Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

The Inspector General of the Social Security Administration,

Petitioner,

v.

Richard Lee Carlson,

Respondent.

Docket No. C-14-1220

Decision No. CR4064

Date: July 24, 2015

DECISION

The Inspector General (IG) of the Social Security Administration (SSA) charges that Respondent, Richard Lee Carlson, violated section 1129 of the Social Security Act (Act) because he returned to work while receiving Social Security disability benefits, without reporting his work activities to SSA. In fact, he repeatedly and falsely told SSA that he had not worked since his disability began in June 2002. SSA wants to impose against him a $20,000 penalty plus a $59,488 assessment in lieu of damages, for a total civil money penalty (CMP) of $79,488.

For the reasons set forth below, I agree that Respondent Carlson violated section 1129, because he collected disability insurance benefits while he worked, and he knowingly withheld that material fact from SSA. When asked, he falsely claimed that he had not performed any work activity. I find the proposed CMP reasonable.

Background

Section 1129(a)(1) of the Act subjects to penalty any person who

> (A) makes, or causes to be made, a statement or representation of a material fact, for use in determining any initial or continuing right to or the amount of monthly insurance benefits 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 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 § 1129(a)(2); 42 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.

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[1] Title II of the Act governs the Social Security disability insurance program, and Title XVI governs the Supplemental Security Income (SSI) program.

In this case, the IG contends that, while receiving Social Security disability insurance benefits, Respondent Carlson returned to work for his long-time employer, a company called Anderson Excavating. He was paid in cash and deliberately concealed his work activity from SSA.

On March 27, 2014, the IG sent Respondent Carlson a letter advising him of the IG's determination and the proposed CMP, which the IG then set at $97,990 (a $20,000 penalty plus a $77,990 assessment in lieu of damages).[2] SSA Ex. 25. Respondent Carlson requested a hearing.

The parties submitted briefs (IG Br.; R. Br.) and proposed exhibits, including written declarations of witnesses. Neither party objected to my admitting any of the exhibits, so, following a March 4, 2015 prehearing conference, I admitted into evidence SSA Exhibits (SSA Exs.) 1-27, and Respondent's Exhibits (R. Exs.) 1-15. Order Summarizing Prehearing Conference at 2 (March 4, 2015) (Order).

Each party submitted the written direct testimony of his witnesses (the IG has three witnesses; Respondent Carlson has ten witnesses), but neither party asked that any witness be produced for cross-examination at an in-person hearing. An in-person hearing would therefore serve no purpose. Order at 2; *see* Acknowledgment and Prehearing Order at 4 ¶ 6 (June 2, 2014).

I left the record open so that the parties could submit additional briefing and suggested they address the impact on this case, if any, of two recent Departmental Appeals Board decisions (*Salvatore Cappetta*, DAB No. 2606 (2014) and *Michelle Valent*, DAB No. 2604 (2014)). Order at 2. The IG filed a Supplemental Brief (IG Supp. Br.), and Respondent filed a reply (R. Reply).[3]

Issues

The issues before me are:

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[2] The IG subsequently lowered to $59,488 the amount of the proposed assessment in lieu of damages because SSA recovered some of its lost money by withholding benefits. *See* Discussion, Finding 2, below.

[3] Initially, based on the ALJ decisions in *Cappetta* and *Valent*, Respondent argued that his work activity was not material because SSA may not consider work activity as evidence that an individual is no longer disabled. R. Br. at 16-19. The Board reversed the ALJ's conclusions in *Cappetta* and *Valent*, and Respondent has abandoned the arguments. R. Reply at 1.

1) Did Respondent Carlson make, or cause to be made, to SSA, a statement or representation of a material fact that he knew or should have known was false and misleading, for SSA's use in determining his right to Social Security disability insurance benefits, and/or the amount of those benefits, or did he omit a material fact or make such a statement with knowing disregard for the truth; and

2) if so, is the proposed CMP of $79,488, consisting of a $20,000 penalty and a $59,488 assessment in lieu of damages, reasonable.

Discussion

1. The IG may impose a CMP because: 1) Respondent Carlson worked while collecting Social Security disability insurance benefits; 2) he deliberately withheld that information from SSA; and 3) when asked, he falsely told SSA that he had not worked since June 2002 (the onset date of his disability).[4]

Regulations governing eligibility for Social Security disability insurance benefits (Title II of the Act) are found at 20 C.F.R. Part 404. 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).

In assessing whether an individual is disabled, SSA first considers his work activity. An individual who engages in substantial gainful activity is not disabled, no matter how severe his physical or mental impairments. 20 C.F.R. § 404.1520(a)(4)(i). Work activity is considered "substantial" if it involves significant physical or mental activities, even if performed on a part-time basis and even if the individual is paid less or has less responsibility than before. 20 C.F.R. § 404.1572(a). Work activity is considered "gainful" if it is "the kind of work usually done for pay or profit, whether or not a profit is realized." 20 C.F.R. § 404.1572(b).

Thus, an individual's work activity is material to SSA's determining his continuing right to disability insurance benefits.

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

In this case, Respondent Carlson applied for disability insurance benefits on July 22, 2002, alleging that he became unable to work because of a disabling condition (coronary disease) on June 4, 2002. As part of his application, he agreed to notify SSA if he went to work "whether as an employee or a self-employed person." SSA Ex. 1; SSA Ex. 6 at 2 (Dostal Decl. ¶ 4).

SSA found him disabled, with a June 4, 2002 onset date, and awarded him disability insurance benefits. *See* SSA Ex. 22 at 5.[5] However, according to the IG, Respondent Carlson returned to work in November 2005, without reporting that fact to SSA. SSA Ex. 25 at 1.[6] Indeed, he deliberately and repeatedly concealed his work activity. In a report he completed and signed on December 8, 2008, he reported that he had not worked since June 2002. The document warned that "making a false statement or representation of a material fact for use in determining a right to payment under" the Act is "a crime punishable under federal law." SSA Ex. 2. In a separate report, completed the same day, he wrote "I am not working at all." This document also warned against making false statements. SSA Ex. 3. On a third work activity report, which he completed and signed on December 22, 2010, Respondent again denied that he had worked since his disability onset date. That document also warned against making false statements. SSA Ex. 4.

<u>The accusation</u>. In December 2008, an individual contacted the SSA district office in Council Bluffs, Iowa, to complain that Respondent Carlson was collecting disability benefits while working as a mechanic at Anderson Excavating Company. The informant reported that Respondent Carlson had been working there full time for about three years and was "paid under the table." SSA Ex. 5; SSA Ex. 6 at 1-2 (Dostal Decl. ¶ 3). Anderson Excavating is a large company that provides excavation services on multi-million dollar projects. SSA Ex. 6 at 2 (Dostal Decl. ¶ 3); *see* SSA Ex. 6 at 3 (Dostal Decl. ¶ 6).

The IG began a years-long, intensive, and thorough investigation.

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[5] No one disputes that, but for his work activity, Respondent Carlson is eligible for disability insurance benefits.

[6] In fact, the evidence establishes that Respondent Carlson returned to work in December 2002, but SSA considers his work activity from then until May 2005 a "trial work period," during which he could work and still be eligible for disability benefits. 20 C.F.R. § 404.1592; SSA Ex. 22 at 7. Of course, he should have reported that work activity to SSA, but the IG has not pressed this point.

Surveillance. On January 6, 2009, IG Special Agent Brian Dostal conducted surveillance of Anderson Excavating. He observed Respondent Carlson driving a white GMC Sierra pickup truck owned by the company. SSA Ex. 6 at 2 (Dostal Decl. ¶ 5); *see* SSA Ex. 16 at 3, 4 (conceding that Carlson drove a company truck and that the company paid for its fuel and maintenance).

On June 17, 18, and 19, 2009, Agent Dostal conducted surveillance of Respondent Carlson's residence. On the evening of June 17, he observed the white pickup parked in Respondent's driveway. At 6:35 the following morning, he saw Respondent Carlson drive away in the truck. The respondent returned at 6:09 p.m. and parked the company truck in his driveway. The next morning, he left home at 6:39 a.m., again driving away in the company truck. SSA Ex. 6 at 6-7 (Dostal Decl. ¶ 16).

Pursuant to a court order, on August 21, 2009, Special Agent Dostal installed a GPS tracking device on the white pickup. The device remained in place and – except for two occasions when its battery died – functioned until November 13, 2009.[7] A GPS tracking log shows – in excruciating detail – the truck's movements. Virtually every workday (Monday through Friday), the truck left Respondent Carlson's home at about 6:30 a.m. and returned home between 5:30 p.m. and 6:00 p.m. The truck made regular stops at Anderson Excavating work sites and construction equipment supply centers, as well as "Nebraska Machinery Company," a retailer of Caterpillar construction equipment. From August 21 through September 25, the truck stopped at Anderson Excavating's corporate offices (19th & Dorcas) every Friday between 4:45 and 5:00 p.m., which corresponds with the time that the company paid its employees. SSA Ex. 6 at 7-8 (Dostal Decl. ¶ 17); SSA Ex. 7 at 2, 7, 14, 20, 27, 32; *see* SSA Ex. 12 at 3.

On one occasion during this time of GPS tracking, Special Agent Dostal personally witnessed Respondent Carlson driving the pickup and making stops. On September 16, Respondent Carlson left his house at 6:23 a.m., stopped briefly at a convenience store, and then drove on to the Nebraska Machinery Company, where, at 6:49 a.m., Agent Dostal watched him park the truck and go into the business. He emerged about 15 minutes later, pushing a cart full of items, which he loaded into the back of the pickup. He returned the cart to the business and drove off. SSA Ex. 6 at 8 (Dostal Decl. ¶ 18); SSA Ex. 8; *see* SSA Ex. 7 at 23-24. According to the GPS surveillance log, the respondent stopped at a mall and then drove to the Anderson Excavating "yard." SSA Ex. 7 at 24.

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[7] The device stopped working after 1:51 p.m. on September 10. Its battery was replaced during the early morning hours of September 11. SSA Ex. 7 at 19. That battery died sometime after 5:11 p.m. on September 30 and was not replaced until October 16. SSA Ex. 7 at 37.

<u>Employee statements</u>. Agent Dostal interviewed current and former employees of Anderson Excavating and others who did business with the company; he obtained the following information:

- Dean Teten (February 12, 2009 interview). Dean Teten told Agent Dostal that, since about 2004 or 2005, he had been working part-time as a superintendent for Anderson Excavating. He reported that, throughout this time, Respondent Carlson worked there as a mechanic and continued to work there. SSA Ex. 6 at 3 (Dostal Decl. ¶ 7); SSA Ex. 9.

  In a written declaration, Dean Teten does not deny making this statement to Agent Dostal but suggests that he has not been in a position to know what Respondent was doing at Anderson Excavating. He refers to Respondent Carlson's "building his models" at the shop. He also admits that he would call the respondent "on a cellphone provided to [Carlson] by [Anderson Excavating]" when equipment his crew used failed. Respondent Carlson would respond, sometimes telling him how to fix broken equipment. R. Ex. 9 at 2 (Teten Decl. ¶¶ 5, 7, 9).

- James Wilson (February 13, 2009 interview). From 1994 through 2005, James Wilson worked at Anderson Excavating in various capacities, including estimating, purchasing, superintendent, and general labor. He told Agent Dostal that, when he started at Anderson Excavating, Respondent Carlson was working there as a mechanic and was still working there in 2005, when Mr. Wilson left the company. Mr. Wilson believed that Respondent Carlson continued to work at Anderson Excavating. SSA Ex. 6 at 3 (Dostal Decl. ¶ 8); SSA Ex. 10.

- Virgil Anderson (February 19, 2009 interview). Virgil Anderson, the company's owner and chief executive officer (CEO), learned from Dean Teten that the IG was investigating Respondent Carlson's work activities. Virgil Anderson told Special Agents Dostal and Jason Albers that he owned Anderson Excavating and that he and Respondent Carlson had been good friends for many years. He conceded that Respondent Carlson "hung around" the business and occasionally acted as a consultant for the company, explaining how to fix equipment problems. He told the agents that Carlson worked on Caterpillar equipment as a hobby and that he also built small machines. He denied paying Carlson for work but admitted that Respondent Carlson "provides the services that he provides in order to pay back the money [$30,000] that [I] loaned him to pay off [a] government debt." SSA Ex. 6 at 3-4 (Dostal Decl. ¶ 9).

  CEO Anderson confirmed that Respondent drove a company vehicle and that the company paid for its fuel. He also admitted that the company provided Respondent Carlson with a cell phone. SSA Ex. 6 at 4 (Dostal Decl. ¶ 9); SSA Ex. 16.

In a written statement, signed by CEO Anderson on February 19, 2009, he repeated that "Rich Carlson is repaying me in consulting information for paying his taxes," but asserted that, from 2003 to this day, "I have not paid Rich Carlson any money . . . . From 2003 forward, Rich has done consulting . . . for no pay, directly or indirectly." SSA Ex. 16, Attach. A.

Eighteen months later, the investigation continued. Agent Dostal and his colleagues interviewed more Anderson employees, with similar results. Virtually everyone said that Respondent Carlson continued working at Anderson Excavating after June 2002:

- Gerald Seffron (August 18, 2010 interview). Gerald Seffron was a carpenter, who had worked at Anderson Excavating for approximately 22 years. He told Special Agents Dostal and Albers that Respondent Carlson worked for Anderson Excavating. He said that Respondent Carlson ran the company's maintenance program, but he believed that Respondent Carlson had left the company 7 or 8 months earlier. SSA Ex. 6 at 13 (Dostal Decl. ¶ 31); SSA Ex. 12 at 1-2.

  In a written declaration, Gerald Seffron denies telling the agents that Respondent Carlson left the company 7 or 8 months earlier, but claims to have said that he last saw the respondent 7 or 8 months earlier. He claims that he "assumed" that Respondent Carlson was not employed at the company, because he saw him working on models, but he did not know whether Respondent Carlson worked at the company or not. R. Ex. 12 at 2 (Seffron Decl. ¶¶ 3, 4, 5, 6).

- Jose Aguero-Chavarria (August 18, 2010 interview). Jose Aguero-Chavarria was employed at Anderson Excavating as a general laborer and had been there for about 20 years. He told the agents that Respondent Carlson (whom he called "Rich") was a mechanic who also supervised the other mechanics. He estimated that "Rich" had worked at Anderson for about 20 years. Mr. Aguero confirmed that the respondent drove a white company pickup truck. SSA Ex. 6 at 13 (Dostal Decl. ¶ 32); SSA Ex. 12 at 2.

- Martin Almazan (August 18, 2010 interview). Martin Almazan had been employed by Anderson Excavating for about 25 years. He told Agents Dostal and Albers that he knew Respondent Carlson, who had been at the company almost that long. He believed that Respondent Carlson had worked full-time as a maintenance worker until about 1½ years earlier, when he reduced his hours because of heart problems. He thought that Respondent Carlson searched the internet and ordered parts needed for company equipment. The respondent delivered the parts to job locations so that they could be installed on the equipment. Mr. Almazan identified Randy Miller as Carlson's supervisor and

named two other mechanics with whom Respondent Carlson worked: "Travis" (who was the stepson of company owner, Virgil Anderson) and "White." SSA Ex. 6 at 13-14 (Dostal Decl. ¶ 33); SSA Ex. 12 at 2-3.

- Linda Holmes (August 19, 2010 interview). Linda Holmes told Special Agent Dostal that, from about August 2005 until March 2006, she worked as a receptionist at Anderson Excavating. She confirmed that Respondent Carlson was employed there, and she believed that he was a supervisor in the company's maintenance shop. She remembered his coming into the office on Friday afternoons to pick up the payroll checks for the mechanics in his department. SSA Ex. 6 at 14 (Dostal Decl. ¶ 34); SSA Ex. 12 at 3.

- Debbie Miller (January 26, 2011 interview). Debbie Miller, who was the daughter of company owner Virgil Anderson, worked in the office at Anderson Excavating from 2000 until 2007. She had been Linda Holmes's supervisor. She told Special Agents Dostal and Joel Ferris that Respondent Carlson was a mechanic at Anderson Excavating and was on the payroll until he had his heart attack. But when Special Agent Dostal told her that the heart attack was in 2002, she said that she thought it had occurred later, closer to the time she left the company. SSA Ex. 6 at 14 (Dostal Decl. ¶ 35); SSA Ex. 12 at 3; SSA Ex. 13.

<u>Related interviews</u>. The special agents also interviewed employees of businesses that the GPS tracking device indicated Respondent Carlson frequented. Those individuals consistently reported that the respondent stopped to purchase machine parts, which he subsequently delivered to Anderson Excavating work sites. They also said that Respondent Carlson ordered the parts on behalf of Anderson Excavating and that the businesses billed Anderson for them.

- Dave Thomas (October 19, 2009 interview). Dave Thomas was an assistant manager in the parts department of Nebraska Machinery Company. He told Agents Dostal and Albers that he had known Respondent Carlson for about 15 years in Carlson's capacity as the head mechanic for Anderson Excavating. Respondent Carlson regularly ordered parts from Nebraska Machinery, then picked them up and delivered them to Anderson Excavating's various job sites. Mr. Thomas told the agents that, prior to Respondent Carlson's heart problems, he had been a hands-on mechanic, but now he trained the other mechanics, ordered parts, and delivered the parts to the job sites. SSA Ex. 6 at 10 (Dostal Decl. ¶ 23);

- SSA Ex. 11 at 1-2; *see* SSA Ex. 7 at 1, 6, 7, 9, 10, 11, 12, 13, 14 (showing stops at Nebraska Machinery, referred to as "Caterpillar," followed by stops at the Anderson main yard and work sites).[8]

- Jana Dalton (October 19, 2009 interview). Jana Dalton worked in the parts department at Murphy Tractor and Equipment Company. She told Agents Dostal and Albers that she thought Respondent Carlson worked as a mechanic at Anderson Excavating because he was "dirty like a mechanic" when he came to the office. She said that he usually arrived at about the time that the business opened up in the morning. He ordered parts and came to the company to pick them up for delivery to the Anderson Excavating job sites. She was not aware of anyone else who picked up parts for Anderson Excavating. She also said that Respondent Carlson signed Anderson invoices for the parts. She gave the agents the last three such invoices, dated August 28, September 1, and September 10, 2009. SSA Ex. 6 at 10-11 (Dostal Decl. ¶ 24); SSA Ex. 11 at 2; *see* SSA Ex. 7 at 6, 7, 12, 17, 18.

- Darren Gatlin (October 19, 2009 interview). Darren Gatlin was a sales associate at Airgas North Central. He knew "Rich" Carlson as an Anderson Excavation employee and told the agents that the respondent had been coming to his business once or twice a month for as long as Mr. Gatlin had worked there (2½ years). Airgas billed Anderson Excavating for the products Respondent Carlson picked up. Mr. Gatlin also reported that Respondent Carlson had been training someone named "Santos," a welder at Anderson Excavating. SSA Ex. 6 at 11 (Dostal Decl. ¶ 25); SSA Ex. 11 at 2-3; *see* SSA Ex. 7 at 12.

- Ted Christensen (October 19, 2009 interview). Ted Christensen was a salesman in the parts department at Road Builders Machinery and Supply Company. He told Agents Dostal and Albers that Respondent Carlson ordered parts and came to the business to pick them up and distribute them to Anderson Excavating work sites. Mr. Christensen said that he had been working at Road Builders for about four years and that Respondent Carlson had been ordering and picking up parts that entire time. Before he started working at Road Builders, Mr. Christensen worked at Nebraska Machinery, from whom Respondent Carlson also ordered and picked up parts. SSA Ex. 6 at 11 (Dostal Decl. ¶ 26); SSA Ex. 11 at 3; *see* SSA Ex. 7 at 6, 22.

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[8] The tracking log refers to the Nebraska Machinery location as "Hwy 370 & I-80," while Agent Dostal gives its address as "11002 Sapp Brothers Drive." Highway 370 and I-80 form the southern and eastern borders of the business property, and Sapp Brothers Drive is the western border.

- Pat Bivens (October 19, 2009 interview). Pat Bivens was a service manager at Road Builders Machinery and Supply Company. He told Agents Dostal and Albers that Respondent Carlson worked for Anderson Excavating as a mechanic. Although they did not have much contact, he remembered Respondent Carlson coming into the business during the fall of 2008 or spring of 2009 to look at a piece of equipment that Virgil Anderson wanted to buy. SSA Ex. 6 at 11-12 (Dostal Decl. ¶ 27); SSA Ex. 11 at 3.

- Neal McGrath (October 19, 2009 interview). Neal McGrath worked at the front counter of Allied Oil & Supply Company, Inc., selling equipment lubricants. He told Agents Dostal and Albers that Respondent Carlson worked for Anderson Excavating, ordering and distributing parts and supplies to Anderson's work sites. He said that, for the twelve years he (Mr. McGrath) had been working there, Respondent Carlson had been coming in two or three times per week. Respondent Carlson usually had with him a purchase order number from Anderson Excavating. If not, Mr. McGrath contacted Anderson Excavating and got it. SSA Ex. 6 at 12 (Dostal Decl. ¶ 28); SSA Ex. 11 at 3-4; *see* SSA Ex. 7 at 3, 5, 20.

- Clyde Schulte (October 19, 2009 interview). Clyde Schulte owned and managed Roe Machine and Pattern Works. He identified Respondent as a "maintenance man" for Anderson Excavating and told the special agents that Respondent Carlson, acting on behalf of Anderson Excavating, brought him items in need of repair, most recently, a wheel hub. Mr. Schulte then billed Anderson Excavating for his repair services. He estimated that Respondent Carlson had been doing this for more than ten years. SSA Ex. 6 at 12 (Dostal Decl. ¶ 29); SSA Ex. 7 at 3, 5, 13, 16; SSA Ex. 11 at 4.

<u>Tools and documents seized or recorded</u>. On October 16, 2009, Special Agent Dostal and other agents executed search warrants on Respondent Carlson's residence and the Anderson-owned pickup truck that he drove. The agents seized a long list of items, including equipment belonging to Anderson Excavating, receipts, notebooks, and parts inventories. SSA Ex. 6 at 9 (Dostal Decl. ¶ 20); SSA Ex. 6, Attach. A; SSA Exs. 14, 15.

The items seized were too numerous to list in this decision, but they included:

- A notebook marked "security alarms," with codes for the alarms on Anderson Excavating work sites. The notebook also contained the names of employees with access to the "code books," and "Rich Carlson" was one of those names. SSA Ex. 6, Attach. A at 1; SSA Ex. 14 at 9-10.

- A file folder containing specification sheets for pieces of Anderson Excavating equipment and a handwritten listing of parts. A fax cover sheet to "Chrissie" from "Tom Kuehl" identifies the documents as "Rich's list." Respondent Carlson admitted that the handwriting was his own. SSA Ex. 6, Attach. A at 1; SSA Ex. 14 at 1-8.

- A spiral notebook with company identification numbers and parts numbers in Respondent Carlson's handwriting. SSA Ex. 6, Attach. A at 1; SSA Ex. 14 at 14-21.

- Parts receipts and invoices identifying "Rich" or "Rich Carlson" as the contact person or person ordering. SSA Ex. 6, Attach. A at 1; SSA Ex. 14 at 25-30.

- A rolodex containing telephone numbers, most for Omaha-area parts vendors. SSA Ex. 6, Attach. A at 1; SSA Ex. 14 at 31-35.

<u>Respondent's cell phone documents</u>. Respondent Carlson had a company cell phone and incurred thousands of dollars in cell phone bills that Anderson Excavating paid. Most of the calls were to or from other Anderson employees, who also had company phones, or to equipment and parts vendors, such as Nebraska Machinery. From December 8, 2002, until October 18, 2009, Respondent Carlson logged a monthly average of 39 cell phone hours on Anderson's behalf. SSA Ex. 6 at 9 (Dostal Decl. ¶ 22); SSA Ex. 17; *see* SSA Ex. 16 at 3 (admitting that the company provided Respondent with a cell phone).

<u>Respondent's police statement</u>. On February 11, 2003, Respondent Carlson was in an accident while driving the company-owned pickup truck. The Omaha Police Department cited him for driving without a valid operator's license. According to the accident report, Respondent told the police officer that he worked "days" and identified his business as Anderson Excavating. SSA Ex. 6 at 6 (Dostal Decl. ¶ 15); SSA Ex. 18 at 4.[9]

<u>Bank records/spending habits</u>. Agent Dostal reviewed Respondent Carlson's bank records as well as records from creditors. Respondent and his wife had a checking account at First Nebraska Educators Credit Union. SSA Ex. 6 at 6 (Dostal Decl. ¶ 13); SSA Ex. 19 at 6-11. Respondent's disability benefits were deposited into that account, as were monthly checks from the State of Nebraska, payable to his wife (apparently for

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[9] Even though it occurred during his trial work period, the statement is relevant. It shows the ongoing nature of his work and, because a trial work period is limited, the fact that he was working in 2003 affects his eligibility for benefits in 2005 and beyond. I note that Respondent asserts that the incident occurred in 2005. *See* discussion below.

providing daycare for her grandchildren), and multiple, unexplained cash deposits. SSA Ex. 6 at 6, 9 (Dostal Decl. ¶¶ 13, 21); SSA Ex. 19. Notwithstanding the checking account, documentation established that the Carlsons regularly paid their bills with cash. SSA Ex. 6 at 9 (Dostal Decl. ¶ 21); SSA Ex. 15; SSA Ex. 19 at 1-3.

Respondent's defenses. Respondent argues that he was not employed by Anderson Excavating because he was no longer capable of repairing heavy equipment, which was the work he did before he became disabled. R. Ex. 1 at 2 (Carlson Decl. ¶ 7); *see* R. Ex. 4 at 3 (Virginia Anderson Decl. ¶ 11) (maintaining that Respondent has a "very sharp mind and a lot of experience with the mechanical operations of the machines, but he cannot perform the physical labor."). Whether he could return to his prior job is irrelevant; no one argues that he could. The question is whether he was performing work activities without reporting that fact to SSA.

Respondent characterizes his activities at Anderson Excavating as "hobbies" and "social programs," which do not constitute substantial gainful activity and thus would not affect his eligibility for benefits. R. Br. at 10, 12-13. But, whether his work activity constituted substantial gainful activity, which would have disqualified him from eligibility for disability benefits, is also irrelevant to the question of whether he falsely reported his work activities.[10] A disability claimant must describe accurately any activities performed, and SSA then determines whether those activities constitute the type of work that would preclude a finding of disability. A claimant is not free to determine on his own whether his activities are disqualifying, reporting only his conclusion to SSA. In a similar context, the Departmental Appeals Board agreed:

> Had Respondent cooperated with SSA's inquiries by providing accurate information about his work activities, then SSA would have been able to determine whether or not those activities demonstrated a capacity for gainful employment. By concealing the extent of his work . . . Respondent deprived SSA of the ability to evaluate those facts along with medical evidence [if necessary] to make that determination.

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[10] In a decision issued March 22, 2012, an administrative law judge for the Social Security Administration determined that Respondent Carlson completed his trial work period in May 2005 and began performing substantial gainful activity as of August 1, 2005. SSA Ex. 22 at 8-14. Although neither party addressed this issue, that decision is arguably entitled to *res judicata* effect. *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966) ("[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it, which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.").

Social Security Administration, Office of the Inspector General v. Anthony Koutsogiannis, DAB CR1569, at 17 (2007), *aff'd*, DAB, A-07-81 (2007); *accord*, *Social Security Administration, Office of the Inspector General v. Deliece L. White and Joseph R. O'Lone*, DAB CR1298, at 13 (2005), *aff'd*, DAB A-05-89 (2005); *see* 20 C.F.R. § 404.1571 (advising beneficiaries that all work must be reported: "Even if the work you have done was not substantial gainful activity, it may show that you are able to do more work than you actually did.").

Thus, Respondent was bound to report his activities, regardless of whether they constituted disqualifying substantial gainful activity. In any event, the services he provided were plainly the types of services usually done for pay or profit. *See* 20 C.F.R. § 404.1572(b). In fact, ordering parts from vendors and advising/supervising less skilled employees were some of the job duties he performed prior to the onset of his disability. R. Ex. 1 at 2 (Carlson Decl. ¶ 4).

Respondent admits (as he must) that, after the onset of his disability, he regularly went to the Anderson Excavating shop but claims that he did so in order to visit his friends and to work on his hobby – building models of construction equipment. R. Br. at 2, 13; R. Ex. 1 at 3 (Carlson Decl. ¶¶ 10, 11). Virgil Anderson and the company president, Virginia Anderson (who are husband and wife), concede that Respondent Carlson continued to come into the shop after he had his heart attack, but they claim that he did so to work on his models. R. Ex. 4 at 2 (Virginia Anderson Decl. ¶¶ 5, 9); R. Ex. 5 at 2 (Virgil Anderson Decl. ¶ 4, 9). Other Anderson Excavating employees refer to seeing Respondent Carlson spending time in the company's workshop but say that he was not capable of returning to his old job and suggest that he was working on his hobby. This testimony is significantly weakened by their assertions that they really didn't know what he was doing, R. Ex. 9 at 2 (Teten Decl. ¶ 5, 7); R. Ex. 12 at 2 (Seffron Decl. ¶ 6), or by their describing his actual work activities. R. Ex. 9 at 2 (Teten Decl. ¶ 8); R. Ex. 10 at 2 (Schoening Decl. ¶¶ 7, 9, 10); R. Ex. 11 at 2 (Davis Decl. ¶¶ 7, 8, 9, 10).

Everyone, including Respondent Carlson, concedes that he drove a company pickup truck. Respondent claims that CEO Anderson allowed him to use the truck out of friendship and that he was not the only person to drive that truck. R. Ex. 1 at 3 (Carlson Decl. ¶ 12). Again, the Andersons echo his assertion, adding that they intended the truck for his personal use. R. Ex. 4 at 2 (Virginia Anderson Decl. ¶ 7); R. Ex. 5 at 2 (Virgil Anderson Decl. ¶ 6).

Everyone also agrees that the company provided Respondent Carlson with a cell phone and company credit card. Respondent Carlson claims that Virgil Anderson gave the cell phone to him "so that if I had heart problems that I could call 911." R. Ex. 1 at 4 (Carlson Decl. ¶ 14). The Andersons claim that they gave him the company phone out of friendship and that it was for his own personal use. R. Ex. 4 at 2 (Virginia Anderson Decl. ¶ 7); R. Ex. 5 at 2 (Virgil Anderson Decl. ¶ 6). They justify his access to the

company credit card by asserting that the card was used to fuel multiple "vehicles or pieces of equipment used by the company. In fact, on the back of the credit card were the words, 'Shop Use.'" R. Ex. 1 at 5 (Carlson Decl. ¶ 17(d)). This hardly furthers Respondent's case. Rather, it suggests that the Andersons gave him a company credit card to use for company business, and the evidence establishes that he did just that.

Using an interesting – and potentially revealing – choice of words, the Andersons say that they allowed Respondent and "other employees" to use a company credit card "for gas and services related to the vehicles and equipment." R. Br. at 15; R. Ex. 4 at 2 (Virginia Anderson Decl. ¶ 7); R. Ex. 5 at 2 (Virgil Anderson Decl. ¶ 6). Taken literally, this verbiage suggests that Respondent was one among the company's other employees. However, I consider the statement inartfully drafted rather than an admission that the respondent was among the company employees. Nevertheless, this language underscores an already strong inference: the respondent's use of a company vehicle, cell phone, and credit card establishes that he was employed by the company.

Significantly, Respondent Carlson, the Andersons, and other company employees concede that he engaged in work activity for the company, including running errands, picking up and delivering supplies, offering equipment advice, and teaching younger employees. According to the Andersons, he did so voluntarily, without hopes of compensation, so that he could visit with his friends at the parts dealers and on the job sites. R. Br. at 6, 13; R. Ex. 1 at 4 (Carlson Decl. ¶ 16); R. Ex. 4 at 2, 3 (Virginia Anderson Decl. ¶¶ 8, 11); R. Ex. 5 at 2 (Virgil Anderson Decl. ¶ 8); R. Ex. 10 at 2 (Schoening Decl. ¶¶ 7, 9, 10); R. Ex. 11 at 2 (Davis Decl. ¶¶ 7, 8, 9, 10). I note that not one of the outside vendors suggested to the IG special agents that Respondent Carlson had stopped by for a friendly visit. They consistently maintained that he came to their businesses to do business – mainly, purchasing parts for Anderson Excavating, which he subsequently delivered to job sites.

Ultimately, the problem with Respondent's explanations is that the overwhelming evidence establishes that he used the truck, phone, and credit card primarily for company business. The surveillance logs, the cell phone records, and the sheer volume of order forms, equipment inventories, receipts, and other records belie his claims that he only occasionally performed the work activities.

With respect to the police statement, Respondent Carlson previously acknowledged having two accidents in Anderson Excavating vehicles, including one in 2003. SSA Ex. 6 at 9 (Dostal Decl. ¶ 19). He and CEO Anderson now appear to claim that the 2003 accident happened in 2005. Inasmuch as the IG produced a 2003 accident report, I suspect that Respondent Carlson and CEO Anderson are mistaken in their written testimony. In any event, the respondent denies telling the police officer on the scene that he "worked days." According to Respondent Carlson, he told the officer that he was not working at Anderson Excavating at the time, but, because he was driving a commercial

vehicle, the officer told him that he "was required to put something down regarding my employment," so he wrote that the respondent was working. R. Ex. 1 at 3-4 (Carlson Decl. ¶ 13); R. Ex. 5 at 2 (Virgil Anderson Decl. ¶ 7). I do not find this credible.

Finally, Respondent denies receiving, and the Andersons deny paying him wages or "cash under the table." R. Ex. 1 at 2, 5 (Carlson Decl. ¶¶ 8, 18); R. Ex. 4 at 2 (Virginia Anderson Decl. ¶ 6); R. Ex. 5 at 2 (Virgil Anderson Decl. ¶ 5). He attributes all of his suspicious cash transactions to an arrangement that he and his wife had with her adult children: the children charged purchases on the Carlsons' credit card and repaid the Carlsons in cash. R. Ex. 1 at 5-6 (Carlson Decl. ¶ 18); R. Ex. 6 at 2-3 (D. Carlson Decl. ¶ 9). Respondent also claims that, in 2005, his wife's ex-husband gave them $5,000 in cash to cover the costs of a son's legal fees. R. Ex. 6 at 3 (D. Carlson Decl. ¶ 10); R. Ex. 8 at 2 (Rolfe Decl. ¶ 5).

These explanations do not fully answer the questions raised by all the cash transactions found by the IG investigators. First, Respondent has not provided a full and comprehensive accounting of his cash receipts. *See* SSA Ex. 19. Second, even accepting the dubious proposition that Respondent and those who gave him money dealt strictly in cash and created no records of their transactions, the undisputed evidence establishes that Respondent Carlson was compensated for at least some of his work activities. CEO Anderson volunteered, and Respondent has not challenged, that he repaid a substantial debt by providing his services to Anderson Excavating. SSA Ex. 6 at 4 (Dostal Decl. ¶ 9); SSA Ex. 16, Attach. A. Third, work may be disqualifying so long as it is "the kind of work usually done for pay or profit, whether or not a profit is realized." 20 C.F.R. § 404.1572(b). Respondent was obligated to report his work activities, whether he was paid or not.

Thus, the reliable – and largely unrebutted – evidence establishes that, while he was receiving disability insurance benefits, Respondent Carlson engaged in work activities. He deliberately withheld that information from SSA and, when asked, he repeatedly and falsely denied any work activity. He is therefore subject to penalty under section 1129 of the Act.

2. The IG proposes a reasonable CMP against Respondent Carlson.

Penalty. The statute allows the IG 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. §§ 498.102(a), 498.103(a).

As discussed above, in assessing a penalty, the IG disregards Respondent Carlson's work activity prior to March 2008 and relies solely on the 21 months – from March 2008 through November 2009 – that Respondent collected benefits while working. IG Br. at

13; SSA Ex. 25 at 1; SSA Ex. 27 at 2 (Bungard Decl. ¶ 6). This alone could subject him to a penalty of $105,000 ($5,000 x 21). In addition, in three separate reports – two dated December 8, 2008, and one dated December 22, 2010 – he affirmatively represented that he was "not working at all." Those three statements could add an additional $15,000 to his penalty. SSA Exs. 2-4.

Thus, the IG's proposed penalty, $20,000, represents a fraction of Respondent's potential liability.

Assessment in lieu of damages. The IG 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.

Between November 2005 and November 2009, SSA paid Respondent Carlson $74,421 in benefits to which he was not entitled plus it paid $3,569.40 in Medicare premiums on his behalf, to which he was not entitled, totaling $77,990.40 in overpayments. SSA Ex. 21 at 1; IG Br. at 1 n.1. The agency subsequently recouped some of that overpayment by withholding benefits, which reduced the amount of the overpayment to $59,488. IG Br. at 13; R. Br. at 19; R. Ex. 1 at 7. The IG now seeks an assessment in lieu of damages of $59,488, which represents SSA's actual losses. SSA Ex. 27 at 2-3 (Bungard Decl. ¶ 7); IG Br. at 13. Again, the proposed assessment is much lower than the maximum authorized by statute.

Respondent Carlson does not specifically challenge SSA's calculation of the overpayment, the assessment in lieu of damages, or the penalty amount. Rather, he argues that the proposed CMP is "unreasonable based upon [his] financial position, personal history, and the underlying facts of this case." R. Br. at 20. Specifically, Respondent claims that he lacks significant income, assets, or earning potential, has no history of fraud, and has a low degree of culpability because he did not attempt to conceal his work activity at Anderson Excavating. R. Br. at 19-20.

Regulatory criteria. I now apply the regulatory criteria to assess whether the amount of the CMP is appropriate. I am specifically authorized to affirm, deny, increase, or reduce the penalties proposed by the IG. 20 C.F.R. § 498.220(b). 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(a).

The IG does not contend that Respondent Carlson has a history of prior offenses, although he points out that Respondent's deception continued for a substantial period of time. IG Br. at 14.

With respect to the respondent's financial condition, he has limited resources and income, which must be considered in determining a reasonable CMP. IG Br. at 14; SSA Ex. 24. Because of his financial limitations, the IG has limited the assessment to SSA's actual losses and proposed a penalty that represents a fraction of the statutorily-authorized maximum.

As to the other factors, Respondent Carlson engaged in deception that lasted for years, much longer than the 21 months for which the IG is holding him accountable. During that time, he knowingly withheld material information from SSA and, when questioned directly about his work activities, he deliberately misled the agency. Nor was he straight-forward with the IG investigators, admitting only that he "would occasionally look at a piece of equipment and give his advice on how to fix it." SSA Ex. 16 at 4; *see* SSA Ex. 16, Attach. B. He did not mention that he regularly ordered and purchased parts, which he picked up and delivered to the work sites. His culpability is substantial and more than justifies the CMP imposed here.

Finally, I note that the integrity of the disability system depends on each claimant or beneficiary accurately describing his work activities, so that SSA can determine whether he qualifies or continues to qualify for benefits. Where, as here, a beneficiary deliberately misrepresents his work activities, he undermines the integrity of that system.

Conclusion

Respondent Carlson violated section 1129 of the Act because he collected disability insurance benefits while he continued to perform work activities; then, he knowingly withheld and misrepresented that material fact. I consider the $79,488 CMP reasonable.

/s/

Carolyn Cozad Hughes
Administrative Law Judge