (55 pounds) since he stopped working as a tennis pro. His physical exam showed good muscle tone and bulk, full range of motion, no tenderness in any extremity, but his right fourth toe was bruised, swollen and tender. His neurological exam was normal; his strength was 5/5 throughout, and his gait was normal. He showed good affect, good insight, and good judgment. IG Ex. 18, at 14.

A consultative examination dated November 9, 2004, found normal range of motion in all of his joints, and noted that he did not require an assistive device (e.g., a cane) for ambulation. IG Ex. 18, at 15-17.

The report of his annual physical exam, dated December 8, 2004, indicates that he is feeling "well," although he gained weight and complained of back pain. His exam was within normal limits. IG Ex. 18, at 11.

Psychiatric reports from 2004, 2005, and 2006, show that his bipolar disorder was well-controlled. He was consistently described as cooperative, neatly groomed, with normal speech and memory, logical and coherent thought content, average cognitive ability, and good judgment. IG Ex. 18, at 1-9; R. Ex. 7.

Respondent Getchell has not rebutted any of this evidence. Nor has he explained the obvious discrepancies between what he told SSA he could do and what the recorded images show him doing. Rather, he responds only to the evidence provided by his former wife, Heidi Swedberg (nee Heidi Getchell). Respondent attacks her credibility, pointing out, with some justification, that, until their estrangement, Ms. Swedberg supported his application for disability benefits. In these proceedings, as well as during their acrimonious divorce proceedings, she has offered multiple inconsistent statements as to

Respondent Getchell's limitations and activities. I agree that her inconsistent statements undermine her credibility, and, aside from accepting her representations as to the dates of the video and DVD – which Respondent has not challenged -- I accord her testimony no weight.

Thus, the largely undisputed evidence establishes that, in applying for disability benefits, Respondent Getchell knowingly and repeatedly misrepresented his functional abilities and his activities.

B. Respondent Getchell's misrepresentations were material.

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 . . . or eligible for benefits or payments under title XVI.” Act, section 1129(a)(2). Regulations governing eligibility for Social Security disability insurance (Title II of the Act) are found at 20 C.F.R. Part 404, and regulations governing SSI eligibility (Title XVI of the Act) are found at 20 C.F.R. Part 416. Under each part, an individual is disabled if he is unable to perform any “substantial gainful activity” because of a “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.” 20 C.F.R. §§ 404.1505(a), 416.905(a).

To satisfy the basic definition of disability, an individual must have a severe impairment that makes him unable to perform his past relevant work or any other substantial gainful work. 20 C.F.R. §§ 404.1505(a), 416.905(a). If the individual is not working, he may be found disabled if, based on his “residual functional capacity” and certain vocational factors (age, education, work experience), he is unable to return to his past relevant work or perform other work. 20 C.F.R. § 404.1505(a). Residual functional capacity is defined as “the most [an individual] can still do despite [his] limitations.” 20 C.F.R. § 404.1545(a). To determine residual functional capacity, the agency assesses the nature and extent of the individual's physical limitations.

A limited ability to perform certain physical demands of work activities, such as sitting, standing, walking, lifting, carrying, pushing, pulling, or other physical functions (including manipulative or postural functions, such as reaching, handling, stooping or crouching), may reduce your ability to do past work and other work.

20 C.F.R. § 404.1545(b). The agency also assesses the nature and extent of mental limitations and restrictions.

A limited ability to carry out certain mental activities, such as limitations in understanding, remembering, and carrying out instructions . . . may reduce [the individual's] ability to do past work and other work.

20 C.F.R. § 404.1545(c).

Thus, the types of limitations described by Respondent Getchell in his efforts to get benefits would limit a claimant's ability to perform substantial gainful activity, enhancing his claim of disability, and must be considered material.

C. The IG proposes a reasonable penalty, \$60,000, against Respondent Getchell.

The statute authorizes imposition of a CMP of “not more than \$5,000 for each such statement or representation.” Act, section 1129(a)(1); 20 C.F.R. §§ 498.103(a), 498.104.

The IG cites “at least” 17 false statements or misrepresentations made by Respondent Getchell in his efforts to qualify for disability benefits.

I am not prepared to find that all of the representations cited by the IG fall within the ambit of section 1129. Some, such as his list of impairments and complaints of pain and other symptoms are either supported by the evidence or are simply too vague to be considered knowing misrepresentations. IG Ex. 2 (Respondent Getchell claimed to suffer from bi-polar disorder, depression, chronic fatigue, fibromyalgia, arthritis, and irritable bowel syndrome, poor concentration, and constant pain); IG Ex. 4 (general complaints of pain); IG Ex. 9 (an undated Disability Report providing virtually no usable information).

On the other hand, I find that the following statements and representations fall within section 1129 because they are false and misleading, and that Respondent Getchell knew or should have known that they were false and misleading:

- In his February 16, 2004 Activities of Daily Living report, Respondent Getchell claimed that he engaged in no social activities; that he stopped going to church because the number of people in such a confined space made it difficult; that he did not go out or visit others; and that he was unable to deal with deadlines or schedules. IG Ex. 3, at 2, 3, 4;
- In his July 10, 2004 Disability Report, he claimed that “doing any activity, either standing, sitting, or moving causes constant pain throughout my body.” IG Ex. 6, at 6;

- In an Adult Function Report, completed on September 22, 2004, he claimed that doing any physical activity is hard and very painful; that he is able to walk only a few hundred yards without stopping to rest; and that he uses a cane to walk. IG Ex. 7, at 6, 7;
- He claimed on a September 22, 2004 pain questionnaire that walking and standing “are both very tough” and these activities, as well as sitting and sleeping, cause him pain if he does them for any length of time. IG Ex. 8, at 2; and
- During his hearing before Judge Ouellette, Respondent Getchell made numerous false or misleading statements. I have listed twelve of them in the charts, above. He also falsely denied attending church. IG Ex. 10, at 33. He said that he had not used his kayak in three years. IG Ex. 10, at 33. He said that he did not play tennis anymore, and had played softball only for one season “when we moved down here.” IG Ex. 10, at 34.

Given the number of false and misleading statements contained in the reports he submitted to SSA and made while he testified under oath at his disability hearing, the proposed penalty falls well below the statutory maximum of \$5,000 per misrepresentation.

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 Getchell has no history of prior offenses. With respect to his financial condition, he failed to return to the IG a financial disclosure form for use in determining his ability to pay. Nor did he provide to this forum any credible evidence of his financial condition.

With respect to the other factors, I find that, from at least February 2004 until the date of his disability hearing in October 2006, his actions were deliberate. At each stage of the appeals process, he added to the misrepresentations. Most disturbing, he made false statements under oath at his ALJ hearing. Respondent Getchell has offered no evidence to mitigate his offenses, but persists in claiming that he made no false statements.

That he has been diagnosed with a mental impairment (bipolar disorder) and may even have experienced some decline in his physical abilities (although the record contains little support for any significant physical impairment) does not justify his efforts to obtain

