Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Latoshia Walker-Mays
Docket No. A-11-13
February 17, 2011

RECOMMENDED DECISION

Latoshia Walker-Mays (Respondent) appealed a September 17, 2010 decision by Administrative Law Judge (ALJ) Steven T. Kessel. *Social Security Administration v. Latoshia Walker-Mays*, DAB CR2243 (2010) (ALJ Decision). The ALJ upheld the determination of the Inspector General of the Social Security Administration (SSA I.G.) that Respondent violated the Social Security Act by making false statements, misrepresentations and material omissions of fact to continue receiving benefits on behalf of her minor child. The ALJ determined that the civil money penalty (CMP) of $61,000 the SSA I.G. proposed was reasonable.

As explained more fully below, we recommend that the Commissioner of SSA affirm the ALJ Decision because it is supported by substantial evidence and consistent with applicable legal authorities.

Applicable Statute and Regulations

Section 1129(a)(1) of the Social Security (Act) (42 U.S.C. § 1320a–8(a)(1))[1] authorizes the imposition of CMPs 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 title II [Social Security] or benefits or payments under title VIII or XVI [SSI], 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

[1] The current version of the Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

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

See also 20 C.F.R. §§ 498.100, 498.102(a) (implementing regulations). For the purpose of section 1129, "a material fact is one which the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under title II or title VIII, or eligible for benefits or payments under title XVI." Act § 1129(a)(2).

Section 1129(a)(1) of the Act authorizes a civil money penalty of $5,000 for *each* willful misrepresentation or false statement of material fact that an individual makes to SSA for use in determining eligibility for or the amount of SSI benefits or payments, or for *each* monthly SSI benefit or payment received while knowingly withholding disclosure of a material fact from SSA. *See also* 20 C.F.R. § 498.103(a). Section 1129 also authorizes, *in addition* to the CMP, 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." *See also* 20 C.F.R. § 498.104(a).

Factual and Procedural Background

Respondent received Supplemental Security Income (SSI) benefits on behalf of her minor daughter, to whom we refer as "S." The SSA I.G. alleged that Respondent violated section 1129 of the Act by withholding from SSA information about her residence and household composition that was material to SSA's determination of the amount of SSI benefits her daughter was eligible to receive, and by making to SSA statements or misrepresentations that she knew or should have known were false and misleading. OIG Ex. 18. The SSA I.G. determined that from 2002 through 2008, Respondent consistently reported to SSA, on SSA forms used for the purpose of redetermining her daughter's eligibility for SSI benefits, that she was separated from her husband and lived with S and her other children in her parents' home in Trenton, Tennessee (Trenton home). *Id*. The SSA I.G. determined, however, that, from September 2003 to December 2008, Respondent and her husband rented a three-bedroom, two-bath subsidized apartment in Milan, Tennessee (Milan apartment) where they resided with Respondent's children. *Id*; ALJ Decision at 3, 4, 6; SSA I.G. Post-Hearing Br. at 2. The SSA I.G. alleged that Respondent withheld this information from SSA, which consequently did not consider Respondent's husband's income in determining S's eligibility for SSI benefits and paid $20,620.81 that S was not entitled to receive. By notice dated August 13, 2009, the SSA I.G. proposed a CMP of $61,000. OIG Ex. 18. Respondent requested a hearing before an ALJ, and the ALJ held a hearing by telephone on July 12, 2010.

The ALJ sustained the SSA I.G.'s determination and the CMP. The ALJ held that Respondent knowingly made materially false statements or omissions of fact to SSA to obtain SSI benefits for her daughter and that the $61,000 CMP that the SSA I.G. proposed was reasonable. ALJ Decision at 2-10. The ALJ found:

> For a more than four year period, beginning in 2003 and continuing into 2008, Respondent repeatedly misrepresented where she and her daughter lived and the composition of their household. Respondent repeatedly stated on forms that the Social Security Administration used to determine eligibility for SSI payments that she and her daughter, [S], resided exclusively with [S]'s siblings at Respondent's parents' residence in Trenton, Tennessee. Respondent consistently failed to reveal that she maintained another residence, a three-bedroom two-bath apartment in Milan, Tennessee, which she and her husband shared along with Respondent's three children.

Id. at 3. The ALJ concluded that that Respondent "consistently and materially misrepresented the truth about her and her daughter's living arrangements to show income and resources that satisfied SSI eligibility criteria." *Id*.

Standard of Review

The regulations governing section 1129 appeals provide that the Board "will limit its review to whether the ALJ's initial decision is supported by substantial evidence on the whole record or contained an error of law." 20 C.F.R. § 498.221(i). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Under the substantial evidence standard, the reviewer must examine the record as a whole and take into account whatever in the record fairly detracts from the weight of the evidence relied on in the decision below. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Analysis

On appeal, Respondent denies making false statements, misrepresentations or material omissions to SSA, and argues that the CMP is unreasonable. Respondent also asserts that she was denied the opportunity to present her case before the ALJ and requests an oral hearing, and she asks that the SSA I.G.'s response to her appeal be struck as untimely. For the reasons discussed below, we conclude that there is no merit to her arguments and that further proceedings are not necessary, and we decline to strike the SSA I.G.'s response. Accordingly, we sustain the ALJ Decision.

1. **The ALJ's determination that Respondent knowingly made materially false statements or omissions of fact to SSA to obtain SSI benefits for her daughter is supported by substantial evidence and not legally erroneous.**

As the ALJ found, there is "a gross disparity" between what Respondent repeatedly told SSA about her residence and household composition in order to qualify her daughter for continuing SSI payments, and what she stated in documents she and her husband completed incident to their rental of the Milan apartment. ALJ Decision at 4.

The evidence the ALJ relied on demonstrates that, from July 2003 to October 2007, Respondent repeatedly informed SSA that as of February 9, 2002, she and her children, including S, lived in the Trenton home in a household that did not include her husband. OIG Exs. 2-5, cited at ALJ Decision at 3, 4-5. Respondent reported or certified this information on SSA "Statement[s] for Determining Continuing Eligibility for [SSI] Payments" dated July 28, 2003 and January 13, 2005 (OIG Exs. 2, 3), and SSA "Redetermination Summar[ies] for Determining Continuing Eligibility for [SSI] Payments" dated November 1, 2005 and October 31, 2007 (OIG Exs. 4, 5).[2]

However, documents Respondent and her husband completed and signed in order to rent the Milan apartment tell a far different story about her living arrangements and support the ALJ's finding that she "consistently failed to reveal that she maintained another residence, a three-bedroom two-bath apartment in Milan, Tennessee, which she and her husband shared along with Respondent's three children." ALJ Decision at 3. These documents consist of applications to rent the Milan apartment, leases for the apartment, and Tennessee Housing Development Household Agency Income Certification forms that Respondent and her husband completed, apparently to qualify for subsidized rent. ALJ Decision at 5-6. From August 2003 to October 2007, Respondent and her husband repeatedly stated on these many forms, under penalty of perjury, that they lived together in a household that included all of Respondent's children.

On the initial application for the Milan apartment Respondent and her husband signed in August 2003, and on subsequent recertification applications they signed in October 2005 and September 2007, they stated that they were married, they provided both of their incomes as household income, and they listed themselves and Respondent's children, including S, as "all persons" who were going to occupy the apartment. OIG Ex. 6, at 1-2; OIG Ex. 9, at 1-4; OIG Ex. 13, at 1-3. Respondent's husband reported the same information on a recertification application that he signed in November 2006. OIG Ex.

[2] The "Statements" from February 2002, July 2003, and January 2005 are worded as statements of a beneficiary or representative payee and have a space for that person's signature. OIG Exs. 1-3. The later "Redetermination Summaries" report information provided to SSA and have no signature space; instead, they instruct the beneficiary or representative payee to contact SSA if he or she disagrees with any of the statements therein. OIG Exs. 4-5; s*ee also* OIG Ex. 22, at 2-3 (Mabry Decl.) (the forms from January and November 2005 and October 2007 "were attested to and not signed, pursuant to SSA practices"). Respondent does not deny that she provided the information on these forms.

11, at 1-2. The applications also indicate that they originally moved into the apartment on September 11, 2003. *Id*. at 1; OIG Ex. 13, at 1. Respondent certified on the 2003 application that the information she reported was "true and correct" and that she had "not knowingly withheld any fact or circumstance," and she certified on the subsequent applications that "the facts set forth" therein "are true, complete and correct to the best of my knowledge and belief and are made in good faith." OIG Ex. 6, at 2; OIG Ex. 9, at 2; OIG Ex. 13, at 3.

On the initial one-year lease for the Milan apartment that Respondent and her husband signed September 2003, they both initialed a clause stating that "[t]he Resident(s) must live in the unit and the unit must be the Resident(s) only place of residence" and that "[t]he Resident(s) shall use the premises only as a private dwelling for himself/herself and the individuals listed below." OIG Ex. 7, at 1. The "individuals listed below" are Respondent's three children, including S. *Id*. Another clause in that lease states that in order to qualify for reduced rent, the residents were required to verify their household income. *Id*. On subsequent leases they signed for the Milan apartment in October 2005 and November 2006, and a lease Respondent's husband signed in October 2007, they again stated that they intended to live in the Milan apartment with Respondent's children, including S. OIG Exs. 10, 12, 14. The October 2007 lease continued through August 30, 2008. OIG Ex. 14, at 1.

Respondent and her husband also signed "Tennessee Housing Development Agency Household Income Certification" statements to qualify for the apartment, initially in September 2003 and again for recertification in October 2005, September 2006, and October 2007. OIG Ex. 6, at 3-4; OIG Ex. 9, at 5-6; OIG Ex. 11, at 3-4; OIG Ex. 13, at 4-5. Respondent and her husband certified on these forms that their household was composed of themselves and Respondent's children, including S, and they reported both of their incomes. *Id*. Respondent signed these forms under penalty of perjury and certified that the information present in the forms was true and accurate to the best of her knowledge and belief. *Id*.

As the ALJ discussed, unchallenged witness testimony supports the documentary evidence showing that Respondent maintained a home for her family at the Milan apartment. ALJ Decision at 6-8. For example, Pat Long, the property manager of the Milan apartments between November 2007 and December 2008, testified that Respondent's apartment faced her office and that she would "sometimes see them coming and going, or riding in their car with their children," that both Respondent and her husband came to Ms. Long's office to pay rent, the husband more frequently, and that when she inspected the apartment on approximately 20 occasions between 2007 and 2008, she saw evidence that a family lived there. OIG Ex. 24 (Long Decl.); Tr. at 14, 18-19. Respondent's own witness Wendy Gilliam, a foster child of Respondent's parents, testified that during the period of 2004 to 2006 she sometimes provided live-in babysitting services for Respondent's children other than S at the Milan apartment. Tr. at 43-44. Jennifer Simer, who succeeded Ms. Long as property manager, also testified

without contradiction that apartment records showed that Respondent and her husband resided there between 2003 and 2008. OIG Ex. 23.; Tr. at 27; ALJ Decision at 6. SSA's technical expert who worked on Respondent's case, Pamela Mabry, stated that in March 2008, she contacted Respondent's and her husband's employers, who said that she and her husband each lived at the Milan address. OIG Ex. 22, at 3 (Mabry Decl.). Respondent herself bolstered SSA's case, stating that her husband "resided in several location[s] in Union City, TN **until our arrangement in Milan**." Request for Hearing at 2nd unnumbered page (emphasis added).

This evidence amply supports the ALJ's finding that Respondent made multiple misstatements and omissions of fact to SSA about her living arrangements, in the course of providing information that SSA used to determine her daughter's eligibility for SSI payments.

The SSA forms that Respondent completed further demonstrate that her omissions and misstatements were knowingly made. These forms cautioned the recipient or representative payee to report changes in living arrangements (e.g., if the recipient moved or if someone moved in or out of the recipient's household), and the receipt of any income and assistance from others. OIG Ex. 2, at 4; OIG Ex. 3, at 5; OIG Ex. 4, at 5-8; OIG Ex. 5, at 5-8. Moreover, they warned of possible criminal and other penalties for knowingly reporting false information. The "Redetermination Summaries" completed in November 2005 and October 2007 advised:

> You declared under penalty of perjury that all of the information on this summary is true and correct to the best of your knowledge. Anyone who knowingly gives a false or misleading statement about a material fact in a redetermination, or causes someone else to do so, commits a crime and may be sent to prison or may face other penalties, or both.

OIG Ex. 4, at 5; OIG Ex. 5, at 5. The earlier "Statements for Determining Continuing Eligibility" state, above the space for the payee's signature, "I understand that anyone who knowingly lies or misrepresents the truth or arranges for someone to knowingly lie or misrepresent the truth is committing a crime which can be punished under federal law, State law, or both. Everything on this document is the truth as best I know it." OIG Ex. 2, at 4; OIG Ex. 3, at 5.

Respondent knew from these SSA forms that she was required to inform SSA about the Milan apartment she and her husband rented. On none of the forms did she do so. There is no question, and Respondent does not contest, that Respondent's misrepresentations and omissions were material. The SSI technical expert, Ms. Mabry, testified that if SSA had known that Respondent lived in a household that included her husband, then SSA would have considered the husband's income as part of the household's income in determining whether Respondent's daughter was eligible to receive SSI payments, and the amount of those payments. OIG Ex. 22 (Mabry Decl.); Tr. at 36-39. She testified

that SSA paid Respondent $20,620.81 for which her daughter was not eligible due to Respondent's failure to disclose information about her living arrangements. OIG Ex. 22, at 4. As the ALJ correctly concluded:

> The misrepresentations made by Respondent in her statements concerning continued SSI eligibility were material in two respects. First, in stating that she lived with her children at the Trenton address, Respondent told the Social Security Administration that she was a single parent who lived without the benefit of the support of a husband. These statements were a series of falsehoods that created an image of Respondent's material circumstances that differed greatly from reality and which greatly understated the resources that were available to her and her family. Second, in omitting to tell the Social Security Administration about her true residence and family situation, Respondent concealed facts showing the actual extent of her family's income and resources.

ALJ Decision at 8.

Respondent does not dispute either the authenticity or accuracy of any of the above documents showing that she and her husband rented the Milan apartment as a residence for themselves and her children while at the same time Respondent was reporting to SSA that she resided with her children in her parent's Trenton home in a household that did not include her husband. However, Respondent gives two reasons for why she believes that she did not give false or misleading information to SSA or withhold material information from SSA.

First, Respondent asserts she informed SSA about the Milan apartment, and, more specifically, that she told Ms. Mabry about the Milan apartment in person and by telephone but that Ms. Mabry "stated that she did not need information about [S] with the [Milan] apartment because [S] wasn't living there." Notice of Appeal (NA). In rejecting this claim, the ALJ noted that Respondent "has provided no proof of any communication between her and the Social Security Administration about her household status other than that which the SSA I.G. offered as evidence." ALJ Decision at 7. The ALJ also relied upon Ms. Mabry's written testimony "that it was not until January 15, 2008 that Respondent acknowledged to the Social Security Administration that she maintained two households" and that it was not until after March 24, 2008 that Ms. Mabry learned that both Respondent and her husband had reported to their employers that they lived at an address that was the Milan apartment. *Id*., citing OIG Ex. 22, at 3-4. Respondent has submitted no evidence to corroborate her claim that she ever specifically informed SSA about the Milan apartment and her living arrangements prior to the time that SSA notified her by letter dated November 20, 2008 that it was considering a CMP against her. OIG Ex. 16. Respondent also asserts that she informed a State agency, Children's Special Services of the Tennessee Department of Health, about her living arrangements. NA. Even if true, this would not have satisfied her obligation to provide full and accurate

information about her living arrangements to SSA. Nor has Respondent provided any proof that anyone from SSA ever informed her that information about her other living arrangements was not important to her case.

Second, Respondent argues that the information she provided on the SSA forms reflected her family's "unorthodox" living arrangements. essentially because, notwithstanding her and her husband's rental of the three-bedroom, two-bath Milan apartment, she and her children still resided at her parents' Trenton home. R. Ex. 1. Viewed in the most favorable light, her arguments and testimony, and the testimony of her one witness, Ms. Gilliam, portray the following situation:

- Respondent and her husband "jointly obtain[ed]" the Milan apartment to "co-parent" their minor child or children other than S, who was not her husband's child, and did not live at the Milan apartment "as husband and wife." R. ALJ Reply at 2nd unnumbered page.
- Respondent maintained "dual residency" at both locations, using the Trenton home as her "main" or "primary" address and staying at the Milan apartment for "convenience . . . more than two and three nights out of the week because I was going to school [or] because I was sick," including sometimes on weekends, particularly if her husband wasn't there. Tr. at 48-49; R. ALJ Reply at 1st unnumbered page; R. Ex. 1; R. Ex. 2 (Gilliam Decl.).
- Respondent's husband stayed at the Milan apartment only on weekends, and with relatives near his job during the week. R. Ex. 1, at 3rd unnumbered page; R. ALJ Reply at 2nd unnumbered page.
- Respondent's children lived in the Trenton home of Respondent's parents, who acted as S's "active parents," although the other children sometimes stayed at the Milan apartment with Respondent and/or her husband, and S was taken to the Milan apartment for visits. R. ALJ Reply at unnumbered 2nd page; Tr. at 15, 44, 49; R. Ex. 2 (Gilliam Decl.).

Regardless of whether Respondent and her husband lived together as "husband and wife" or "shared the same bed[,]" they still maintained a household at the Milan apartment in which they and at least some of Respondent's children resided at various times. R. ALJ Reply at 2nd unnumbered page. Thus, even accepting the foregoing account of her living arrangements, Respondent was obligated to disclose those arrangements to SSA but failed to do so.

Respondent's suggestions that she and her children did not regularly reside in the three-bedroom, two-bath Milan apartment is also contradicted by the documentary evidence, which shows that Respondent and her husband maintained a household at the Milan apartment during the time she informed SSA that she lived in her parents' Trenton home without her husband. For example, as the ALJ pointed out, Respondent and her husband, throughout their tenancy of the Milan apartment, repeatedly listed themselves and Respondent's children as residents of the apartment on the many applications and leases

and on State income statements that she and her husband signed. ALJ Decision at 4, 5-6; OIG Exs. 5-7, 9-14. Respondent's assertion that she "was told that I had to list everybody" in her family even if they were "not going [to] be there" in order to qualify for the subsidized apartment is not credible in light of the specific language of the application documents themselves. Tr. at 54-55. The initial application for the apartment that she signed in August 2003 clearly instructed Respondent to provide the names and dates of birth and relationship "of ALL persons who are going to occupy the unit," and subsequent applications she signed in October 2005 and September 2007 similarly required the names of "All Persons who will occupy Apartment" and "all Persons who will occupy the Unit," respectively. OIG Ex. 6, at 1-2; OIG Ex. 9, at 1-2; OIG Ex. 13, at 1-3. The initial lease, on which Respondent listed all of her children as occupants, cautioned that the apartment was to be used "only as a private dwelling for himself/herself and the individuals listed" and that the apartment must be the residents' only place of residence, and subsequent leases state that she intended to occupy the apartment with her husband and all of her children. OIG Ex. 7, at 1; OIG Exs. 10, 12, 14. Finally, on the State income certification forms, Respondent and her husband listed themselves and all of her children under "household composition." OIG Ex. 6, at 3; OIG Ex. 9, at 5-6; OIG Ex. 11, at 3-4. All of the various forms relating to the Milan apartment were signed under penalty of perjury. None of them anywhere instruct the applicant or lessee to list, as residents of the apartment, family members who would not be living there.

These documents and testimony constitute substantial evidence that Respondent provided false information and omitted material information about her residence and household composition to SSA in the SSA forms that she completed to demonstrate her daughter's continuing eligibility for the SSI payments Respondent received on her daughter's behalf.

In making our recommendation to affirm the ALJ Decision we have considered that there is conflicting information in the record about the extent to which Respondent's daughter S stayed at the Milan apartment. Ms. Long testified that she did not see S at the Milan apartment although she saw the other children there, Ms. Gilliam testified that S did not stay overnight at the Milan apartment, and Respondent provided records indicating that S attended school in Trenton.[3] Tr. at 15, 44; R. Ex. 1. It is also not disputed that the Milan apartment was on the third floor and was not classified as a "handicapped accessible" unit, and that S used a wheelchair. *See* OIG Ex. 10, at 4 (lease). Ms. Gilliam testified, however, that S visited the Milan apartment, and Ms. Long testified that she saw Respondent and others carrying a wheelchair up to the apartment on one occasion and that she saw the wheelchair in the apartment during inspections. Tr. at 15, 20-22. The ALJ found the presence of the wheelchair at the Milan apartment to be "strong evidence that [S] lived there at least part of the time," and the fact that she may have attended

[3] A letter dated March 11, 2010 from the supervisor of transportation at Peabody High School in Trenton stating that S attends school there and "is picked up" each day at the Trenton home is of limited probative value as to the time period at issue here. R. Ex. 1.

school in Trenton "not inconsistent . . . with evidence showing that [S] spent at least part of the time there." ALJ Decision at 7, 8. Moreover, as noted above, on the various documents associated with the Milan apartment, Respondent stated under penalty of perjury that S lived at the Milan apartment, and that it was her only residence.

We have concluded that it is not material whether S resided part, or even more, of the time in Trenton. Even if S was found to have spent more time in Trenton, that fact would not alter the inescapable conclusion that Respondent provided false information to SSA that was material to the determination of S's eligibility for SSI payments. As the ALJ ultimately concluded, "the fact that Respondent may have lived separately from [S] much of the time does not justify Respondent's concealing the Milan apartment and her relationship with her husband from the Social Security Administration." *Id*. at 8. It was incumbent on Respondent to provide SSA with full, complete information about her living arrangements so that SSA could determine to what extent to which her husband's income and resources would affect her daughter's eligibility for SSI benefits. She clearly failed to do so.

2. The ALJ's determination that a CMP of $61,000 is reasonable is supported by substantial evidence and not legally erroneous.

There was no error in the ALJ's conclusion that the $61,000 CMP, though substantial, is reasonable. *Id*. at 9. It is significantly less than the total CMP and assessment that the SSA I.G. could have imposed. As the ALJ found, Respondent's receipt over a four-year period of some $20,620.81 on behalf of her daughter "that she would not have been eligible to receive had Respondent stated truthfully her places of residence and her resources" justified an assessment in lieu of damages "of more than $40,000," that is, "double the amount of benefits or payments made as a consequence of an individual's materially false statements or omissions." *Id*. He also found that the SSA I.G. was authorized to impose in addition a CMP of $5,000 for each of "13 separate false statements uttered by Respondent and proven by the SSA I.G." on the SSA forms from January and November 2005 and October 2007, or up to $65,000. *Id*. While five of these 13 statements were that S lived at the Trenton home, we conclude that even if in fact S's principal residence was the Trenton home, this would not warrant reducing the CMP. The SSA I.G. could still have imposed a substantially larger CMP than that imposed here, based on the length of the period during which Respondent withheld material information about her living arrangements, without regard to the number of false statements. Because the record conclusively establishes that Respondent withheld material information from SSA since the beginning of her tenancy at the Milan apartment in September 2003, the SSA I.G. could have imposed, in addition to an assessment in excess of $40,000, a CMP of $5,000 for *each month* during which she withheld that information. Act § 1129(a)(1); 20 C.F.R. § 498.103(a); *see* OIG. Ex. 22, at 3 (Respondent received monthly payments). The ALJ thus correctly pointed out that Respondent's "material omissions would justify the imposition of a [CMP] substantially in excess of $65,000" and that "the total amount

of penalty and assessment that the SSA I.G. might have proposed would be well over $100,000."[4] ALJ Decision at 9.

The ALJ also concluded that the $61,000 CMP was reasonable under the factors that the regulations direct the SSA I.G. to consider in determining the amount of a penalty (the nature of the statements, representations, and the circumstances under which they occurred; the degree of culpability of the person committing the offense; the history of prior offenses of the person committing the offense; the financial condition of the person committing the offense; and such other matters as justice may require). 20 C.F.R. § 498.106(a). The ALJ concluded that "[t]he persistence with which Respondent deceived the Social Security Administration, and the obviously intentional quality of her false statements, is persuasive evidence of a very high degree of culpability." ALJ Decision at 10. We agree that the fact that Respondent knowingly withheld material information from SSA over an extended period of time demonstrates that she was highly culpable.

The ALJ rejected, as unsupported by the evidence, Respondent's claim that her financial condition precluded her from paying the penalty because she: 1) had purchased a home in Medina, Tennessee; 2) was employed with a salary of $32,000 per year; 3) was receiving child support from her husband and financial support from S's father; and 4) had offered no proof that she lacked the financial wherewithal to pay the penalty amount, or proof as to the degree of her indebtedness. *Id*. Though Respondent has averred that the CMP will render her destitute and force her to lead a life of poverty, she does not dispute any of the ALJ's findings as to her income and resources. Respondent had the burden of demonstrating her financial condition and inability to pay, but failed to do so. In any event, as the CMP is well below what the SSA I.G. could have imposed, it is not clear that a different evaluation of the regulatory factors would provide a basis to reduce the CMP. *See Anthony Koutsogiannis,* App. Div. Docket No. A-07-81, at 19 (June 20, 2007) ("since the I.G. sought only half of the assessment that could have been imposed, it is not at all clear that any showing of financial hardship which Respondent might now make would justify an even further reduction in the assessment."). Accordingly, we sustain the CMP.

3. No additional proceedings are warranted.

Respondent requested an "oral hearing so . . . I can [dispute] the Judges' decision and present the case I was denied before." R. Reply. She asserts she was reprimanded for seeking discovery from SSA, and has submitted additional documents with her notice of appeal.

[4] The SSA I.G. determined that Respondent could have been subject to a $5,000 CMP per month for 21 months beginning with December 2006, the first full month following the effective date of the language in section 1129 authorizing CMPs for each receipt of a payment while withholding material information. *See* SSA I.G. Br. at 23.

The record does not support Respondent's claim that she was denied discovery or an opportunity to present her case. The documents she has submitted on appeal, even if admissible, do not support her argument, and there is no basis to convene a hearing in this proceeding.

The record shows that Respondent submitted a request for documents on March 14, 2010, well beyond the December 2, 2009 deadline for discovery that the ALJ set in his Prehearing Conference Order, and was informed by a staff attorney acting at the direction of the ALJ that the request was untimely. Letter to Parties (Mar. 26, 2010). Nothing in this letter fairly suggests a reprimand. SSA I.G. counsel states, moreover, that SSA provided Respondent with "all documents she requested." SSA I.G. Resp. at 11. Respondent in her reply did not dispute this or allege that she was denied discovery from SSA.

Respondent submitted three letters with her appeal that she asserts were not available at the time of the ALJ hearing. One letter, from the Tennessee Department of Health dated October 15, 2010, states that this State agency had provided services to Respondent's children but had since purged information relating to them from its files. Respondent asserts that the purged information would show that she informed the State agency about her living arrangements. NA. The other two letters are from Ms. Long, the former property manager of the Milan apartments and are dated in June and July 2008. These letters confirm that Respondent moved into the Milan apartment on September 11, 2003, that the apartment did not have handicapped access, that rent was paid for the apartment, and that Respondent would be moving "due to medical need for additional space for your daughter and the equipment she requires." These two letters were submitted under a fax cover sheet from an Alma Jones of the Community Action Network, Inc. Respondent asserts that Ms. Jones told her that "there were two documents submitted from Mrs. Long that concluded that [Respondent's husband] wasn't physically living in the [Milan] apartment." NA.

The regulations governing this appeal provide that we "may remand the matter to the ALJ" to consider "additional evidence not presented at [the ALJ] hearing" if the party submitting such evidence demonstrates, among other things, that it is "relevant and material[.]" 20 C.F.R. § 498.221(g). We conclude that Respondent's additional evidence is neither relevant nor material. As we stated above, even if Respondent had told the State agency about the Milan apartment, this would not have fulfilled her obligation to provide that information to SSA. The letters from Ms. Long do not state that Respondent's husband did not live in the Milan apartment, and Ms. Long testified that she saw evidence that he did. If anything, Ms. Long's letters support the SSA I.G.'s case and the ALJ Decision by confirming that, consistent with Ms. Long's testimony, Respondent was living at the Milan apartment during the time period when she informed SSA that she lived in the Trenton home.

Regarding her request for an oral hearing, Respondent stated in a telephone message to the Board staff attorney on December 29, 2010 that she had documents she was not able to present during the original hearing and witnesses who were "not willing to come forward during the original hearing." Memo to File, Dec. 30, 2010. The staff attorney returned Respondent's call on December 30, 2010 and left a message advising her to write to or fax the Board as soon as possible describing the additional evidence and to explain why she had not submitted it earlier. In Respondent's only subsequent submission, her letter faxed to the Board on January 7, 2011 (R. Reply), she did not identify any witnesses who would testify, proffered no evidence, and merely reiterated her request for an oral hearing. Respondent also claims in her notice of appeal that "two witnesses gave conflicting statements and are withholding vital information" without identifying these witnesses or their allegedly conflicting statements, and accuses Ms. Simer, the property manager of the Milan apartments, of withholding evidence "that validates the information" Respondent provided to the ALJ.

The regulations governing this appeal state that "[t]here is no right to appear personally before the DAB[.]" 20 C.F.R. § 498.221(d). Given Respondent's failure to identify any additional evidence or witnesses or to proffer evidence that she provided SSA with complete and accurate information about her living arrangements and household composition, we see no purpose in convening an oral proceeding, nor any basis to remand this case to the ALJ to take new evidence.

4. We deny Respondent's request to strike the SSA I.G.'s response to her appeal as untimely.

Respondent questioned whether the SSA I.G. submitted its response to Respondent's notice of appeal by the deadline provided in the regulations, 30 days after the SSA I.G.'s receipt of the notice of appeal. 20 C.F.R. § 498.221(c). Respondent provided copies of certified mail receipts and tracking information showing receipt by "SSA" in Baltimore on October 25, 2010 of a letter or package sent from Trenton, Tennessee and postmarked October 21, 2010. The SSA I.G.'s response was dated and faxed to the Board December 3, 2010.

The Board treated Respondent's submission as an objection to the SSA I.G.'s response as untimely, and provided the SSA I.G. an opportunity to respond. While counsel for the SSA I.G. acknowledged that "it does appear" that Respondent's notice of appeal "was submitted (here, somewhere) on the 25th [of October 2010]," counsel further stated that she had not received this document, and that the first copy of the notice of appeal she received was one that the Board attached to its November 2, 2010 letter to the SSA I.G. acknowledging receipt of the notice of appeal. *See* E-mail from SSA I.G. counsel to Board staff attorney (Dec. 21, 2010, 12:55 p.m. EST); SSA I.G. Response to Challenge of Timeliness of SSA I.G. Response. The Board attached that copy to its November 2, 2010 letter because the notice of appeal contained no indication that a copy had been sent to the SSA I.G.. Counsel for the SSA I.G. moved that the Board accept the response she

submitted on December 3, 2011, stating that this was within 30 days after she first received the copy of the notice appeal from the Board.

We decline to strike the SSA I.G.'s response. There is no reason to doubt the SSA I.G. counsel's report that she personally did not receive a copy of the notice of appeal earlier than she asserts, even though there is evidence that a copy was received earlier by SSA. Counsel would not have known from the copy she received from the Board that Respondent had sent a copy to SSA or counsel earlier because there was no statement or other indication on the notice of appeal that SSA had been served. SSA I.G. counsel submitted the SSA I.G.'s response within 30 days of her receipt of the copy of the notice of appeal that the Board sent to her; which was only nine days after it would have been due based on SSA's receipt of the notice of appeal on October 25, 2010. Respondent has not shown that she was prejudiced by having received the response nine days late. Regarding this last point, we note that even if we were to strike the SSA I.G.'s response, that would not change the result in this case. The regulations governing the Board's review "limit its review to whether the ALJ's initial decision is supported by substantial evidence on the whole record or contained error of law" and moreover state that "no error . . . in any act done or omitted . . . by any of the parties is ground for vacating, modifying or otherwise disturbing an otherwise appropriate ruling or order . . . unless refusal to take such action appears to the ALJ or the DAB to be inconsistent with substantial justice." 20 C.F.R. §§ 498.221(i), 498.224. Based on our review of the entire record we conclude that the ALJ Decision is supported by substantial evidence and contained no error of law.

Conclusion

For the reasons explained above, we recommend that the Commissioner affirm the penalty determined by the ALJ.

_____/s/_____
Sheila Ann Hegy

_____/s/_____
Leslie A. Sussan

_____/s/_____
Stephen M. Godek
Presiding Board Member