

**Department of Health and Human Services**  
**DEPARTMENTAL APPEALS BOARD**  
**Appellate Division**

Nancy Whitehead  
Docket No. A-13-53  
June 25, 2013

**RECOMMENDED DECISION**

Nancy Whitehead (Respondent) appeals a March 11, 2013 decision by an Administrative Law Judge. *Nancy Whitehead*, DAB CR2718 (2013) (ALJ Decision). The ALJ upheld the determination by the Inspector General of the Social Security Administration (SSA I.G.) that Respondent violated section 1129(a)(3) of the Social Security Act (Act) by converting Social Security disability payments made to her as a representative payee to a use she knew or should have known was not for the benefit of the beneficiary. The ALJ also determined that the remedies proposed by the SSA I.G., a \$70,000 civil monetary penalty (CMP) and a \$66,616 assessment, are appropriate and supported by the record.

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.

**Legal Background**

The Social Security Disability Insurance program (Title II of the Act) pays benefits to insured individuals who are aged, blind, or disabled. If SSA determines that a beneficiary cannot manage his benefits because he is legally incompetent or mentally or physically incapable, it will pay the benefits to a representative payee (commonly referred to as a “rep payee”). 20 C.F.R. § 404.2010(a).

Among other requirements, the rep payee must use the benefits solely for the beneficiary’s use and benefit in a manner he or she determines, consistent with SSA regulations, to be in the beneficiary’s best interest. *Id.* § 404.2035(a). SSA considers the benefits to be used for the beneficiary’s benefit if the rep payee uses them for the beneficiary’s “current maintenance,” which includes costs incurred for food, shelter, clothing, medical care, and personal comfort items. *Id.* § 404.2040(a)(1).

Unless the rep payee is the beneficiary’s spouse, parent or stepparent and lives in the same household, the rep payee must keep any benefits received on behalf of the beneficiary separate from his or her own funds and show the beneficiary’s ownership of

the benefits. *Id.* § 404.2035(b). Upon request, the rep payee must submit to SSA a written report accounting for the benefits received and make all supporting records available for review. *Id.* § 404.2035(e).

Section 1129(a)(3) of the Act, 42 U.S.C. § 1320a-8(a)(3), authorizes the imposition of a CMP against any person –

who, having received, while acting in the capacity of a representative payee . . . , a payment under title II . . . for the use and benefit of another individual, converts such payment, or any part thereof, to a use that such person knows or should know is other than for the use and benefit of such other individual . . . .

Section 1129(a)(3) authorizes a CMP “of not more than \$5,000 for each such conversion.” Consistent with the statute, the implementing regulation provides that the SSA I.G. “may impose a penalty of not more than \$5,000 against a representative payee for each time” the rep payee receives a benefit payment on behalf of a beneficiary and “converts such payment, or any part thereof, to a use” the rep payee “knew or should have known was other than for the use and benefit” of the beneficiary. 20 C.F.R. § 498.103(b). Section 1129(a)(3) also authorizes “an assessment, in lieu of damages sustained by the United States resulting from the conversion, of not more than twice the amount of any payments so converted.” 42 U.S.C. § 1320a-8(a)(3); *see also* 20 C.F.R. § 498.104.

In determining the amount of any proposed CMP and assessment, the SSA I.G. must consider the rep payee’s: (1) improper actions and the circumstances under which they occurred; (2) degree of culpability; (3) history of prior offenses; and (4) financial condition. The SSA I.G. also must consider “such other matters as justice may require.” 20 C.F.R. § 498.106(a). An ALJ may affirm, deny, increase, or reduce the SSA I.G.’s proposed penalties and assessments. *Id.* § 498.220(b). If the ALJ’s decision is appealed to the Board, the Board may remand the case to the ALJ for further proceedings or may issue a recommended decision to decline review or to affirm, increase, reduce, or reverse any penalty or assessment determined by the ALJ. *Id.* § 498.221(h).

### **Factual and Procedural Background**

In April 2009, an SSA ALJ awarded the beneficiary Social Security disability benefits, with an effective date of January 2007, and recommended that his benefits be paid to a rep payee. SSA Ex. 1, at 3, 21; SSA Ex. 11, at 2. The beneficiary is married to Respondent’s sister. Respondent (R.) Ex. 2, at 1. After SSA awarded benefits to the beneficiary, Respondent asked SSA to appoint her as the beneficiary’s rep payee. SSA Ex. 1, at 8. SSA granted Respondent’s request and began sending Respondent benefit

checks on the beneficiary's behalf. Between May 2009 and May 2010, when a new rep payee was appointed, SSA sent Respondent 18 checks totaling \$52,724.96, including a lump-sum check of \$31,376.72 for the beneficiary's retroactively awarded benefits. SSA Ex. 2, at 20-38.

The SSA I.G. determined that Respondent converted to an improper use \$33,808 in benefits paid to her as the beneficiary's rep payee. SSA Ex. 6, at 4. By letter dated December 14, 2011, the SSA I.G. proposed imposing a \$70,000 CMP and a \$66,616 assessment. *Id.* at 6. Respondent requested a hearing before an ALJ.<sup>1</sup>

The ALJ sustained the SSA I.G.'s determination and proposed CMP and assessment. The ALJ held that the SSA I.G. had a basis for imposing these remedies because, while acting as the beneficiary's rep payee, Respondent knowingly converted to improper uses significant portions of his benefits. ALJ Decision at 3. The ALJ found that Respondent misused the benefits by:

- depositing the benefit checks into a bank account held solely in her name;
- using \$6,520.24 to repay what she claimed were outstanding debts to herself and "other family members" for covering the beneficiary's living expenses before he began receiving benefits;
- giving an additional \$10,000 to her sister, allegedly to repay an inheritance from their parents that the sister had loaned to the beneficiary;
- using \$15,000 as a down payment on a house that she titled in her and her husband's names; and
- overcharging the beneficiary a total of \$2,288 in rent to live in the house for nine months (a sum arrived at based on evidence of the home's fair market rental value).

*Id.* at 5-12. The ALJ also determined that the CMP and assessment proposed by the SSA I.G. are reasonable. *Id.* at 12-17.

### **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

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<sup>1</sup> The ALJ pointed out the discrepancy between the amount of benefits the SSA I.G. now states Respondent misused (\$33,808) and the lower amount (\$33,308) set out in its December 14, 2011 notice letter and used as a basis for its proposed assessment. *See* ALJ Decision at 15 n.13. Like the ALJ, we use the lower amount.

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**

#### **1. The ALJ’s conclusion that the SSA I.G. had a basis for imposing remedies is supported by substantial evidence and not legally erroneous.**

In her Notice of Appeal, Respondent asserts the ALJ erred in finding that “while acting [as] a rep payee . . . [she] knowingly converted to improper uses significant portions of [the beneficiary’s] social security benefits.” R. Br. at 1<sup>st</sup> p. (unnumbered). Petitioner’s arguments on appeal, however, go to the amount of the CMP and assessment. She does not specifically dispute that she converted some of the benefits to improper uses and that the SSA I.G., therefore, had a basis to impose a CMP and assessment. In any event, Respondent’s own admissions establish that multiple conversions occurred, and one conversion is all that is necessary for the SSA I.G. to impose remedies against her.

As noted above, the regulations provide that SSA will consider payments to have been used for the use and benefit of the beneficiary if they are used for the beneficiary’s “current maintenance.” 20 C.F.R. § 404.2040(a)(1). The regulations also provide that a rep payee must conserve or invest any unused benefits on the beneficiary’s behalf and may not use benefits to satisfy the beneficiary’s past debts unless the beneficiary’s “current and reasonably foreseeable needs” are met. *Id.* §§ 404.2045(a), 404.2040(d). In accordance with these requirements, when Respondent applied to be the beneficiary’s rep payee, she acknowledged that she had to use all benefit payments for his current needs and to save any currently unneeded benefits for his future use. SSA Ex. 1, at 9, 11. However, Respondent admitted that she spent \$6,520.24 to repay herself and other family members for living expenses they allegedly paid on behalf of the beneficiary before he began receiving benefits. SSA Ex. 4, at 3, 5. Respondent also admitted that she gave her sister \$10,000 in repayment for what Respondent claimed was a prior loan to the beneficiary. SSA Ex. 2, at 4, 41. To the extent that SSA rules allow repayment of beneficiary debt under certain circumstances, as the ALJ pointed out, Respondent did not provide any evidence establishing that the beneficiary had any legal obligation to repay

the purported debts to members of his family.<sup>2</sup> ALJ Decision at 7. Respondent also did not provide any evidence that she ensured the beneficiary's current and reasonably foreseeable needs were met before repaying his alleged past debts, and it is undisputed that she did not "conserve or invest" any of the unused benefits on the beneficiary's behalf. Accordingly, substantial evidence establishes that she converted the benefits to an improper use when she made the purported loan repayments.

Respondent also admitted that she used \$15,000 as a down payment on a home that she titled in her and her husband's names. SSA Ex. 2, at 40; R. Ex. 1, at 2. She claims that the beneficiary could not receive financing to purchase the home himself and so he agreed to make monthly rent-to-own payments to her for ten years, at which point she would transfer the title to his name. R. Ex. 1, at 2. Even if Respondent's claims are true, as the ALJ noted, she "jeopardized his interests and violated the regulations" because she did not document his ownership of the property in any way.<sup>3</sup> ALJ Decision at 10, citing 20 C.F.R. § 404.2035(b). Thus, substantial evidence establishes that Respondent converted the funds to her own use by using them to purchase a house to which she and her husband, rather than the beneficiary, had title.

For these reasons and others discussed by the ALJ, we conclude that the SSA I.G. had a basis for imposing remedies on Respondent because she converted to improper uses benefits that she received as the beneficiary's rep payee.

**2. The ALJ's determination that a \$70,000 CMP is consistent with the record is supported by substantial evidence and not legally erroneous.**

Before the ALJ, the parties disagreed about how many conversions occurred and, therefore, what total amount the SSA I.G. could impose as a CMP. The SSA I.G. argued that it may impose a CMP of up to \$5,000 against a rep payee for each instance in which the payee converted benefits to an improper use, without identifying the particular benefit check or checks from which the benefits derived. The SSA I.G. maintained that its proposed \$70,000 CMP is justified because the evidence showed Respondent converted benefits in at least 14 instances (5,000 multiplied by 14 equals 70,000). Respondent contended that the SSA I.G. may impose a CMP of up to \$5,000 only for each check, or

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<sup>2</sup> SSA does not generally allow someone to whom a beneficiary owes money to act as the beneficiary's rep payee. See 20 C.F.R. § 404.2022(e) (providing that, with some exceptions, a creditor may not serve as a rep payee). In addition, as the ALJ found, when Respondent applied to be the beneficiary's rep payee, she assured SSA that he did not owe her any money. ALJ Decision at 7, citing SSA Ex. 1, at 8; SSA Ex. 7, at 2.

<sup>3</sup> As the ALJ observed, in the State of Georgia, "transactions concerning land sales are enforceable only if they are in writing and signed by the parties." ALJ Decision at 10 n.8, citing Ga. Code Ann. § 13-5-30.

part thereof, that the payee converted. Respondent asserted that the record shows she spent approximately \$20,500 on the beneficiary and also gave him several hundred dollars in cash during the period that she was his rep payee. According to Respondent, this meant that all of her improper disbursements came from the \$31,376.72 lump-sum check and so she should be subject to only one CMP of up to \$5,000.

The ALJ determined that because the evidence established that Respondent converted all or part of at least 14 checks, she did not need to decide this issue in order to conclude that the record supports the \$70,000 CMP proposed by the SSA I.G. ALJ Decision at 13. The ALJ found that Respondent received a total of 18 checks from SSA and deposited all or part of each of these checks into an account on which hers was the only name, so arguably she converted benefits and subjected herself to a CMP with each deposit. *Id.* The ALJ also concluded that Respondent “may not unilaterally attribute the misspent funds to one check,” and then applied “first-in, first-out” (FIFO) accounting principles – where the first funds deposited into an account are presumed to be the first funds withdrawn – to find that Respondent’s improper disbursements came from 16 different benefit checks, not just the lump-sum check. *Id.* at 13-14. On appeal, Respondent has not specifically challenged the ALJ’s treatment of these issues.<sup>4</sup>

We conclude that the record supports at least a \$70,000 CMP since under the circumstances here, as the ALJ suggested, the SSA I.G. could have imposed a \$5,000 CMP against Respondent for each of the 18 checks she deposited into a bank account bearing her name only.

Respondent does not dispute that she deposited all or part of each of the 18 checks she received from SSA into her bank account. She contends that she simply “found it convenient to use an existing bank account as a depository of the benefit checks.” R. Br. at 2<sup>nd</sup> p. (unnumbered). According to Respondent, she deposited the checks into the same account “from which she had used her own money to support the [beneficiary] for almost three years prior to the receipt of the first benefit checks.” *Id.* Yet, when Respondent applied to be the beneficiary’s rep payee, she told SSA that she did not have a bank

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<sup>4</sup> Instead of repeating the argument she made before the ALJ that all of her improper disbursements came from the lump-sum benefit check, Respondent asserts here that the money she claims she spent on the beneficiary was “but \$540.44 short of the non-lump sum benefits provided by the SSA . . .,” which she says was a total of \$20,998.24. *See* R. Br. at 1<sup>st</sup>-2<sup>nd</sup> p. (unnumbered) (emphasis added). As the SSA I.G. notes, this argument fails to acknowledge that Respondent received a total of \$52,474.96 (including lump-sum and monthly payments) on behalf of the beneficiary and that the SSA I.G. found she “properly spent” only \$18,666.72 on him. SSA Resp. Br. at 4. But, as the I.G. further notes, even if Respondent’s assertion were accepted, it fails to account for the balance of the \$52,474.96. *Id.*

account and declined to have the beneficiary's benefits deposited directly into an account set up for him with her as payee. SSA Ex. 1, at 9, 11. The fact that Respondent hid the bank account's existence from SSA belies her assertion that she used the account out of convenience.

In addition, when agents from the SSA I.G. interviewed Respondent, she falsely told them she had deposited the benefit checks into an account in her and the beneficiary's names. SSA Ex 2, at 39. Respondent did add the beneficiary's name to the account, but not until August 2010. *Compare* R. Ex. 5, at 34 *with id.* at 36 (bank statements listing name of account holder). As the ALJ observed, August 2010 was three months after Respondent was removed as the beneficiary's rep payee, when she was no longer receiving benefit checks on his behalf and depositing them into the account. ALJ Decision at 6. Section 404.2035(b) requires that a rep payee keep any benefits received on behalf of a beneficiary separate from his or her own funds and show the beneficiary's ownership of the benefits. 20 C.F.R. § 404.2035(b). The ALJ could reasonably infer that Respondent belatedly added the beneficiary's name to the account "to obscure the fact that she kept his benefits under her own name." ALJ Decision at 6.

Moreover, although neither section 1129 nor the implementing regulations define "convert" or "conversion," Respondent's failure to keep the benefit funds separate from her own money as required under section 404.2035(b) is consistent with the ordinary definition of conversion as the "wrongful possession or disposition of another's property as if it were one's own." Black's Law Dictionary (9th ed. 2009); *see also* William Geldart, *Introduction to English Law* 143 (D.C.M. Yardley ed., 9th ed. 1984) ("By conversion of goods is meant any act in relation to goods which amounts to an exercise of dominion over them, inconsistent with the owner's right of property.") (quoted in Black's). After Respondent deposited the benefit checks into her personal bank account, the beneficiary did not have any demonstrable ownership right over the funds or any way to access them for his own use. Indeed, in rejecting a due-process vagueness challenge to 42 U.S.C. § 408(5)(a) (which applies to criminal fraud by rep payees) a court concluded a jury could find that a rep payee's placement of benefit funds in accounts where the beneficiary had no access "could constitute a 'knowing and willful conversion' of benefit payments." *United States v. Berry*, 638 F. Supp. 2d 1163, 1167 (N.D. Cal. 2009) (order).

In sum, substantial evidence establishes that Respondent knowingly converted the benefits to her own use, rather than the beneficiary's, each time she deposited the benefit checks into her personal bank account. Under these circumstances, the SSA I.G. could have imposed a \$5,000 CMP for each of the 18 checks that Respondent deposited into the account, which would have totaled \$90,000, significantly more than the SSA I.G.'s proposed \$70,000 CMP. The \$70,000 CMP may be upheld on this basis.

In light of this conclusion, we need not address the ALJ's first-in-first-out" approach. Nor do we need to reach the issue left unresolved by the ALJ (and which the SSA I.G. asks us to consider) of whether the \$70,000 CMP is also supported by the record based on the SSA I.G.'s position that the statute and regulations permitted it to impose a \$5,000 CMP on Respondent for each instance in which she applied any part of the beneficiary's benefits to an improper use, irrespective of the SSA benefit check or checks from which the benefits derived. Nonetheless, we note that the SSA I.G.'s position is not precluded by the statute or regulations or unreasonable on its face, despite the ALJ's expressed reservations about the position.

Section 1129(a)(3) authorizes the imposition of a \$5,000 CMP for "each such conversion," i.e., whenever a rep payee converts a "payment, or any part thereof" to a use the rep payee knew or should have known was improper. The implementing regulation at 20 C.F.R. § 498.103(b) interprets this as meaning "each time" the rep payee so converts "such payment or any part thereof." This wording may reasonably be read as referring to each time a rep payee converts any part of a payment to an improper use, even if part of that same payment had already been converted to an improper use. Neither the statute nor the regulation specifies that the SSA I.G. may impose only one \$5,000 CMP per benefit check issued by SSA.

The SSA I.G.'s reading that CMP is authorized for each time a rep payee misuses benefits also is supported by the legislative history, which explains that what became section 1129(a)(3) of the Act "expands the application of civil monetary penalties to include misuse of Title II, VIII, or XVI benefits by representative payees" and authorizes a CMP of up to \$5,000 "for each violation." S. Rep. N. 108-176, at 13 (2003) (emphasis added). The legislative history also explains that the legislation was inspired in part by recommendations from SSA and the SSA I.G. that Congress draft "legislation to raise the standards for persons and organizations serving as representative payees and to impose stricter regulation and monetary penalties on those who mismanage benefits." *Id.* at 5-6. Yet, the SSA I.G. might face a heavy administrative burden if it had to match misused benefits to particular checks instead of just identifying particular instances of misuse in order to calculate the appropriate amount of a CMP, and the rep payees least able to account for their use of benefits would likely face the smallest CMPs. Reading the statute as authorizing a \$5,000 CMP for each instance of misuse would also harmonize it with other provisions for CMPs in the Act. *See, e.g.*, 42 U.S.C. §§ 1320a-8(a)(1) (imposing up to \$5,000 CMP for "each" false or misleading statement of material fact that SSA might use in determining an initial or continuing right to disability benefits) and 1320b-10(a)(1), (b) (allowing SSA to impose CMP of up to \$5,000 for each piece of mail in a bulk mailing that misuses certain Social Security, Medicare, and HHS words, letters, symbols, or emblems).



**3. The ALJ’s determination that a \$66,616 assessment is consistent with the record is supported by substantial evidence and not legally erroneous.**

As noted above, the SSA I.G. may impose an assessment in lieu of damages of no more than twice the amount of any converted benefit payments. 42 U.S.C. § 1320a-8(a)(3); 20 C.F.R. § 498.104. The ALJ upheld the \$66,616 assessment proposed by the SSA I.G., reasoning that the record would have supported a larger assessment based on the following amounts Respondent converted to improper uses while she was the beneficiary’s rep payee:

- \$10,000 to her sister;
- \$15,000 to purchase the house;
- \$6,520.24 to repay herself and others for covering the beneficiary’s living expenses before he began receiving benefits; and
- \$2,288 total in excess rent charges.

ALJ Decision at 14-15. These conversions total \$33,808.24, so under the statute the SSA I.G. could have imposed an assessment of \$67,616.48. Respondent does not raise any specific challenges to the ALJ’s computations, and we agree that they are correct. We have already addressed how the record supports each identified instance of misuse, so it is not necessary for us to engage in further analysis to recommend upholding the ALJ’s determination, and we do make that recommendation.

**4. The ALJ’s conclusion that the SSA I.G.’s proposed CMP and assessment are appropriate in light of the factors in section 498.106(a) is supported by substantial evidence and not legally erroneous.**

Respondent challenges the ALJ’s conclusion that the SSA I.G.’s proposed CMP and assessment are appropriate in light of the factors in section 498.106(a). She argues that these remedies are excessive and asserts that during the period she was the beneficiary’s rep payee, she spent more for his benefit than she received in benefits, so it is “common sense” that her violations of section 1129(a)(3) are “non-substantial.” R. Br. at 2<sup>nd</sup>-3<sup>rd</sup> p. (unnumbered).

Respondent does not point to any evidence in the record – nor have we located any – to back up her assertion that she spent more money on the beneficiary than she received in benefits. Moreover, we disagree with Respondent that the proposed remedies are excessive in light of the factors in section 498.106(a). As noted above, those factors consist of Respondent’s: (1) improper actions and the circumstances under which they occurred; (2) degree of culpability; (3) history of prior offenses; and (4) financial condition, as well as (5) “such other matters as justice may require.”

The ALJ recognized that Respondent has no history of prior offenses, but concluded that she was “completely culpable” for the circumstances surrounding her misuse of the benefits, particularly her “deliberate and ongoing efforts to conceal her actions” and “refusal to return the beneficiary’s money.” ALJ Decision at 16. The ALJ also rejected as unsupported Respondent’s contention that she would be financially devastated by the remedies and emphasized that the beneficiary’s “mental impairments made him especially vulnerable to victimization.” *Id.* at 15-17. In addition, the ALJ concluded that the SSA I.G. was “conservative in determining the number of violations and the amount misused.” *Id.* at 15. We see no error in the ALJ’s application of the regulatory factors, and Respondent does not specifically challenge any of the ALJ’s conclusions. Accordingly, we agree with the ALJ’s decision to affirm the SSA I.G.’s proposed \$70,000 CMP and \$66,616 assessment.

### **Conclusion**

For the reasons explained above, we recommend that the Commissioner affirm the CMP of \$70,000 and assessment of \$66,616 determined by the ALJ.

/s/

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Judith A. Ballard

/s/

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Leslie A. Sussan

/s/

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Sheila Ann Hegy  
Presiding Board Member