

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

The Inspector General for the Social Security Administration

v.

Cindy Lopez

Docket No. C-13-612

Decision No. CR3083

Date: January 14, 2014

AMENDED DECISION

The Inspector General (IG) for the Social Security Administration (SSA) charges that Respondent, Cindy Lopez, violated section 1129 of the Social Security Act (Act), because she falsely reported her living arrangements and income in order to maintain her minor son's Supplemental Security Income (SSI) benefits. The IG proposes imposing against Respondent Lopez a \$34,266 civil money penalty (CMP).

For the reasons discussed below, I agree that Respondent Lopez deliberately misled SSA about her living arrangements and household income so that her son's SSI benefits would not be reduced or cancelled. In light of her deliberate long-standing deception, I consider \$34,266 a reasonable penalty.

I. Background

SSI Rules. The SSI program (Title XVI of the Act) pays benefits to individuals who are aged, blind, or disabled, and have limited income and resources. 20 C.F.R. §§ 416.202; 416.1100. In determining an individual's eligibility for benefits, SSA considers his entire household's income and resources. For a child receiving SSI benefits, SSA "deems" to the child "any resources not otherwise excluded" belonging to an ineligible parent or stepparent living in the same household, whether or not those resources are available to

the child. 20 C.F.R. § 416.1202(b). SSA expects a stepparent living in the child's household to use some of his income to take care of the child's needs, and SSA considers the stepparent's income in deciding eligibility for and/or the amount of benefits. 20 C.F.R. § 416.1160(a).

Representative Payees. Generally, if an SSI beneficiary is under age 18, SSA will pay his benefits to a representative payee (rep payee). 20 C.F.R. § 416.610. Among other requirements, the rep payee must notify SSA of any event or change affecting the beneficiary's right to benefits, amount of benefits, or how the beneficiary receives them. 20 C.F.R. § 416.635(d). She must also report changes in income, including an eligible child's income. 20 C.F.R. § 416.708.

Section 1129 Sanctions. Section 1129(a)(1) of the Act subjects to penalty any person (including an organization, agency, or other entity) who: 1) knowingly misrepresents a material fact for SSA's use in determining a right to SSI benefits or the amount of those benefits; 2) makes such a statement with "knowing disregard of the truth"; or 3) knowingly omits or otherwise withholds a fact that she knows or should know is material to SSA's determining eligibility for benefits or benefit amounts.

Similarly, Social Security regulations authorize the IG to impose a penalty against any person who "[h]as made . . . a statement or representation of a material fact" that is used to determine the person's eligibility for SSI benefits or the amount of those benefits or payments, where the person "knew, or should have known, that the statement or representation was false or misleading," made the statement "with knowing disregard of the truth," or where the person omitted, "or otherwise withheld disclosure of" the material fact. 20 C.F.R. § 498.102(a).

Factual/Procedural Background. In this case, SSA designated Respondent Lopez as rep payee for her minor child, a recipient of SSI benefits. The IG contends that she deliberately withheld information and then affirmatively misled SSA about the family's living arrangements. According to the IG, Respondent Lopez did not reveal that she and her children began living with her gainfully-employed boyfriend, who subsequently became her husband, and she deliberately concealed his income. By letter dated February 14, 2013, the IG advised Respondent Lopez that he proposed imposing against her a CMP of \$34,266 (an \$18,000 penalty plus a \$16,266 assessment in lieu of damages). SSA Ex. 15.¹ Respondent Lopez requested a hearing.

¹ In error, the notice letter said that SSA based its CMP on Respondent Lopez's false statements and omissions regarding her *marital status* and income. The IG has since clarified that it bases this action on Respondent's false statements and omissions regarding her *living arrangements* and income. The IG is not limited to the specific items or information contained in his notice letter, so long as he provides adequate notice of

On May 1, 2013, I held a prehearing conference with both parties and thereafter issued an Order and Schedule for Filing Briefs and Documentary Evidence, directing the parties to file prehearing exchanges, which included written briefs, any proposed exhibits, and witness statements. The IG timely filed its prehearing exchange, but Respondent Lopez did not. She sent the IG a letter, dated September 1 but postmarked September 9, 2013, (after her filing deadline had passed) with three short witness statements enclosed. IG counsel forwarded copies of those documents to my office, and they have been added to the record, the witness statements marked as Respondent's (Resp.) Exhibits (Exs.) 1-3.

On September 23, 2013, I issued an Order to Show Cause, requiring Respondent Lopez to show cause why I should not dismiss her hearing request for abandonment, pursuant to 20 C.F.R. § 498.202(f)(2) or as a sanction pursuant to 20 C.F.R. § 498.214(a), for failing to comply with my order. On October 15, 2013, the Civil Remedies Division received a letter from Respondent Lopez, dated October 3, 2013. She claimed that she misunderstood her filing deadline and that she intended the statements she submitted (to the IG) in September "to be used in [her] case on [her] behalf."

In an order issued October 25, 2013, I directed the parties to inform my office, in writing, whether an in-person hearing is necessary, and, if so, which witnesses they would like to cross-examine at an in-person hearing. The order said that I would close the record and decide the case on the written submissions, if I received no response. In a letter dated November 4, 2013, IG counsel indicated that an in-person hearing was not necessary. Respondent Lopez did not respond. I therefore closed the record and base this decision on the parties' written submissions.

The IG submitted a brief (IG Br.) and 23 exhibits (IG Exs. 1-23). In the absence of any objection, I admit into evidence IG Exs. 1-23. I have also accepted Respondent Lopez's letters of September 9 and October 3, 2013, and the documents that accompanied her September 9 letter. In the absence of any objection, I admit those documents into evidence as Resp. Exs. 1-3.²

II. Issues

The issues before me are: 1) Did Respondent Lopez make, or cause to be made, to SSA, a statement or representation of a material fact, which she knew or should have known was false and misleading, for SSA's use in determining her child's right to SSI benefits

changes. 20 C.F.R. § 498.215 (e)(1). Here, the I.G. has provided the requisite notice. IG Br. at 1, 11-12.

² We have marked Tracy Plock's statement as Resp. Ex. 1; Debbie Wagner's statement as Resp. Ex. 2; and Misha Svoboda's statement as Resp. Ex. 3.

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 – \$34,266 – reasonable?

III. Discussion

A. Respondent Lopez violated section 1129 of the Act, because she deliberately withheld material facts and made false statements to SSA for its use in determining her child's eligibility for SSI benefits.³

Respondent Lopez has acted as her son's rep payee since February 2007. SSA Ex. 1. Throughout her tenure as rep payee, she has agreed to notify SSA of changes in her son's living arrangements. *See, e.g.,* SSA Ex. 1 at 3. For its part, SSA has emphasized that she is required to notify the administration "promptly" if: 1) the claimant's "HOUSEHOLD CHANGES (someone moves in/out of the place where the claimant lives)"; 2) the claimant's income or the income of "anyone in the claimant's household" changes; and 3) the claimant's resources or the resources of anyone in the household changes. SSA Ex. 1 at 4. Periodically, SSA reminded Respondent Lopez of her reporting obligations, specifically instructing her to report any changes "within 10 days after the end of the month [the change] occurs," and warning that a penalty could be imposed if she fails to do so. SSA Ex. 2 at 6-9; SSA Ex. 3 at 7-9; SSA Ex. 4 at 6-8; SSA Ex. 5 at 5-7; SSA Ex. 8 at 7. Respondent Lopez has not denied that she was fully informed of her obligations.

On January 28, 2011, Respondent Lopez and her then-boyfriend/fiancé, Andrew Lopez, jointly signed a residential lease for a home located at 1709 2nd Street, Columbus, Nebraska, with the term beginning on **February 15, 2011**. SSA Ex. 18. Respondent Lopez did not then report this new living arrangement to SSA, as required by SSA regulations. 20 C.F.R. §§ 416.708, 416.714. She and Andrew Lopez were married on **July 30, 2011**. SSA Ex. 21 at 2 (Kent Decl. ¶ 4).

On August 19, 2011, Respondent Lopez took her marriage license into the SSA district office in Grand Island, Nebraska, requesting a name change. She reported that her husband worked full time at Camco and earned \$15.22 per hour. SSA Ex. 6 at 2; SSA Ex. 21 at 2 (Kent Decl. ¶ 4). On October 5, 2011, the Grand Island district office staff called Respondent Lopez to verify her address. She told staff that the family would be moving on the following weekend to 1604 16th Street, Columbus, Nebraska. SSA Ex. 6 at 2.

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

On **October 8, 2011**, Respondent Lopez and her husband signed a lease for the home at 1604 16th Street, Columbus. SSA Ex. 19. In the accompanying rental application, she listed the household members who would be living in the unit: herself, her husband (Andrew); and her two children. SSA Ex. 19 at 5.

Thus, compelling evidence establishes that Andrew Lopez began living with Respondent and her two children as least as early as mid-February 2011.

The Grand Island SSA office reported Respondent's marriage, and, in response, SSA Claims Representative Brian Kent (who works in the SSA field office in Norfolk, Nebraska) scheduled a telephone appointment with her in order to update her son's SSI eligibility. SSA Ex. 6 at 2; SSA Ex. 7; SSA Ex. 21 at 2-3 (Kent Decl. ¶ 5). He interviewed the respondent on March 29, 2012. SSA Ex. 21 at 3 (Kent Decl. ¶ 6). She told him that:

- Beginning August 15, 2010, she was living with her son (the SSI beneficiary) and daughter in a home that she rented at 1410 11th Street, Columbus, Nebraska. She listed no other member of the household and said that the household received no help or money from anyone else. SSA Ex. 8 at 2.
- On February 13, 2011, she and the children began living at 1709 2nd Street, which is consistent with the lease she and Andrew signed (SSA Ex. 18). But she listed no other member of the household – omitting Andrew – and denied receiving help or money from anyone else. SSA Ex. 8 at 2-3.
- On February 1, 2012, she and the two children began living in a home she had rented at 1604 16th Street, Columbus, Nebraska, but, again, she listed no other member of the household and denied receiving help or money from anyone else. SSA Ex. 8 at 3. Notwithstanding the lease she and her husband had signed for that rental property, she did not mention Andrew Lopez.

Claims Representative Kent specifically remembers that he twice asked Respondent Lopez if, at any time since November 1, 2010, she and her children lived with anyone else. He remembers doing so “because I knew her response was not true based on what the Grand Island Office recorded” SSA Ex. 21 at 3 (Kent Decl. ¶ 7).

Respondent Lopez now concedes that she and her children began living with her husband at least as early as July 30, 2011, the date of her marriage, and, except for about a month of separation in February 2012, they have continued living together. Her witness statements say the same. Resp. Exs. 1-3. One of her witnesses claims that the couple did not begin living together until the time of her marriage, but Respondent Lopez herself has not made this claim. Resp. Ex. 3; *see* Resp. Sept. letter. Nor has Respondent come forward with any evidence (separate lease, utility bill, or other correspondence)

suggesting that Andrew Lopez maintained a separate address. I therefore conclude that Andrew Lopez began living with the family at least as early as February 15, 2011, the effective date of the lease he and Respondent signed, and the approximate date (within two days) that Respondent Lopez told SSA that she and her children began living at the 2nd Street address.⁴

On March 29, 2012, Respondent Lopez completed, on her son's behalf, a summary of income and resources. She reported monthly income of \$1,432.20 from January 2011 through August 2012, except in March and September 2011, when she said that she earned \$2,148.30. She denied receiving any other type of income. SSA Ex. 9 at 3. She did not mention her husband's earnings. See SSA Ex. 21 at 3-4 (Kent Decl. ¶ 8). The evidence shows that she significantly understated her income. Comparing her assertions to wage information compiled by the Nebraska Department of Labor shows that she earned significantly more than she reported:

- She claimed to have earned \$5,012.70 during the first quarter of 2011 (2 months @ \$1,432.20 + 1 month @ \$2, 148.30). According to the state agency, she earned \$8,015.53 that quarter.
- She claimed to have earned \$4,296.60 during the second quarter of 2011 (\$1,432.20 x 3= \$4,296.60). The state's document indicates that she earned \$7,267.47.
- She claimed to have earned \$5,012.70 during the third quarter of 2011, but the state's document shows that she earned \$8,275.16.
- She claimed to have earned \$4,296.60 during the fourth quarter of 2011, but the state's document shows that she earned \$6,710.09.
- She claimed to have earned \$4,296.60 during the first quarter of 2012, but the state's document shows that she earned \$8,817.75.

Compare SSA Ex. 9 at 3 with SSA Ex. 11 at 2.

Her husband's earnings for this period were: \$5,399.87 for the first quarter of 2011; \$6,495.92 for the second quarter of 2011; \$8,261.75 for the third quarter of 2011; \$10,493.74 for the fourth quarter of 2011; and \$8,845.26 for the first quarter of 2012.

⁴ SSA submits evidence – Andrew's vehicle registrations – indicating that he lived at Respondent's residence as far back as 2009. SSA Ex. 20. However, SSA has not relied on that evidence to justify the penalty here. In any event, even if the couple began living together in July 2011, her deception about the living arrangement from that later date would justify the relatively small penalty. See discussion below.

SSA Ex. 11 at 1. With an annual household income exceeding \$60,000 for 2011, Respondent's son would probably not have qualified for SSI benefits. Even if qualified, his benefits certainly would have been reduced. *See* SSA Ex. 21 at 4-5 (Kent Decl. ¶¶ 10, 12, 13); 20 C.F.R. §§ 416.202(c), 416.1100; 416.1165.

Claims Representative Kent referred this matter to SSA's Office of Investigations on August 13, 2012. SSA Ex. 21 at 4 (Kent Decl. ¶ 9). Thereafter, SSA investigator, Shane Taylor, interviewed Respondent Lopez, who conceded that she and her husband resided together with her two children. SSA Ex. 12 at 2.

The documentary evidence thus establishes that Respondent Lopez deceived SSA about her living arrangements. On January 28, 2011, she and Andrew Lopez signed a lease together for the home on 2nd Street, with an effective date of February 15. On July 30, 2011, they were married. On October 8, 2011, they signed a lease for a second home on 16th Street and filled out a rental agreement, which included Andrew as a member of the household. Accepting that the couple separated for a month in February 2012 does not alter the fact that, for a year, she failed to report the significant change in her living arrangements, and, when directly asked, she deliberately misrepresented the situation. She therefore violated section 1129 of the Act, and the IG may impose penalties against her.⁵

B. The I.G. proposes reasonable penalties against Respondent Lopez.

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. Act §1129(a)(1); 20 C.F.R. § 498.103(a), (b).

Even counting the number of false statements in a manner most favorable to the respondent, during her March 29 interview alone, Respondent Lopez made at least three false statements regarding her living situation and one regarding her income. SSA Ex. 8 at 2-3; SSA Ex. 9 at 3. She also collected a year's worth of benefit checks (i.e., twelve monthly checks) while withholding disclosure of material facts. SSA's proposed penalty, \$18,000, thus represents a fraction of Respondent's potential liability.

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

⁵ Respondent Lopez also faults SSA for its purported failure to contact her after she reported her marriage. SSA Ex. 14 at 6; SSA Ex. 16. In light of the thoroughly-documented communications between her and Claims Representative Kent, I find this claim not only false, but baffling. SSA Exs. 8-10.

statements or misrepresentations or the withholding of disclosure. Act § 1129(a)(1); 20 C.F.R. § 498.104.

The IG proposes an assessment in lieu of damages of \$16,266, which is, in fact, much lower than twice the amount of the benefits paid as a result of her misrepresentations and withholding of disclosure. Based solely on the discrepancies between Respondent's reported income and her actual income from December 2010 until August 2012, Claims Representative Kent determined that her son had been paid \$8,133.45 to which he was not entitled. The claims representative was not then aware that Andrew Lopez was living in the household, so he did not consider Andrew's income when he made his determination. SSA Ex. 21 at 4 (Kent Decl. ¶ 12). Had Andrew's income been factored in, the overpayment would have been greater. SSA Ex. 21 at 5 (Kent Decl. ¶ 13).

The proposed \$16,266 assessment in lieu of damages is therefore 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 that Respondent has a history of prior offenses. SSA Ex. 15 at 3.

With respect to her financial condition, the IG is correct that 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."). Respondent Lopez submitted a financial disclosure form to the IG in response to the IG's November 6, 2012 warning letter. SSA Exs. 12, 14. The form is dated November 22, 2012. In it, Respondent claims that she and her husband left their prior jobs in August 2012, and that she earned only \$10 an hour at her new job, which she began just three weeks earlier. She claims that her husband has no earnings. SSA Ex. 14 at 1-2. According to the form, the household's only additional income at that time was \$443 per month in child support "if the fathers pay." SSA Ex. 14 at 2. She offers no explanation for the sudden decline in her household's income and provides no documentary evidence to support her claims of such reduced income and resources. In the absence of such support, and in light of her well-demonstrated lack of veracity, I find that she has not met her burden of establishing that her financial condition prevents her

