Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Social Security Administration,	)	Date: February 28, 2007
Office of the Inspector General,	)	
	)	
- v. -	)	Docket No. C-06-411
	)	Decision No. CR1569
Anthony Koutsogiannis,	)	
	)	
Respondent.	)	
	)	

DECISION

I sustain the determination of the Social Security Administration (SSA) Inspector General (I.G.) to impose civil money penalties totaling $10,000 and an assessment of $95,218 against Respondent, Anthony Koutsogiannis.

I. Background

I hear and decide this case pursuant to section 1129 of the Social Security Act (Act). Section 1129(a)(1) of the Act authorizes the I.G. to impose civil money penalties and an assessment against 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 [Social Security] or benefits under [other programs including Medicare], that the person knows or should know is false or misleading,

> (B) makes such a statement or representation for such use with knowing disregard for the truth, or
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> (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 [Social Security] or benefits or payments under [other programs including Medicare], 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 . . . .

The Act defines a "material fact" to be a fact which the Commissioner of Social Security may consider in evaluating whether a person is eligible for Social Security or other benefits. Act, section 1129(a)(2).

The I.G. is authorized to impose civil money penalties of not more than $5,000 for each statement or representation that contravenes section 1129(a)(1) and, in addition, an assessment in lieu of money damages of not more than twice the amount of benefits paid as a consequence of such statement or statements. Act, section 1129(a)(1).

On February 14, 2006, the I.G. notified Respondent of his intent to impose civil money penalties and an assessment against him based on false statements made by Respondent relating to his work activity while receiving Social Security disability benefits. Respondent requested a hearing and the case was assigned to me for a hearing and a decision. I held a hearing in Boston, Massachusetts, on November 27, 2006. At the hearing I received into evidence exhibits from the I.G. which are identified as SSA Ex. 1 - SSA Ex. 21, and exhibits from Respondent which are identified as AK Ex. 1 - AK Ex. 19. Each party filed a pre-hearing and a post-hearing brief.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. Respondent deliberately made false or misleading statements, as are described at section 1129(a)(1) of the Act, concerning his eligibility for Social Security disability benefits, and

2. If he made such statements, penalties and an assessment as proposed by the I.G. are reasonable.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading. I discuss each Finding in detail.

1. Respondent deliberately made false or misleading statements concerning his eligibility for disability benefits.

At issue in this case are two statements made by Respondent to SSA concerning his work activity. I find that these statements are deliberately false and misleading as to material facts. In making these statements Respondent concealed from SSA work or work-related activity that he performed during the period when he received Social Security disability benefits thereby depriving SSA of information that it needed in order to evaluate whether he was eligible to receive such benefits.

On December 17, 1996, Respondent applied for Social Security disability benefits, alleging that he was not working and had been medically disabled and unable to work since March 14, 1995. SSA Ex. 1, at 1.[1] SSA accepted Respondent's application and in July 1996 determined him to be eligible for disability benefits. Respondent received disability benefits with benefits payments retroactive to January 8, 1996.

In 2000 an alleged financial creditor of Respondent informed SSA that Respondent was working under the table at a business named Professional Image in the Fall River, Massachusetts area. SSA Ex. 3, at 1. That allegation prompted SSA to send an inquiry to Respondent on March 14, 2000. *Id.* at 2. SSA advised Respondent that it had been informed that he was working at Professional Image and told him that he was required by law to report "any and all work." *Id.* It requested Respondent to complete a statement concerning his work activity. SSA explicitly told Respondent that it wanted to know about any work activity he performed subsequent to his disability onset date.

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[1] Respondent's wife filed an application for SSA children's benefits on behalf of Respondent's three children on March 7, 1997. SSA Ex. 2.

The information sought by SSA from Respondent was highly material to its evaluation of Respondent's continuing eligibility to receive disability benefits. Any work or work-related activity engaged in by Respondent after the alleged onset date of his disability related directly to the criteria used by SSA for determining whether Respondent was eligible to receive disability benefits. Any concealment by Respondent from SSA of work or work-related activities from SSA would deprive that entity of material information that it wanted and needed in order properly to evaluate Respondent's status.

Professional Image is a men's retail clothing store in Fall River. AK Ex. 19, at 3. Beginning in the mid-1990's and up until the present, Respondent's parents rented space from Professional Image at which they ran a tailoring business under the name of Mr. and Mrs. K's Custom Tailoring. *Id.*

Respondent replied to SSA's inquiry with a handwritten statement which he signed on March 17, 2000 (March 17, 2000 statement). SSA Ex. 4. The March 17, 2000 statement is the first of two statements that the I.G. contends are willfully false. In it, Respondent averred that:

> I am not working and have not worked since I have been receiving disability benefits. My parents have a business at the same building as Professional Image and I may go to visit my parents at their business from time to time.

Id. This statement is outright false in some respects and thoroughly misleading in others. The statement conveys the distinct image of a man who engaged in no work and who, at best, was an occasional visitor to his parents' business. But, that was far from the truth. Respondent was not an occasional visitor to Professional Image and his parents' business, he was there from four to seven days per week for periods of from three to eight hours at a time. Hearing Transcript (Tr.) at 121. And, while he was there he performed many of the duties of a clothing salesman and a tailor. He showed suits to customers, answered the phone, measured customers for alterations, and wrote up sales receipts for them. *Id.*; AK Ex. 12, at 12.

Moreover, Respondent held himself out to the public as an employee of Professional Image and/or his parents' business. SSA Ex. 12, at 5. On April 3, 2002, an I.G. agent visited Professional Image and Mr. and Mrs. K's Custom Tailoring in an undercover capacity. *Id.* The agent posed as a customer seeking to have two pairs of pants altered. Respondent met the agent at the entrance to the business, measured and marked the pants for alteration, discussed the alterations he would make, totaled the cost of the alterations, and assisted the agent in looking at several suits. *Id.* He advised the agent that he had

additional suits coming in the next day. He gave the agent his parents' business card, telling him that he had worked as a tailor full time for four years but that he wanted to be "incognito." *Id.*; AK Ex. 12, at 6. During a subsequent visit a week later Respondent provided the agent with the altered pants and told the agent that he had performed the tailoring work. SSA Ex. 12, at 7.[2]

Respondent argues that I should find not to be credible the report of the I.G. agent who investigated Respondent's work activity. He contends that the agent exaggerated the extent of Respondent's activities. To support this argument Respondent asserts that the agent never observed Respondent actually altering garments or sewing. Respondent's post-hearing brief at 11 - 13. However, the I.G. agent never contended that he saw Respondent alter garments or sew. Notwithstanding Respondent's arguments, I find nothing in the agent's report to be incredible or exaggerated. Indeed, much of it was corroborated by Respondent's admissions of the extent of the activity he engaged in while he was at Professional Image or his parents' business. SSA Ex. 12; Tr. at 121.

Respondent also asserts – even as he admits the truth of much of the agent's findings – that he lied about the extent of his work activities when he described them to the I.G.'s agent. According to Respondent:

> [I]f I told him the truth I would have had to have shared the fact that I had [multiple sclerosis] and was a substance abuser, couldn't work and couldn't support my family. Rather than share that information with a stranger, I let him leave with the impression that I was a tailor and had been for about four years. That information was not true because they had not identified themselves as government agents I felt no need to share the truth with them.

AK Ex. 12, at 14. I find this statement to be self-serving and not credible. Respondent did not have to admit to anyone that he had an illness or was a substance abuser in order to be truthful about his activities at his parents' business, if, in fact, he was merely a social visitor to the enterprise. He merely had to tell the agent that he was not an employee.

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[2] On this visit an unidentified woman working at the counter confirmed that Respondent did the tailoring work on the pants. SSA Ex. 12, at 8.

Finally, in discussing his activities at Professional Image and his parents' business, Respondent argues that none of the activities that the agent observed really were in the nature of work. According to Respondent, assisting customers, conducting business matters on the telephone, and processing payments for tailoring work are not true work activities but are "simple activities which virtually anyone could perform." AK Ex. 12, at 12. He therefore seems to argue that he was not actually working at Professional Image if he did not perform the full range of activities of a skilled tailor. He seems also to argue that the allegedly simple activities that he performed for his parents' business were not material to SSA. However, the issue in this case is not whether Respondent made false or misleading statements to SSA about his work as a skilled tailor, it is whether Respondent made false or misleading statements to SSA about *any* work or work-related activities that he performed. The "simple activities" that Respondent admits to having performed are precisely the types of activities that comprise work. They involve both exertion and mental activity that are consistent with work activity.

The March 17, 2000 statement also is false in that it failed to disclose that Respondent worked in another capacity after the onset date of his disability. In 1996 or 1997 Respondent worked as an apprentice electrician for Raymond D. Melanson Electric, an electrical contractor. SSA Ex. 18, at 2 - 3. There is a dispute about the precise dates when Respondent performed this work. It is unnecessary, however, that I resolve that issue. It is apparent from Mr. Melanson's testimony that Respondent performed this work at some time after January 8, 1996, the date when Respondent first began qualifying for disability benefits payments. *Id.* at 3.

SSA continued to receive numerous communications after March 2000 from an individual or individuals who alleged that Respondent was working while receiving disability benefits. SSA Ex. 9. In May 2001 SSA conducted a review of Respondent's case and determined to cease his disability benefits based on Respondent's failure to present medical evidence demonstrating continuing disability. SSA Ex. 5. Respondent challenged this determination. On November 16, 2004, Respondent made a statement in support of his assertion that he should continue to receive disability benefits (November 16, 2004 statement). SSA Ex. 15. The November 16, 2004 statement is the second statement by Respondent that the I.G. avers is willfully false. In it Respondent states:

> I did not work at all since I have been on disability.

Id.

This statement, as with the March 17, 2000 statement is false and misleading because it implicitly denies both Respondent's work activity for Professional Image and Mr. and Mrs. K's custom tailoring and for R.D. Melanson Electric on dates after Respondent first began receiving disability benefits.

The concealment by Respondent of his work and work-related activities was deliberate. The deliberately false quality of Respondent's blanket denials of work becomes evident when the two statements are read in the context of what Respondent knew SSA was interested in determining. Respondent knew that SSA might terminate his benefits if it determined that he had been working or if it concluded that he was physically and mentally capable of working. SSA's interest in Respondent's possible post-onset work activity was made plain by the March 14, 2000 letter that SSA sent to him. SSA Ex. 3, at 2.

Respondent argues that he made no deliberately false or misleading statements because he never believed that what he was doing for Professional Image or his parents constituted work. Respondent contends that he thought that his activities were not work because they allegedly were not remunerative. Tr. at 127; Respondent's post-hearing brief at 4 - 5. This assertion is utterly unpersuasive. Respondent knew that his eligibility for disability benefits hinged not only on whether he was working but on whether he was able to work. The activities that he performed for his parents and Professional Image would certainly be disqualifying if they provided substantial remuneration to Respondent. But, even if Respondent took nothing in return for those activities, they were evidence of his physical and mental capacity for work and might have been used by SSA to disqualify him from receiving disability benefits. It blinks at reality to accept the premise that Respondent was unaware that activities consisting of assisting in a tailor shop and clothing store, several days a week, for up to eight hours a day, would not have potentially disqualified him from receiving disability benefits, had SSA been aware of such activities. Thus, how – or whether – Respondent was paid for his services for his parents and Professional Image is not necessary to my finding that Respondent deliberately and falsely misstated his work activity.[3]

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[3] I make no findings in this case as to whether Respondent was paid for his services for Professional Image and his parents because it is unnecessary that I do so. There is evidence in the record, however, from which I could infer that Respondent was paid. Tr. at 142 - 150.

According to Respondent, his understanding of what it means to work is consistent with SSA's own definition of "work", which Respondent characterizes as being employment for wages. I disagree with that characterization. Respondent knew – his protests notwithstanding – that the duties he performed for his parents and Professional Image arguably would be disqualifying even if he received no pay for them. In asking Respondent to describe his work activities, SSA plainly was interested in learning more from Respondent than whether he worked for pay. Unemployment and disability are not synonymous terms. A person is eligible for disability if he or she is not working *and* if he or she is unable to work. 20 C.F.R. § 404.1505. Performance of work certainly is a disqualifying factor. But, performance of physical and mental activities that establish the ability to work also is a disqualifying factor.

Respondent argues that he did not intentionally conceal his work for R.D. Melanson Electric because his statements that he did no work since he began receiving disability are literally true. He argues that he worked for this employer some time in 1996 but prior to July 8, 1996, the date when SSA notified him that he was *awarded* disability benefits. He contends that his statements that he did no work since he began "receiving disability benefits" and since "being on disability" reflect his belief that his disability benefits began on July 8, 1996. I find this assertion to be unbelievable. Respondent may have received notification from SSA on July 8, 1996. However, that notification told Respondent – based in part on Respondent's representations as to his medical condition and his past work activity – that SSA had determined that he had been eligible to receive disability benefits since January 8, 1996, and that he would be paid benefits *retroactively* to that date.[4]

The defenses in this case rest heavily on Respondent's assertions of honesty and credibility. In effect, Respondent argues that his statements, even if false or misleading in fact, were never intended by him to be false or misleading. Obviously, the strength of Respondent's assertion of benign intent rests on the plausibility of his explanation for his

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[4] As I discuss above, there is a dispute as to when Respondent worked for R.D. Melanson Electric. Ray Melanson originally told the I.G.'s agents that Respondent worked for him in 1997. SSA Ex. 12, at 3. He subsequently averred that the agents had either mischaracterized what he said or misunderstood him and that Respondent actually had worked for him in 1996. I do not resolve this dispute because it is unnecessary that I do so. Whether Respondent worked for R.D. Melanson in 1996 or 1997, it was after the onset date of his disability and, as I find above, Respondent knew that when he stated twice, in 2000 and 2004, that he had done no work after first receiving disability benefits.

statements. As I discuss above, I find Respondent's explanation to be implausible. But, of course, his declaration of honesty also rests heavily on his overall credibility. I conclude that Respondent is simply not believable.

Respondent's history of dealing with SSA shows that he has never been honest with the agency. Assuming his assertion to be true that he worked for R.D. Melanson Electric in 1996 but prior to July 8 of that year, the date when he was found to be eligible for benefits, then his December 17, 1996 application for disability benefits – in which he avers that he last worked prior to March 14, 1995 – along with the two statements that are at issue in this case, is deliberately false. SSA Ex. 1, at 1. Given that, I find no reason to accept as honest his protestations that he never intended to lie in his March 17, 2000 and November 16, 2004 statements.

His assertions of honest intent also are unbelievable when they are weighed in the context of the testimony he gave at the hearing. His recall of facts under cross-examination was convenient. There was an obvious pattern to his testimony in which time after time Respondent could not remember facts that were potentially damaging to his case. Thus, Respondent asserted that he could not remember:

- Any of the details of a conversation that he had with I.G. agents on May 3, 2002. Tr. at 115 - 116. It was during this meeting that the agents confronted Respondent with evidence that he had held himself out to an agent, in previous encounters, as working for his parents' business. SSA Ex. 12, at 16;

- When he became unable to work as a consequence of his disability. Tr. at 125;

- When he worked for R.D. Melanson Electric. Tr. at 125;

- What he meant in a statement he made to a health care provider on July 20, 1999 when he listed as a "Job/School/Living" problem: "Helping father at Store." Tr. at 128; AK Ex. 3, at 9;

- Telling a health care provider on May 7, 1998 that he was an electrician who "hasn't worked in 1 year". Tr. at 129 - 130; AK Ex. 7, at 3;

- Telling a physician, also on May 7, 1998, that he was an electrician "who stopped full time work last year." Tr. at 130; AK Ex. 7, at 7.

In Respondent's written direct testimony he asserts that:

> I would like the court to be aware that during my cross-examination I might forget certain facts. If this happens, I am not trying to be evasive it is simply a condition or symptom of my disease. If I am reminded of a particular event or fact, however, it may help my memory.

AK Ex. 12, at 9. I do not find this to be a persuasive explanation by Respondent for his convenient memory lapses at the hearing. He demonstrated an acute recall, in both his direct testimony and in redirect testimony, of those facts that he thought were helpful to his case. *See* AK Ex. 12; Tr. at 134 - 138.

2. Civil money penalties of $10,000 and an assessment of $95,218 are reasonable.

The I.G. argues that I should impose civil money penalties against Respondent totaling $10,000. Additionally, the I.G. asks that I impose an assessment of $95,218 against Respondent.

The I.G. confuses somewhat the concepts of civil money penalty and assessment by treating the proposed assessment as being part and parcel of the civil money penalties that he asks me to impose. I.G.'s post-hearing brief at 10 - 13. However, and as a matter of law, a civil money penalty and an assessment are separate remedies. Act, section 1129(a)(1); 20 C.F.R. §§ 498.103, 498.104. Civil money penalties are limited to $5,000 for each deliberately false or misleading statement that a person makes about a material fact. An assessment may be for up to double the benefits paid by SSA as a consequence of a false statement or statements. *Id.*

In this case the I.G. seeks the maximum allowable civil money penalties of $5,000 for each of the two false statements made by Respondent. The I.G.'s proposed assessment of $95,218 is well below the maximum allowed by law if it is assumed that Respondent was, by virtue of the false statements he made about his work activity, entitled to none of the disability benefits he or his family received from SSA after March 2000.[5]

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[5] In the I.G.'s February 24, 2006 notice of intent to impose remedies against Respondent, the I.G. originally proposed an assessment of $89,422. That amount appeared, from the face of the notice letter, to equal the total amount of benefits that the I.G. asserted that Respondent had received after March 2000 based on his false statements. Subsequently, the I.G. increased the proposed assessment to $95,218 based

Section 1129(c) of the Act establishes criteria for determining the amounts of penalties and assessments. These criteria have been implemented by regulation at 20 C.F.R. § 498.106(a):

> (1) The nature of the [false or misleading] statements and representations . . . and the circumstances under which they occurred;
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> (2) The degree of culpability of the person committing the offense;
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> (3) The history of prior offenses of the person committing the offense;
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> (4) The financial condition of the person committing the offense; and
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> (5) Such other matters as justice may require.

I have considered the evidence of this case in light of all of these factors. I decide that the penalties and assessment sought by the I.G. are warranted. Respondent demonstrates a very high degree of culpability for his actions. The evidence in this case is that his false statements were designed intentionally to deceive SSA. Respondent certainly was aware of the probable impact that his false statements would have on SSA. In March 2000 and thereafter Respondent knew that SSA had received information from other sources that he was working for his parents' business and Professional Image. He knew that SSA was interested in learning exactly what he was doing for these entities. He knew also that he engaged in a broad range of activities for these enterprises that any reasonable person would conclude were work or at least work related. His denials, made in the face of this knowledge, clearly were intentional and willful untruths.

The level of Respondent's culpability for his false statements is made all the more evident by his history of uttering falsehoods to SSA about his work activity. As I discuss above, Respondent made a false statement in his initial application for disability benefits – an application which ultimately succeeded in convincing SSA to award benefits to him – concerning his work activity. On December 17, 1996, when he filed that application, he

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on a recalculation of the total benefits that Respondent and his family received. Respondent has not disputed the accuracy of this sum. I note that both the original and amended assessment amount are well under the maximum that the Act allows, if one assumes that all of the benefits that Respondent received were obtained by him improperly.

averred to SSA that he had not worked since March 14, 1995. In fact, and as Respondent now admits, he worked after March 14, 1995. If his assertions are accepted as true, he worked for R.D. Melanson Electronics sometime before July 8, 1996, the date when SSA determined that he was disabled based, in part, on Respondent's assertion that he was not working.

The very high level of Respondent's culpability coupled with his long history of untruthful statements about his work activity clearly justifies imposing the maximum civil money penalties of $5,000 for each of the two false statements for which the I.G. seeks penalties. I find also that this culpability and history justifies imposition of the assessment of $95,218 sought by the I.G. Respondent obtained disability benefits and he continued to receive them for several years premised on his false statements. The assessment demanded by the I.G. is equal in dollar amount only to the amount of benefits paid to Respondent and his family members after Respondent made his March 17, 2000 false statement.[6] It is only 50 percent of the allowable maximum assessment amount and I find it to be justified fully by Respondent's culpability and history.

Respondent argues that I must take into account his financial condition. He argues that he and his wife have never earned more than $34,537 in a year. Respondent's post-hearing brief at 20; AK Ex. 10, at 34. He asserts that civil money penalties and an assessment in the amounts sought by the I.G. would work substantial financial hardship on him, his children, and on his extended family as well. I do not find Respondent's argument to be persuasive. He has not established a detailed picture of his financial status. He has not, for example, offered as evidence complete information concerning his total resources. Nor has he offered income tax returns for years after 2004. I note also that Respondent failed to cooperate with the I.G. when the I.G. sought information about Respondent's income and resources before making a penalty and assessment determination. I.G.'s pre-hearing brief at 21.

/s/

Steven T. Kessel
Administrative Law Judge

[6] Respondent does not dispute the accuracy of the I.G.'s calculation of benefits paid to him and his family after March 2000.