Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Salvatore Cappetta
Docket No. A-15-105
January 8, 2016

RECOMMENDED DECISION

The Social Security Administration Office of Inspector General (SSA I.G.) appeals an August 10, 2015 decision by an Administrative Law Judge on remand from the Board holding that there was no basis to impose a civil money penalty (CMP) or an assessment in lieu of damages (assessment) against Salvatore Cappetta (Respondent) under section 1129(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-8(a)(1)). *Salvatore Cappetta*, DAB CR4112 (2015) (ALJ Decision). The SSA I.G. proposed the CMP and assessment on the ground that Respondent failed to disclose to SSA that he engaged in work activity while receiving Social Security Disability Insurance Benefits (DIB) and knew or should have known that the undisclosed information was material and that not disclosing it was misleading.

The ALJ Decision followed the Board's reversal and remand of the ALJ's earlier decision holding that there was no basis to impose the CMP and assessment against Respondent. *Salvatore Cappetta*, DAB CR3260 (2014) (First ALJ Decision), *rev'd and remanded*, *Salvatore Cappetta*, DAB No. 2606 (2014) (Board Decision). The First ALJ Decision found that Respondent had failed to disclose to SSA that he worked while receiving DIB but concluded that, under a provision of the Act applicable to persons who have received DIB for 24 months, SSA could not terminate Respondent's DIB based on his work activity, and that information about his work activity was thus not a material fact and he could not be penalized for failing to disclose it. The Board concluded that the ALJ'S conclusion that SSA could not terminate Respondent's DIB based on his work activity was error and, therefore, that information about his work activity was a material fact. The Board reversed the First ALJ Decision and remanded the case for the ALJ to further consider whether the SSA I.G. had a basis to impose the CMP and assessment and, if so, to address issues relating to the amount of the CMP and the assessment.

On remand, the ALJ again found that Respondent engaged in work activity while receiving DIB and did not disclose his work activity to SSA but nonetheless concluded that the SSA I.G. had no basis to impose the CMP and assessment. The ALJ Decision reiterates the conclusion from the First ALJ Decision that Respondent's work activity was not a material fact for purposes of the disclosure requirement and also advances a

new legal ground for that conclusion. The ALJ Decision also concludes that even if the SSA I.G. had a basis to seek to impose a CMP and assessment, no amount of CMP or assessment was warranted under the regulations stating the factors that the SSA I.G. considers in determining CMP and assessment amounts.

For the reasons discussed below, we reverse the ALJ Decision's conclusions that Respondent did not know and could not have known that the facts about his work activities he withheld from SSA were material and that withholding them was misleading; that the SSA I.G. had no basis to impose a CMP and assessment; and that no amount of CMP or assessment could be imposed under the factors in the Act and regulations. We uphold the ALJ's conclusion that the SSA I.G. showed that Respondent withheld the information about his work activity for 53 months and recommend that the Commissioner of Social Security impose a CMP of $106,000 and an assessment of $47,583.60.

Case background[1]

Respondent had worked in construction and was determined to be disabled and entitled to DIB with an onset of disability on January 15, 1997 based on diagnoses including rheumatoid arthritis, heart condition, and headaches. ALJ Decision at 16. The DIB program, as relevant here, pays monetary benefits to covered, disabled individuals who are unable to engage in any "substantial gainful activity" due to medically determinable physical or mental impairments that are expected to last at least one year and prevent them from doing their previous work or any other kind of substantial gainful work that exists in the national economy. Act § 223(d)(1), (2); 20 C.F.R. Part 404.[2] SSA determines DIB eligibility in part by considering whether an individual has engaged in substantial gainful activity, and will find an individual with an impairment not eligible for DIB if the individual performs services or has earnings from services that exceed the criteria for substantial gainful activity SSA has prescribed in regulations. Act § 223(d)(4)(A); 20 C.F.R. § 404.1574(b)(2).

In July 2012 the SSA I.G. proposed a CMP and assessment on the ground that Respondent failed to disclose to SSA, during the period November 2002 through April 2011, that he had worked while he and his children received DIB. The SSA I.G. proposed the penalty and assessment under section 1129(a)(1)(C) of the Act (42 U.S.C. § 1320a-8(a)(1)(C)) which authorizes CMPs and assessments for any person who fails to

[1] The information in the background section and in our analysis is from the two ALJ Decisions and the record before the ALJ.

[2] "Substantial gainful activity" is work that "(a) Involves doing significant and productive physical or mental duties;" and "(b) Is done (or intended) for pay or profit." 20 C.F.R. § 404.1510; *see also* § 404.1572 (describing some activities that are not considered substantial gainful activity, such as hobbies, self-care, household tasks, therapy and school attendance).

disclose to SSA "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" if the person "knows, or should know . . . that the withholding of such disclosure is misleading[.]" A "material fact" is a fact SSA "may consider in evaluating whether an applicant is entitled to benefits under title II" of the Act (DIB). Act § 1129(a)(2); 20 C.F.R. § 498.101. The SSA I.G. alleged that Respondent had worked for a construction company, Cameron Construction, and for its owner, Peter Cameron, while receiving DIB.

The Act and regulations authorize CMPs of not more than $5,000 for each month an individual withholds material information while receiving DIB, and an assessment of "not more than twice the amount of benefits or payments paid as a result of . . . such a withholding of disclosure." Act § 1129(a)(1); *see* 20 C.F.R. §§ 498.103(a), 498.104. While the SSA I.G. alleged that Respondent's failure to disclose his work while receiving DIB began in November 2002, the SSA I.G. proposed a CMP and assessment for the period December 2006 through April 2011, due to "the effective date of the material withholding provision of Section 1129 [Act § 1129(a)(1)(C)]," the provision under which it proceeded against Respondent. SSA Ex. 17, at 1. The SSA I.G. determined that Respondent and his children improperly received $47,583.60 in benefits during that time and proposed a CMP of $106,000 and an assessment in lieu of damages of $95,167.20, twice the amount of DIB the SSA I.G. determined Respondent and his children had improperly received during that time period ($47,583.60), for a total of $201,167.20. *Id*.

Respondent requested an ALJ hearing, which the ALJ convened by video teleconference on September 25 and November 20, 2013.

The First ALJ Decision

The First ALJ Decision found "that Respondent did engage in some gainful work activity for Peter Cameron," the owner of the construction company for which he had worked before his date of disability, finding his argument to the contrary "not persuasive." First ALJ Decision at 17. The ALJ concluded that Respondent "failed to report work activity [to SSA] in violation of the regulation." *Id*. at 10. The First ALJ Decision also found that Respondent "admitted at hearing that he knew if he worked, he was supposed to report to SSA." *Id*. at 17, citing Tr. at 301-02. Respondent's knowledge of the reporting requirement, the First ALJ Decision found, accurately reflected the requirement of 20 C.F.R. § 404.1588(a) that a beneficiary "entitled to cash benefits for a period of disability, such as Respondent . . . promptly notify SSA when his or her condition improves; when he or she returns to work; when he or she increases the amount of work

performed; or when earnings increase." *Id*. at 16.[3] The First ALJ Decision also cited another regulation, section 404.1571, as requiring beneficiaries to report "all work activity . . . – no matter how minimal, whether for pay or profit or not, whether legal or illegal, or whether in support of a charitable or volunteer organization – which is consistent with the SSA IG's position." *Id*. at 16-17, citing 20 C.F.R. § 404.1571. Section 404.1571, the First ALJ Decision concluded, "indicates that any work activity may impact the determination of whether or not one can perform substantial gainful activity and the determination of entitlement or continuing entitlement to Social Security benefits." *Id.* at 16.

The First ALJ Decision then stated that the ALJ "normally . . . would conclude that Respondent's failure to report that he engaged in work activity, no matter how minimal that work activity or how infrequent, was an omission or failure of Respondent to report a material fact subjecting him to a CMP and assessment under section 1129(a)(1)(C) of the Act." *Id*. at 18. However, the ALJ held that because Respondent had received DIB for more than two years, section 221(m) of the Act precluded SSA's considering his work as a basis to terminate his benefits, which meant that Respondent's work activity was not a material fact SSA could consider in evaluating whether Respondent continued to be entitled to benefits and which Respondent could be sanctioned for failing to disclose. *Id*. at 18-19. The ALJ relied on language in section 221(m) stating that if a beneficiary has received DIB for "at least 24 months— . . . no work activity engaged in by the individual may be used as evidence that the individual is no longer disabled[.]" Act § 221(m)(1)(B).[4] The ALJ concluded that Respondent's "failure to report his work activity . . . is not, as a matter of law, a failure to report a material fact for which a CMP or assessment is authorized under section 1129(a)(1)" and that there was no basis to impose a CMP or assessment. First ALJ Decision at 19. The SSA I.G. appealed the First ALJ Decision to the Board.

[3] 20 C.F.R. § 404.1588, "Your responsibility to tell us of events that may change your disability status," states:

> (a) *Your responsibility to report changes to us.* If you are entitled to cash benefits or to a period of disability because you are disabled, you should promptly tell us if—
> (1) Your condition improves;
> (2) You return to work;
> (3) You increase the amount of your work; or
> (4) Your earnings increase.

[4] Act § 221(m)(1) also forbids SSA from using a 24-month DIB recipient's work activity as the sole basis to schedule a "continuing disability review" to assess whether the recipient is still disabled due to a medically determinable impairment. Act § 221(m)(1)(A).

The Board Decision

The Board Decision found legally erroneous the ALJ's conclusion that section 221(m)(1) of the Act precluded terminating Respondent's benefits based on his work activity, rendering that information not material. The ALJ's conclusion, the Board found, ignored other language in the Act and regulations permitting SSA to terminate benefits to a 24-month DIB recipient based on sufficient earnings derived from work. Specifically, regulations state that earnings may show that a DIB recipient has engaged in substantial gainful activity and specify the amount of monthly earnings that constitutes substantial gainful activity. Board Decision at 11, citing 20 C.F.R. § 404.1574(a)(1), (b)(2). Section 221(m) of the Act goes on to state that a 24-month DIB recipient "shall continue to be subject to . . . termination of benefits under this title in the event that the individual has earnings that exceed the level of earnings established by the Commissioner to represent substantial gainful activity," and the Board held that this language "clearly permits SSA to discontinue DIB payments to a 24-month DIB recipient who has earnings that, under the regulations, show that he or she has engaged in substantial gainful activity." *Id*. at 10, citing Act § 221(m)(2)(B). The Board also relied on language in the legislative history of section 221(m) and implementing regulations indicating that payments to 24-month DIB recipients may be suspended if earnings exceed the substantial gainful activity level. *Id*. at 12.

The Board concluded that SSA could thus consider information about Respondent's work activity to determine whether he had earnings from work that showed substantial gainful activity, authorizing SSA to discontinue his DIB payments, and that section 221(m) did not preclude SSA from considering Respondent's work activity for purposes of determining whether he had earnings from that work at the substantial gainful activity level. *Id*. at 11-12. The Board reversed the First ALJ Decision and remanded the case for the ALJ to consider 1) whether Respondent knew or should have known that the work activity information he withheld from SSA was material and that withholding that information was misleading; 2) whether the SSA I.G. has established the duration of the period for which CMPs and assessments may be imposed; and 3) whether the CMP amount is reasonable based on the factors specified in the regulations at 20 C.F.R. § 498.106(a).

The ALJ Decision on remand

The ALJ Decision determined that Respondent "engaged in reportable work activity as early as November 2001, which he failed to report for 53 months between December 2007 and April 2011 as alleged by the SSA IG." ALJ Decision at 16. Specifically, the ALJ Decision finds that "Respondent did engage in work activity for Cameron Construction and Peter Cameron" and that "[t]here is no dispute that Respondent did not

disclose his work activity for Cameron Construction to SSA." *Id*. at 24. The findings are consistent with the First ALJ Decision's findings that Respondent engaged in work activity that he did not report to SSA, findings that, the ALJ noted, "were not disturbed by the Board." *Id*. citing First ALJ Decision at 17, Board Decision at 14.

The ALJ Decision also found, again consistent with the First ALJ Decision, that "Respondent had at least constructive knowledge of his obligation to report his work activity to SSA" from 20 C.F.R. § 404.1588, and, moreover, that Respondent "admitted that he knew he was to report work activity" and "knew that if he worked he had to report the work to SSA." *Id*. at 20, 24-25; *see* First ALJ Decision at 17 (Respondent "does not defend on the basis that he did not know what activity qualified as work that he had to report" and "admitted at hearing that he knew if he worked, he was supposed to report to SSA"); ALJ Decision at 25 ("There is no question that Respondent had actual and constructive knowledge that he was to report work activity."). The ALJ Decision further concluded, "[b]ased on the statute and regulation," that "Respondent had constructive knowledge that a material fact is a fact the Commissioner may consider in evaluating whether an applicant is entitled to benefits." ALJ Decision at 26, citing 20 C.F.R. § 498.101.

Nonetheless, the ALJ Decision again concludes that Respondent's work activity was not material information and that he was thus not subject to CMPs or assessments for his failure to disclose his work activity to SSA. First, the ALJ Decision asserts that the Board Decision erred in reversing the First ALJ Decision's reading of section 221(m) of the Act and asks the Board to reconsider its holding. Second, the ALJ Decision holds that the definition of "material fact" in the Act and regulations does not include information SSA uses to determine a current DIB recipient's continuing eligibility and thus did not provide constructive notice that information about Respondent's work activity was material and that failing to disclose that information to SSA was misleading. The ALJ Decision also concludes that Respondent did not know and should not have known that failing to disclose that information to SSA was misleading because the regulations create confusion over what constitutes work activity that must be reported.

Finally, the ALJ Decision holds that even if the SSA I.G. had a legal basis to propose a CMP and assessment, no amount of CMP or assessment was justified under the factors that 20 C.F.R. § 498.106(a) instructs the SSA I.G. to consider in determining CMP and assessment amounts.

Present appeal

The SSA I.G. timely appealed the ALJ Decision arguing that the ALJ made errors of law on remand in refusing to accept the conclusions of the Board Decision. SSA I.G. Brief in Support of its Appeal, dated September 9, 2015 (SSA I.G. Br.). Specifically, the SSA I.G. argued that the ALJ erroneously failed to recognize that work is a material fact

which SSA may consider in evaluating Respondent's continued entitlement to DIB and that Respondent knew or should have known that the information he withheld about his work activity was material and misleading. *Id*. at 3-5. Further, the ALJ's alternative conclusion that no CMP or assessment should be imposed based on the regulatory factors was not supported by substantial evidence, according to the SSA I.G. *Id*. at 6-9.

Respondent argues in his reply to the SSA I.G.'s appeal that his activities for Peter Cameron and Cameron construction were "not work," asserting that he was unable to work due to his disabilities and questioning the veracity of the evidence presented against him by the SSA I.G.. Respondent's Reply Brief in Opposition to Petitioner's Brief in Support of its Appeal (Respondent Reply) at 4-6. Respondent, however, did not appeal either the ALJ's factual findings regarding Respondent's activities for Peter Cameron and Cameron Construction or the ALJ's conclusion that those activities constituted work activity that needed to be reported to SSA.[5]

Standard of review

The standard for the Board's review of an ALJ decision on the SSA I.G.'s proposal to impose a CMP or assessment is set by regulation. The Board "will limit its review to whether the ALJ's initial decision is supported by substantial evidence on the whole record or contained error of law." 20 C.F.R. § 498.221(i).

Analysis

I. The ALJ Decision's conclusion that the SSA I.G. had no basis to propose a CMP or assessment is legal error.

The ALJ Decision finds, as noted above, that Respondent did engage in work activity for Cameron Construction and Peter Cameron that he failed to report to SSA for 53 months, despite Respondent's having had actual knowledge that he was required to report any work he did to SSA. Notwithstanding those findings, the ALJ Decision concludes "there is no basis for the imposition of a CMP or assessment in this case." ALJ Decision at 43. The ALJ reiterates his conclusion from the First ALJ Decision that section 221(m) of the Act barred SSA from considering Respondent's work activity and asks the Board to reconsider its reversal of that conclusion. The ALJ also concludes that Respondent's work activity was not material under the definition of "material fact" and that Respondent "could not have known" that his work activity "was a material fact and that failure to

[5] In any case, as our discussion below will show, nothing in Respondent's reply undercuts the ALJ's findings or his conclusion that the evidence of record, which included evidence addressing the nature of Respondent's activities and the compensation received by Respondent for performing them, was sufficient to establish that those activities constituted work activity.

report [his work activity to SSA] was misleading." *Id*. at 16. As we explain below, those conclusions are erroneous. First, however, we discuss why we find no basis to reconsider our conclusion that section 221(m) did not preclude consideration of Respondent's work activity.

A. We find no basis for reconsidering the Board's conclusion that section 221(m) does not bar SSA from considering a 24-month DIB recipient's work activity.

The ALJ Decision attributes the Board's rejection of the First ALJ Decision's analysis of section 221(m) as prohibiting SSA from considering a 24-month DIB recipient's work activity "to a lack of clarity in [the] prior analysis," offers "clarification" and asks the Board "to reconsider its legal ruling." ALJ Decision at 7, 8.

The ALJ Decision essentially concludes that the Board erred by reading section 221(m)(2)(B) as permitting SSA to terminate a 24-month DIB recipient's benefits based on the recipient's work activity because, the ALJ says, that paragraph permits SSA to terminate benefits based on "earnings" and does not use the term "work activity," unlike paragraph (1)(B), on which the First ALJ Decision relied. ALJ Decision at 12 ("221(m)(2)(B) provides that a 24-month DIB beneficiary is subject to termination of benefits when he or she has **earnings** that exceed the level of **substantial gainful activity**" and "does not state that [SSA] may consider work activity of the 24-month DIB beneficiary") (emphasis in original); *see also id*. at 14 ("earnings and substantial gainful activity are material facts while 'work activity' is not as a matter of law").

The ALJ Decision also asserts that the Board ignored distinctions among the terms "work," "earnings," and "substantial gainful activity," as well as the legislative history to section 221(m) which, the ALJ Decision concludes, "does not indicate that Congress intended that [SSA] is permitted to consider the 24-month DIB beneficiar[y's] work activity" but is "intended to encourage long-term DIB beneficiaries to attempt to return to work without fear that the work activity would cause a suspension of their benefits or termination of their entitlement." *Id*. at 9-10, 12-13. The decision notes that the SSA I.G. charged Respondent with failing to report work activity, and not with failing to report that he had earnings or had engaged in substantial gainful activity. *Id*. at 9, citing SSA Ex. 17, Tr. at 401-03, 406-08.

We decline to reconsider the Board's legal conclusion that Act section 221(m) does not render information about a 24-month DIB recipient's work activity immaterial for the following reasons.

The ALJ Decision's reliance on the use of the term "earnings" and not "work activity" in section 221(m)(2)(B), and on distinctions among the various terms used in the Act and regulations, is misplaced and ignores the connections among work activity, earnings and substantial gainful activity underlying the Board Decision's reversal of the legal conclusions in the First ALJ Decision.

The Board Decision noted the following: (1) the Act and regulations permit SSA to terminate DIB payments to recipients who engage in substantial gainful activity; (2) the regulations state that earnings may show that a DIB recipient has engaged in substantial gainful activity and specify the amount of monthly earnings that constitutes substantial gainful activity; and (3) the regulations further specify that earnings must **derive from work activity** in order to show that the recipient has engaged in substantial gainful activity. Board Decision at 10-11, citing Act §§ 221(m)(2)(B), 223(e); 20 C.F.R. §§ 404.1592a(a); 404.1590(i)(1), (4); 404.1574(a)(1), (b)(2). As the Board explained, SSA may thus terminate benefits to a DIB recipient who has earnings derived from work that exceed the levels set in the regulations as indicating substantial gainful activity, without having to find that the DIB recipient no longer has a medically determinable impairment. *Id*. As section 221(m) permits SSA to terminate a 24-month DIB recipient's benefits based on earnings, SSA could thus consider Respondent's work activity for purposes of determining whether he had earnings from that work activity at the substantial gainful activity level, making information about his work material for purposes of section 1129(a)(1). *Id*. at 12 (SSA "could consider information about Respondent's work to determine whether Respondent had earnings from work that showed substantial gainful activity, authorizing SSA to discontinue his DIB payments").

We also find no basis for the ALJ Decision's conclusion that the legislative history of section 221(m) "shows that Congress specifically intended to prohibit [SSA] from considering a 24-month DIB beneficiary's work activity as a basis for conducting a CDR [continuing disability review] and terminating benefits." ALJ Decision at 14. The ALJ Decision quotes the history's statements as follows:

> **Explanation of provision**
>
> The Committee bill establishes the standard that CDRs for long-term SSDI [DIB] beneficiaries (i.e., those receiving disability benefits for at least 24 months) would be limited to periodic CDRs. SSA would continue to evaluate work activity to determine whether eligibility for cash benefits continued, but a return to work would not trigger a review of the beneficiary's impairment to determine whether it continued to be disabling.

> **Reason for change**
>
> The provision is intended to encourage long-term SSDI [DIB] beneficiaries to return to work by ensuring that work activity would not trigger an unscheduled medical review of their eligibility. However, like all beneficiaries, long-term beneficiaries would have benefits suspended if earnings exceeded the substantial gainful activity level, and would be subject to periodic continuing disability reviews.

Id. at 13-14, quoting H.R. Rep. 106-393(I), at 45 (1999) (brackets in ALJ Decision).

The ALJ Decision asserts that this language "actually supports my interpretation of the provision, rather than the Board's." *Id*. at 12. We disagree. We read the second sentence of the "Explanation" as saying that the purpose of section 221(m) is to preclude SSA from reconsidering the physical or mental impairments of a 24-month DIB recipient solely on the basis of work activity while still permitting SSA to discontinue benefits based on work activity. This is consistent with the statement in the "Reason for change" confirming that SSA may consider a 24-month beneficiary's work activity as a basis for discontinuing benefits, but not as a basis for reviewing whether the beneficiary still has a medically determinable impairment, as prohibited by Act § 221(m)(1)(B). The ALJ's conclusion that Congress "specifically prohibited consideration of work activity," *Id*. at 14, is contrary to these clear statements in the legislative history of section 221(m).

The ALJ Decision accordingly provides no basis to reconsider the Board Decision's conclusion that section 221(m)(1) of the Act did not bar SSA from considering Respondent's work activity, or from concluding that information about Respondent's work history was "material."

B. The ALJ erred in his conclusion that Respondent "did not know and could not have known that his failure to report work activity to SSA was a material fact and that failure to report was misleading."

The ALJ Decision summarizes this issue on remand as "[w]hether Respondent knew that failure to report work activity was failure to report a material fact and that failure to report was misleading." ALJ Decision at 23. This statement focusing on actual knowledge is not consistent with the statute, which is not limited to what a beneficiary knows but also applies when the beneficiary "should know" that a withheld fact "is material to the determination of any initial or continuing right to or the amount" of benefits and "should know" that "the withholding of such disclosure is misleading." Act § 1129(a)(1)(C). The ALJ does later acknowledge, however, that the SSA I.G. must only prove that Respondent knew **or should have known** both that facts he withheld from SSA "were material to the determination of any initial or continuing right to or the amount of" his monthly benefits, and that "the withholding of such disclosure was

misleading." ALJ Decision at 24. We find that the ALJ's mistaken focus on whether the Respondent had actual notice of materiality (along with his misunderstanding of section 221(m) and his mischaracterizations of the regulatory language about the meaning of "work") distorted his analysis of this issue.

The ALJ's ultimate conclusion that Respondent "could not have known" that his work activity "was a material fact and that failure to report was misleading," ALJ Decision at 16, is based on additional legal error. The ALJ frames his discussion around the erroneous view that "material fact" is limited to information that SSA uses to review an DIB applicant's **initial** eligibility for benefits, and does not include information relating to a current DIB recipient's **continuing** eligibility. The ALJ cites the Act and regulations, which state that a "material fact" is one SSA "may consider in evaluating whether an applicant is entitled to benefits." Act § 1129(a)(2); 20 C.F.R. § 498.101. The ALJ holds that "the definition in the Act and the regulation do not state that a material fact is a fact [SSA] may consider in evaluating whether a beneficiary continues to be entitled to benefits, as in the case of Respondent." ALJ Decision at 26. The ALJ Decision thus concludes that "there is no regulation in 20 C.F.R. pts. 404 or 498 that states that work activity is a material fact for determining continued entitlement" and that Respondent, therefore, did not have "constructive knowledge that a material fact would be a fact that may be considered related to whether he continued to be eligible for DIB benefits." *Id*.

We disagree. Section 1129(a)(1)(C) of the Act, the statute under which the SSA I.G. proceeded against Respondent, subjects to CMPs and assessments any person who fails to disclose a fact that the person "knows or should know is material to the determination of any initial **or continuing right to** or the amount of monthly . . . benefits" (emphasis added). The statute thus gave notice, and constructive knowledge, that Respondent's work activity was material to his right to continue to receive benefits. This unambiguous language of the Act imposing liability for failure to report information material to the continuing right to or the amount of benefits also undermines the significance the ALJ Decision attaches to the reference to "applicant" in the definition of material fact.

The ALJ's holding that information related to continuing eligibility is not material is, moreover, inconsistent with the First ALJ Decision's conclusion that "the fact that a beneficiary is engaging in work is material because the Commissioner may consider that fact in evaluating whether the beneficiary is entitled initially **and to continuing disability payments or the amount of those payments**." First ALJ Decision at 18 (emphasis added). Finally, the ALJ's reading of the definition of "material fact" as excluding information SSA uses to evaluate a current beneficiary's continuing eligibility would effectively bar the SSA I.G. from taking action against any current beneficiaries who make false statements or omissions to SSA. The ALJ Decision cites nothing to support that incongruous result, and we find no support for it.

Constructive notice that information about a DIB recipient's work activity is material to SSA's determination of the recipient's eligibility for benefits effectively creates in the recipient of that notice constructive knowledge that failure to disclose work information is misleading to SSA, which needs information about a recipient's work activity to render that determination accurately. Indeed, the ALJ's conclusion that Respondent "could not have known" that his work activity "was a material fact and that failure to report was misleading," ALJ Decision at 16, is entirely inconsistent with his conclusions elsewhere in his decision that the Act and regulations gave Respondent "constructive knowledge that a material fact is a fact [SSA] may consider in evaluating whether an applicant is entitled to benefits" and that "the public has at least constructive" knowledge of the requirements of the regulations, *id*. at 26. Since information about work activity is material to SSA's ability to determine entitlement to benefits, it necessarily follows that constructive knowledge of that materiality is also constructive knowledge that withholding that information is misleading. We accordingly reverse the ALJ's conclusion that Respondent did not have constructive notice that his work activity was a material fact and that failure to report was misleading.

The ALJ's erroneous analysis that the regulations do not provide constructive notice that failure to report material information about work activity is misleading appears to have been influenced by his conclusion that there is a "lack of clarity in the regulations[.]" ALJ Decision at 37. The ALJ Decision states that 20 C.F.R. § 404.1571 "creates some confusion as to whether all work activity needs to be reported" and that section 404.1572 "provides that not all work activity need be reported, even if it could be characterized as substantial and gainful." *Id*. at 36-37.

These conclusions are legally erroneous. First, the ALJ's view that the regulations raise confusion over what must be reported to SSA is undercut by his finding, in both decisions, that Respondent knew if he worked while receiving DIB, he was supposed to report that work to SSA. *Id*. at 25; First ALJ Decision at 17.

Second, neither of the two regulations the ALJ cites as creating confusion about what work activity to report addresses reporting requirements or otherwise states what work activities individuals must or need not report to SSA. They instead describe how SSA evaluates whether an individual can engage in substantial gainful activity for the purpose of determining disability. In addition, the listing in section 404.1572(c) of activities that are "generally" not considered to be substantial gainful activity (e.g., household tasks, hobbies, therapy), cited by the ALJ as an example of the alleged confusion, does not carve out exceptions to what is "substantial gainful activity" but merely contrasts activities that are not substantial gainful activity. Thus, even assuming the regulation can be read as addressing what work activity must be reported, it does not create any doubt that, as the ALJ concluded in his first decision, virtually all work activity must be reported. *See* First ALJ Decision at 16-17, citing 20 C.F.R. § 404.1571.

We thus reverse the ALJ Decision's conclusion that Respondent did not know and could not have known that his failure to report work activity to SSA was a material fact and that failure to report was misleading, and hold that the SSA I.G. established a basis for the imposition of a CMP or assessment.

II. The ALJ erred in concluding that there was no basis for a CMP or assessment and that no CMP or assessment is reasonable; we recommend a CMP of $106,000 and an assessment of $47,583.60, finding those amounts reasonable.

A. Since Respondent's liability is established, the SSA I.G. had a basis for imposing a CMP and assessment in some amount consistent with the regulatory factors.

Social Security benefits are paid monthly. *See, e.g.*, Act § 1129(a)(1) (referring to "monthly insurance benefits under title II" of the Act); 20 C.F.R. §§ 404.201(a) (addressing determination of "the monthly benefit amount payable to you and your family"), 404.304 (describing determination of "the highest monthly benefit amount you ordinarily could qualify for under each type of benefit"); 404.317 (addressing calculation of "[y]our monthly benefit"); 404.333 (spouse's "monthly benefit is equal to one-half the insured person's primary insurance amount"). When a beneficiary is determined to have omitted or withheld disclosure of a material fact under section 1129(a)(1) of the Act, the SSA I.G. is authorized to impose a CMP of not more than "$5,000 for each false statement or representation, omission, or receipt of payment or benefit while withholding disclosure of a material fact." 20 C.F.R. § 498.103(a); *see* Act § 1129(a)(1). The SSA I.G. may impose a CMP for each month in which material information is withheld and DIB benefits are received. The SSA I.G. also may impose an "assessment, in lieu of damages" of "not more than twice the amount of benefits or payments paid as a result of such a statement or representation or such a withholding of disclosure." Act § 1129(a)(1); *see* 20 C.F.R. § 498.104. In determining the amount of a CMP and assessment, the SSA I.G. must consider the factors in 20 C.F.R. § 498.106(a) which we discuss below. Here, the SSA I.G. imposed a CMP of $106,000.00 and an assessment in lieu of damages of $95,167.20 after considering the regulatory factors and based on Respondent's failure to disclose his work for a period of 53 months (December 2006 through April 2011) during which he received benefits in the amount of $47,583.60.[6] SSA Ex. 17, at 1.

[6] As we noted earlier, supra at 3, the SSA I.G.'s calculation of the CMP and assessment reflects only that portion of the actual period that Respondent withheld information that occurred after the effective date of the withholding provision in section 1129.

In its Remand Decision, the Board stated that, if the ALJ found on remand that Respondent knew or should have known that the information he withheld about his work was material to SSA's determination of his right to receive benefits or to the amount of benefits and that his withholding was misleading, the ALJ should make findings as to the duration of the period during which Respondent withheld information about his work and should address the issues related to determining whether the amounts of the CMP and assessment were reasonable. Board Decision at 14-16. As discussed above, the ALJ finds, erroneously, that Respondent did not know and should not have known that information about his work activity was material and that withholding that information was misleading and thus was not liable for a CMP or assessment. Nonetheless, the ALJ goes on to "address the additional two issues directed by the Board in its remand decision"– the "duration of the period for which CMPs and assessments may be imposed" and "[w]hether the SSA IG has shown that the CMP [and assessment] amount is reasonable based on the factors in the regulations." ALJ Decision at 38, 40.

After discussing the SSA I.G.'s allegations and the evidence regarding the nature of Respondent's work activity, the ALJ "conclude[s] that it is more likely than not that Respondent engaged in work activity, including running errands, for Peter Cameron or Cameron Construction as early as November 2001" and that "[t]here is no evidence and no allegation that Respondent reported his work activity to SSA through April 2011." *Id*. at 40. The SSA I.G notes that the ALJ's reference to "2001" as the year Respondent began working for Cameron Construction "appears to be a typographical error" since the ALJ decision "elsewhere correctly notes that OIG's July 26, 2012, notice stated the proposed CMP was based on Respondent's failure to report work during the period from November 2002 through April 2011." SSA I.G. Br. at 6 n.6, citing ALJ Decision at 8, Board Decision at 6. Whether the 2001 date was an error is not clear because in yet another part of his decision the ALJ states that he calculated the November 2001 date based on Peter Cameron's telling the SSA I.G. investigator that Respondent worked for him for approximately the past eight years. *See* ALJ Decision at 39. However, since, as explained above, the SSA I.G. recognized that it could not impose penalties for a period beginning before December 2006, we need not resolve this discrepancy. Accordingly, with respect to the duration issue, we read the ALJ's statement as a conclusion that Respondent failed to report his work activity for a period beginning no later than December 2006 and continuing through April 2011, a period of 53 months. Although Respondent disputes his duty to report his work activity for Peter Cameron or Cameron Construction, he does not dispute the ALJ's conclusion as to the duration of his failure to report. Respondent Reply. Accordingly, we affirm without further discussion the ALJ's conclusion that Respondent's failed to report his work activity for 53 months.

While we uphold the ALJ's determination about the duration of the period Respondent withheld information, we have reversed the ALJ's conclusion on remand that Respondent did not know and should not have known that in withholding information about his work activity he was withholding material facts and misleading SSA. Accordingly, we have

concluded that under a correct application of the law, the SSA I.G. had a basis for imposing a CMP and assessment in some amount for Respondent's withholding of material information during the period December 2006 through April 2011. We thus find further error in the ALJ's conclusions "that the SSA IG has failed to establish a basis for the imposition of a CMP or assessment" and "that no CMP or assessment should be imposed against Respondent on the facts of this case." ALJ Decision at 37, 43.

The ALJ's reasoning as to lack of basis is not clear (and is difficult to distinguish from his erroneous decision on liability). However, it seems the ALJ might have read the word "deny" in 20 C.F.R. § 498.220(b) – which provides that an ALJ "may affirm, deny, increase, or reduce the penalties or assessments proposed by the Inspector General" – as meaning that even though the SSA I.G. has established a beneficiary's liability for a CMP and assessment, an ALJ can foreclose SSA's imposition of a CMP or assessment in any amount. *See* ALJ Decision at 41 citing 20 C.F.R. § 498.220(b). We see no basis for this reading in the statute or regulations, and it flies in the face of the regulatory scheme. Clearly, the regulations authorize an ALJ to deny imposition of a CMP or an assessment where the ALJ finds no liability for same. They also allow an ALJ to modify the amount of a CMP or assessment proposed by the SSA I.G. based on the ALJ's de novo review of the factors in 20 C.F.R. § 498.106(a) where the ALJ finds liability. However, it makes no sense to read the word "deny" as allowing an ALJ to decline to find a CMP or assessment in **any** amount reasonable once liability has been established, especially since the regulations provide that an ALJ may not "[r]eview the exercise of discretion by the Office of the Inspector General to seek to impose a civil monetary penalty or assessment under §§ 498.100 through 498.132." 20 C.F.R. § 498.204(c)(5). The SSA I.G.'s unreviewable discretion to impose a CMP and assessment would effectively be nullified if the ALJ's reading were correct. Accordingly, we conclude that the ALJ erred in concluding the SSA I.G. had no basis to impose a CMP and assessment once it had established Respondent's liability for same.

B. A CMP of $106,000 and an assessment of $47,583.60 are reasonable under the factors the SSA I.G., the ALJ and the Board must consider.

Having concluded that the SSA I.G. had a basis to impose a CMP and assessment in some amount, we are left with the issue of whether the CMP and assessment amounts determined by the SSA I.G. are reasonable or should be increased or reduced when the regulatory factors are assessed based on the facts of record in this case. The ALJ Decision contains some discussion of the factors. *See* ALJ Decision at 41-43. However, because of the erroneous premise he brought to that discussion – that there is no basis for a CMP or assessment in any amount – we find it impossible to determine the extent to which the ALJ's discussion of the factors is consistent with our remand instructions and reflects a review of the factors unaffected by his legal errors. In addition, as discussed below, we conclude that the ALJ made his findings regarding Respondent's culpability using a legally erroneous analysis of that factor.

We may remand for the ALJ to make a new determination as to reasonable CMP and assessment amounts, consistent with our conclusions that there is a basis for a CMP and assessment and that an ALJ may not refuse to recognize the SSA I.G.'s discretion to impose a CMP or assessment in some amount once the basis for same is established, and that reflects our upholding of the ALJ's determination of the period for which CMPs and assessments may be imposed (53 months). Alternatively, we may determine what constitutes a reasonable amount of CMP and assessment to recommend to SSA. *See* 20 C.F.R. § 498.221(h) ("The DAB may remand a case to an ALJ for further proceedings, or may issue a recommended decision to . . . affirm, increase, reduce, or reverse any penalty or assessment determined by the ALJ.") We have concluded that the fairest and most efficient use of our authority and Board resources is to resolve the remaining issue ourselves and to issue a recommended decision on all issues to the Commissioner. Our decision in this regard is influenced by the facts that we have already reversed and remanded this case once based on finding legal error, that we have found additional legal error in this appeal of the remand decision and that the issues remaining to be resolved (the amounts of the CMP and assessment) can be resolved on the existing record.

The regulations require consideration of the following factors in determining an amount of a CMP and assessment that is reasonable: (1) the nature of the statements, representations, or actions 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 person's financial condition; and (5) such other matters as justice may require. 20 C.F.R. § 498.106(a); *see also* Act § 1129(c) (presenting as one numbered factor regulatory factors 2, 3 and 4). As stated earlier, the SSA I.G. considered these factors and determined to impose a CMP of $106,000 which, as the ALJ noted, represents approximately $2,000 a month for each of the 53 months Respondent received benefits while withholding material information, as compared to the maximum $5,000 per month allowed by the Act and regulations. Also considering these factors, the SSA I.G. decided to impose an assessment of $95,167.20, twice the amount of the overpaid benefits, which is the maximum assessment allowed by the statute and regulations. SSA Ex. 17, at 1. For the reasons discussed below, we have concluded that while the SSA I.G. was entitled to impose a CMP and assessment in some amount, the amount of the assessment the SSA I.G. imposed is not reasonable under the factors and, we recommend that the assessment be reduced from the maximum twice the amount of benefits improperly received to the amount improperly received, $47,583.60. However, as also discussed, we have concluded that the amount of the CMP that the SSA I.G. determined to impose ($106,000) is reasonable and recommend imposition of a CMP in that amount.

We note at the outset the ALJ's statement in response to the Board's directions on remand that the regulations "do not provide that I am limited to reviewing whether the proposed CMP or assessment are 'reasonable.'" ALJ Decision at 41. While it is true that the language of the regulations does not expressly provide such a limitation, the preamble

to the final rule providing for CMPs and assessments against persons who withhold disclosure of material facts states that the SSA I.G. "will continue to impose reasonable civil monetary penalties and assessments, as applicable, on a case-by-case basis by applying the five enumerated factors . . . as set out at 20 C.F.R. § 498.106(a)." 71 Fed. Reg. 28,574, 576 (May 17, 2006) (emphasis added). Accordingly, we conclude that the intent of the regulations is to use a reasonableness standard in applying the factors in order to arrive at reasonable CMP and assessment amounts. S*ee also Latoshia Walker-Mays*, Docket No. A-11-13, Recommended Decision (2011) (finding legally correct and supported by substantial evidence the ALJ's conclusion that the $61,000 CMP imposed by the SSA I.G. under section 1129(a)(1) of the Act was reasonable under the factors in 20 C.F.R. § 498.106(a)).

The SSA I.G. considered the regulatory factors and based the determination of the CMP and assessment amounts on the following: 1) the nature and "aggravating" circumstances of the withholding of information – citing the fact that Respondent had been informed of his "duty to report certain events to SSA, such as work and income" at the time he applied for benefits but did not comply with this duty and that on November 9, 2009, he submitted a sworn statement to OIG special agents in which he "falsely stated that [he] had not worked since 1998[];"[7] 2) the degree of responsibility – citing Respondent's culpability as "substantial" because despite reminders of the need to be truthful and warnings about potential penalties for not reporting or providing truthful information, Respondent "made a false statement and withheld material information," while he and his children "improperly received more than $100,000.00 in benefits for more than 8 years[];" 3) history of prior offenses – stating that although this was the first time SSA had taken action against Respondent, "the long-term nature of [his] offense outweigh[ed] the mitigating effect that an unblemished official record with the SSA would otherwise provide[]"; 4) financial condition – citing Respondent's failure to complete and return the financial disclosure form as a basis for SSA's determination that the proposed CMP "will not jeopardize [Respondent's] financial condition;[8] 5) any other factors that should be weighed in the interest of justice – citing Respondent's "long, uninterrupted work history in the construction field," the "substantial additions and modifications to [Respondent's] home while receiving Federal benefits to which [he was] not entitled[,]" and "the facts that while [he was] able to work [he] was disabled and [had] several minor children." SSA Ex. 17, at 1-2.

[7] The SSA I.G. penalty notice letter actually says the sworn false statement was made "November 9, 2011," but we conclude that the year stated in the letter was a typographical error since the sworn statement itself is in the record and clearly states that Respondent signed it on November 9, 2009.

[8] In his reply brief, Respondent states that he "has made full financial disclosure in response to Petitioner's discovery request." Respondent Reply at 3, citing SSA Ex. 18. However, the exhibit Respondent cites is a letter containing his request for an ALJ hearing, a notice of appearance, and a request for information regarding SSA's work determination, and does not include any financial information.

We accept the ALJ's finding that there is "no evidence that Respondent is unable to pay a CMP and assessment in the amount proposed by the SSA IG." ALJ Decision at 43. We also accept the ALJ's finding that there is "no evidence of any prior offenses," although we note that the ALJ mentions but does not make any finding with respect to the SSA I.G.'s determination that the mitigating factor of no prior offenses was outweighed by the long-term nature of Respondent's misconduct. *Id.* at 42-43. We also recognize, as did the ALJ, that the $106,000.00 CMP imposed by the SSA I.G. was less than half the maximum amount the SSA I.G. may impose for each month of the failure to disclose material information. *See Id*. at 41-42. The ALJ did not discuss the fact that the assessment imposed was the maximum amount that could be imposed, twice the amount of the overpaid benefits.

The ALJ based his determination that no CMP or assessment was supported by the facts of this case largely on his consideration of the culpability factor. As we indicated above, the SSA I.G. found that Respondent had "substantial" culpability because he withheld information about his work activity while improperly receiving SSA benefits for more than eight years. SSA Ex. 17, at 2. Respondent did so, the SSA I.G. said, despite being reminded of his duty to report any such activities and warnings of potential penalties for not doing so. *Id*. The ALJ acknowledged that Respondent failed to report that he "did some work for Peter Cameron and Cameron Construction as early as November 2001." ALJ Decision at 43. (We note again the ALJ's use of a date beginning a year earlier than the date stated in the SSA I.G.'s July 26, 2012 notice.) The ALJ also had acknowledged earlier in his decision that Respondent had at least constructive knowledge of his duty to report work activity. *Id*. at 24. Nonetheless, after stating that "[t]he simple definition for culpability is blameworthiness," the ALJ concludes that he "d[id] not find Respondent's failure to report to be blameworthy." *Id*. at 43, citing *Black's Law Dictionary* 406 (18th ed. 2004). As a basis for this conclusion the ALJ states, "The SSA IG has failed to present any evidence that Respondent had actual knowledge of what activity constituted work activity that he was obliged to report." *Id*. at 42. The ALJ further states "The SSA regulations are not clear enough for a person of reasonable intelligence to know what activity is reportable as work activity." *Id*. at 43.

In *Michelle Valent*, Recommended Decision, DAB Docket No. A-15-104, at 19 (2015) (cited hereafter as *Valent*, Recommended Decision at __), we rejected essentially the same reasoning by the ALJ as inconsistent with the law, and we reject it again here. With respect to actual knowledge, the Board stated in *Valent*, "The Act and regulations do not require actual knowledge to support liability and permit the SSA I.G. to impose CMPs and assessments based on a 'should have known' standard." There "are degrees of culpability," and "[w]hile actual knowledge might support a finding of enhanced culpability, it is not required to show culpability." *Id*. at 18, 19; *Cf. Paul D. Goldenheim, M.D., et al.*, DAB No. 2268, at 17 (2009) (individuals excluded by the HHS I.G. upon whom law placed responsibility for company's conduct were culpable for that conduct

notwithstanding uncontested claims that they had no personal knowledge of that conduct), *aff'd, Friedman v. Sebelius*, 755 F. Supp. 2d 98 (D.D.C. 2010), *rev'd on other grounds and remanded*, 686 F.3d 813 (D.C. Cir. 2012). As in *Valent*, we reject here the ALJ's suggestion that actual knowledge is required to establish culpability.

We also reject the ALJ's reasoning that Respondent is not culpable because of a purported lack of clarity in the SSA regulations. We rejected a similar statement by the ALJ in *Valent*, in part, because it was inconsistent with the ALJ's earlier statement in that case that "the broad reading of [20 C.F.R. § 404.1588(a)] to require reporting of all work is consistent with the purpose of the Act and the language of the regulation is sufficient notice to Respondent of what to report." *Valent*, Recommended Decision at 18, citing First ALJ *Valent* Decision at 14. Here, the ALJ does not repeat his statement about the "broad reading of the regulation," but he also makes no attempt to distinguish, disavow or change his previous broad reading of the same regulations. We conclude, as we did in *Valent*, that adopting the ALJ's suggestion that alleged lack of clarity in the regulations excuses a failure to report work activity would allow beneficiaries to withhold material work information with impunity, undercutting the whole Social Security disability system.

We also reject the ALJ's suggestion that Respondent's limited English language skills may have affected his ability to understand his duty to report under the regulations. The ALJ states, "It is undisputed that Respondent's command of English is significantly limited."[9] ALJ Decision at 43. We credit the ALJ's finding that Respondent's command of English is significantly limited but not his suggestion that these limitations left Respondent unable to understand his duty to report his work activity for Peter Cameron and Cameron Construction. We first note that the ALJ's suggestion was not based on his assessment of Respondent's language capability in isolation; rather, the ALJ's suggestion follows a statement of his assertion, which we have already rejected, that the "SSA regulations are not clear enough for a person of reasonable intelligence to know what activity is reportable as work activity." *Id*. The ALJ's suggestion that Respondent's limited English skills evidence lack of culpability also is undercut by findings in the ALJ's first decision following a hearing in which the ALJ questioned Respondent rather extensively about his ability to read his statement to the SSA I.G. investigators, a statement he acknowledged signing although someone else wrote it. Tr. at 263, 265; *see generally* Tr. at 262-272 (ALJ questioning of Cappetta regarding his ability to read the statement). In that first decision, the ALJ stated that Respondent "does not defend on the basis that he did not know what activity qualified as work that he had to report[,]" and found that, "[i]n fact, [Respondent] admitted at hearing that he knew if he worked, he was supposed to report to SSA." First ALJ Decision at 17, citing Tr. at 301-02. We find no reason not to apply those earlier findings here since there was no additional testimony on

[9] Respondent indicated on his Continuing Disability Review Report that he could speak and understand English and read a "little" English. SSA Ex. 8, at 22.

remand and no contrary findings by the ALJ. Furthermore, any suggestion that Respondent was not aware of his duty to report his work activity, with or without language limitations, is inconsistent with the ALJ's conclusion, previously discussed, that Respondent had at least constructive knowledge of the duty to report his work activity.

We also find no merit in the ALJ's conclusion that Respondent was not culpable because "The evidence does not show it was more likely than not that Respondent intended to defraud SSA." ALJ Decision at 42. We need not determine whether the SSA I.G. has established intent to defraud SSA in order to determine whether, as the SSA I.G. found here, Respondent's culpability was "substantial." The culpability regulation itself does not require intent to defraud, and, as we stated earlier, there are degrees of culpability.

The SSA I.G. cited Respondent's sworn statement to the SSA I.G. on November 9, 2009 in which he "falsely stated that [he] had not worked since 1998." SSA Ex. 17, at 1-2. The sworn statement is in the record and contains the false denials of work activity. SSA Ex. 8, at 6-7; *see also* SSA Ex. 8, at 8-12 (Work Activity Report in which Respondent states "Since 1998 I have not worked at all!!") The SSA I.G. also stated that at the time he applied for benefits, Respondent had been informed of his duty to report certain events, including work, and Respondent does not dispute this. *Id*. at 1. Respondent made his false statements despite a warning that "a false statement or misrepresentation of a material fact for use in determining a right to payment under the Social Security Act commits a crime punishable under Federal law . . . ." SSA Ex. 8, at 10.

In summary of the culpability issue, we conclude that even if the SSA I.G. did not show intent to defraud (and we make no finding on this issue), Respondent's undisputed denial that he had worked for Peter Cameron or Cameron Construction when, as even the ALJ found, he had done some work for those entities and knew that he was supposed to report work activity, but withheld that information for eight years, ALJ Decision at 42-43, is sufficient to show substantial culpability.

As we consider the remaining factors, we note that although Respondent has challenged his liability for any CMP and assessment, he has not challenged the amounts of the CMP and assessment and also, as the ALJ acknowledged, "has not disputed that the amount of benefits received from December 2006 through April 2011, amounted to $47,583.60." *Id*. at 41 n.9. Nevertheless, our de novo review reflects that the ALJ made findings as to the nature and circumstances of Respondent's work activity that do not fully support the factual premises on which the SSA I.G. determined the amounts of the CMP and assessment. We therefore address the ALJ's evidentiary assessment of facts relevant to the regulatory factors to determine what change may be appropriate to ensure the amounts continue to be reasonable in light of the record as a whole. The SSA I.G. apparently believed, based on various interviews, that Respondent worked "off and on"

for Peter Cameron or Cameron Construction for eight years. Tr. at 154; SSA Ex. 7, at 2 (investigator's report of interview with Peter Cameron also indicating Cameron stated Cappetta worked for Cameron "three to five hours per day when he works" and, "depend[ing] on the job" was paid "$50.00, $100.00, $500.00 per job.")

The ALJ finds that the evidence "does not show it was more likely than not that Respondent engaged in any more than sporadic work activity for Peter Cameron or Cameron Construction." ALJ Decision at 42. The ALJ further finds that although "[t]he evidence does show that Respondent received gifts from Peter Cameron and that Peter Cameron believed that some of Respondent's work activity was in exchange for work Peter Cameron did on Respondent's house[,] [t]he value of Respondent's work activity and the amount of any gifts or other compensation is not established by the evidence."[10] *Id*. The Board will generally defer to an ALJ's findings on the weight and credibility of testimony, absent a compelling reason to do otherwise. *See, e.g., Brenham Nursing & Rehab. Ctr.*, DAB No. 2619, at 13 (2015), *citing Woodland Oaks Healthcare Facility*, DAB No. 2355, at 7 (2010); *Gateway Nursing Ctr*., DAB No. 2283, at 7 (2009); *Koester Pavilion*, DAB No. 1750, at 15, 21 (2000). Here we defer to the ALJ's finding that the evidence of record does not establish the value of Respondent's work activity.

As to the nature of Respondent's work for Peter Cameron or Cameron Construction, we defer to the ALJ's finding that the record supports no more than "sporadic" work activity to the extent the ALJ's use of that term means that his work activity was not continuous or full time, or, as the SSA I.G. put it, was "off and on." However, to the extent the ALJ's use of that term suggests that Respondent's work activity was minimal in nature, we do not find that supported by the record even under the ALJ's assessment. On page 40 of his decision, the ALJ discusses his assessment of Peter Cameron's statement to investigators and his testimony at the hearing. There, the ALJ explains that although he gave more weight to Cameron's hearing testimony than to his statements to investigators, he "treat[s] as credible" Peter Cameron's "statement [to investigators] that Respondent had been doing some work for him for about the last eight years" and that the work "includ[ed] running errands." ALJ Decision at 40. The ALJ states that Cameron's statement to the investigators "is not inconsistent with his testimony or otherwise rebutted . . . ." *Id*. The ALJ also states that Cameron's statement was "consistent with Respondent[']s testimony that he had known Peter Cameron since 2000 . . . and though Respondent denied working for Peter Cameron, he admitted to giving construction related advice, doing little things such as going to get coffee and cigarettes." *Id*., citing Tr. at 248, 250-51, 253-55; *see also* Tr. at 345-47, 350-51 (testimony by Respondent that

[10] The ALJ also stated that "[t]he evidence does not show it was more likely than not that Respondent's work activity was substantial and gainful." ALJ Decision at 42. Respondent denies in his reply brief that his work was substantial or gainful. Respondent Reply at 5. We need not determine whether Respondent's work activity was substantial gainful activity because the action taken by the SSA I.G. is based on his failure to report his work activity without regard to whether SSA would find that work activity to be substantial gainful activity.

the ALJ found consistent with the Cameron testimony). We conclude that the ALJ's findings taken together support a conclusion that Respondent's work activity was not minimal in nature but, rather, was significant and occurred, as the SSA I.G. and the ALJ found, over an eight-year period, even if not on a continuous or full-time basis. As further support for this conclusion, we note that the ALJ did not discuss as part of his assessment of Peter Cameron's statement to investigators that on the days Respondent did work, he did so for 3-5 hours at a time, and nothing in Peter Cameron's testimony rebuts that statement. *See generally* Tr. 343-55.

In summary, we have concluded that even under the ALJ's findings, the work performed by Respondent was significant and was performed over a long period of time. We have also concluded that Respondent's culpability was substantial, and that the ALJ committed legal error in concluding otherwise. On the other hand, the ALJ clearly did not view the evidence presented by the SSA I.G. as sufficient to prove that Respondent engaged in full-time, fully compensated employment, and the SSA I.G. itself does not appear to rely on such a characterization, describing his work as "off and on" and not attaching a specific value to that work. The SSA I.G. does say that under factor 5 (the interest of justice), it considered Respondent's "long, uninterrupted work history in the construction field [and] the fact that you make substantial additions and modifications to your home while receiving Federal benefits to which you were not entitled." SSA Ex. 17, at 2. However, given the "off and on" description discussed above, the SSA I.G.'s reference to Respondent's "uninterrupted work history" must be understood as a reference to Respondent's work history prior to becoming disabled, when he operated his own construction company, not to his work history while withholding information and receiving benefits. The ALJ does not discuss in any detail the evidence presented by the SSA I.G. regarding Respondent's alleged work on the renovations to his home (*see* SSA Ex. 7, at 5; Tr. at 121), although he did discuss Peter Cameron's belief that <u>his</u> work on those renovations "was in exchange for work Peter Cameron did on Respondent's house." ALJ Decision at 42. Nonetheless, while there is some evidence to support the SSA I.G.'s allegation, *see e.g*. Tr. at 248, 250-51, 253-55, 345-47, 350-51, the evidence is not sufficient, in our view, to support an enhanced amount for either the CMP or the assessment.

In order to reasonably reflect the difference between the circumstances as the SSA I.G. appears to have understood them in making the original determination of amount and the circumstances as supported by the record (deferring as appropriate to the ALJ's findings), as well as the relation of those different circumstances to the degree of culpability, we consider a reduction in the amount of the assessment to be proper. Our recommendation recognizes that the determination of the amounts to be imposed is an exercise in reasonableness, rather than an application of formula. The SSA I.G. imposed an assessment of twice the amount of the improperly received benefits, the maximum amount allowable. We question whether that is reasonable based on the SSA I.G.'s acknowledgement that Respondent's work activity, while significant, was "off and on"

and less than full time, albeit over an eight-year period of time and based also on the SSA I.G.'s apparent inability to put a specific value on Respondent's compensation for that work. The SSA I.G. has not offered any analysis in its brief on appeal that would assuage our concerns in this regard. We conclude that reducing the assessment to the amount of the benefits improperly received by Respondent and his children ($47,583.60) would more reasonably reflect the differences in the evidentiary basis as developed before the ALJ. The CMP imposed by the SSA I.G. ($106,000), already reflects a reduction to less than half the amount the SSA I.G. could have imposed. We find that that reduced amount reasonably reflects the differences in the evidentiary basis as developed before the ALJ.

Conclusion

For the reasons stated above, we reverse the ALJ Decision's conclusions that Respondent did not know and could not have known that the facts (his work activities) he withheld from SSA were material and that withholding them was misleading; that the SSA I.G. had no basis to impose a CMP and assessment; and that no amount of CMP or assessment could be imposed under the factors in the Act and regulations. We uphold the ALJ's conclusion that the SSA I.G. showed that Respondent withheld the information about his work activity for 53 months and recommend that the Commissioner of Social Security impose a CMP of $106,000 and an assessment of $47,583.60.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member