

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Social Security Administration  
Office of the Inspector General,

Petitioner,

v.

Nancy Whitehead

Docket No. C-12-370

Decision No. CR2718

Date: March 11, 2013

**DECISION**

The Inspector General (IG) for the Social Security Administration (SSA) charges that Respondent, Nancy Whitehead, violated section 1129 of the Social Security Act (Act), because, while acting as a representative payee for her mentally-impaired brother-in-law, she converted his benefits to her own use or otherwise misused his funds. The IG proposes imposing against Respondent Whitehead a \$70,000 civil money penalty (CMP) plus a \$66,616 assessment in lieu of damages (total penalties: \$136,616).

For the reasons set forth below, I agree that Respondent Whitehead improperly converted her brother-in-law's disability benefits and that she deliberately misled SSA about her actions. I therefore find the penalties imposed reasonable.

**Background**

The Social Security Disability program (Title II of the Act) is an insurance program that pays benefits to insured individuals who are aged, blind, or disabled. Act § 223 et seq. *See also* 20 C.F.R. §§ 404.315, 404.1505.

If SSA determines that a beneficiary is not able to manage his benefits because he is legally incompetent or mentally or physically incapable, it will pay those benefits to a representative payee, commonly referred to as “rep payee.” 20 C.F.R. § 416.610.

Among other requirements, the rep payee must:

- use the benefit payments solely for the beneficiary’s benefit, in a manner she determines to be in the beneficiary’s best interests, consistent with SSA guidelines; payments are considered used for the beneficiary’s benefit if they are used for the beneficiary’s *current* maintenance (food, shelter, clothing, medical care, personal comfort items);
- keep the benefits received on the beneficiary’s behalf separate from her own funds and show the beneficiary’s ownership of the benefits, unless she is a spouse or parent and lives in the same household;
- treat interest earned on the benefits as the beneficiary’s property;
- notify SSA of any event or change that will affect the beneficiary’s right to benefits, amount of benefits, or how the beneficiary receives them;
- upon request, submit to SSA a written report accounting for the benefits received on the beneficiary’s behalf, and make all supporting records available for review; and
- notify SSA of any change in circumstance that would affect her performing her responsibilities as a rep payee.

20 C.F.R. §§ 404.2035; 404.2040(a).

In this case, SSA designated Respondent Whitehead as rep payee for her brother-in-law, Terry Freeman, who is mentally impaired. SSA alleges that Respondent Whitehead used \$15,000 of his benefits to purchase a house, which she titled in her own name; she then charged him excessive rent for living in the house. SSA also alleges that Respondent Whitehead improperly paid \$10,000 of his benefit money to her sister, who was Beneficiary Freeman’s sometimes-estranged wife, claiming that she was repaying an outstanding business loan. Inasmuch as she was acting as her sister’s rep payee, SSA also argues that she had a conflict of interest. Finally, SSA alleges that Respondent Whitehead withheld additional funds and kept them for herself or disbursed them to her sister and unidentified family members.

Respondent Whitehead denies any wrongdoing and claims that she honestly believed that her actions were appropriate and authorized by SSA. She argues that SSA's proposed penalties are excessive, unreasonable, and not authorized by the statute.

The parties agree that an in-person hearing is not necessary, and the case may be decided based on their written submissions. Petitioner's Response to August 17, 2012 Order (August 28, 2012); Respondent's Brief (Resp. Br.) at 1. In response to my initial order, the parties submitted their briefs (SSA Br.; Resp. Br.) and exhibits. The IG submitted 11 exhibits (SSA Exs. 1-11), and Respondent submitted 4 exhibits (Resp. Exs. 1-4).

Responding to my October 25, 2012 Order for Additional Development, Respondent Whitehead submitted a written response (Resp. Response) and a set of bank records, including copies of bank statements and cancelled checks. We have marked these records "Resp. Ex. 5" and numbered the pages (1-70). SSA filed a response (SSA Response) and Respondent Whitehead filed a sur-reply (Resp. sur-reply) with a written declaration signed by Respondent Whitehead (Whitehead 2<sup>nd</sup> Decl.).<sup>1</sup>

In the absence of any objections, I admit into evidence SSA Exs. 1-11 and Resp. Exs. 1-5.

## Issues

The issues before me are: 1) does SSA have a basis for imposing penalties; and 2) if so, are the proposed penalties – a \$70,000 CMP and \$66,616 assessment in lieu of damages – reasonable?

## Discussion

- 1. SSA has a basis for imposing penalties because, while acting as rep payee for her mentally-impaired brother-in-law, Respondent Whitehead knowingly converted to improper uses significant portions of his Social Security disability insurance benefits.*<sup>2</sup>

Section 1129 of the Act subjects to penalty any representative payee who receives benefits on another's behalf and converts those benefits to a use that the rep payee knows, or should know, is other than for the use and benefit of the beneficiary. Act § 1129(a)(3); see 20 C.F.R. § 498.102(b).

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<sup>1</sup> This is Respondent Whitehead's second declaration. The first is admitted as Resp. Ex. 1.

<sup>2</sup> My findings of fact/conclusions of law are set forth, in italics and bold, in the discussion captions of this decision.

On April 9, 2009, an administrative law judge (ALJ) awarded Social Security Disability Insurance Benefits to Beneficiary Freeman, with an effective date of January 2007. SSA Ex. 1 at 3 (Williams Decl. ¶ 8); SSA Ex. 1 at 21; SSA Ex. 11 at 2 (Freeman Decl. ¶ 7). The ALJ also determined that Beneficiary Freeman should have his benefits paid to a rep payee. SSA Ex. 1 at 3 (Williams Decl. ¶ 9).

In a request dated May 1, 2009, Respondent Whitehead asked SSA to pay Beneficiary Freeman's benefits to her. In that request, she asserted:

- Beneficiary Freeman needs a rep payee because he is mentally impaired;
- Beneficiary Freeman lives alone and has no other relative or close friend interested in being his rep payee;
- In error, the request says that Respondent Whitehead is Beneficiary Freeman's brother-in-law; in fact, she is his sister-in-law;<sup>3</sup>
- Beneficiary Freeman owes her no money, and she does not expect him to owe her money in the future;

SSA Ex. 1 at 8.

In the request, Respondent Whitehead acknowledged that all payments made to her as rep payee "must" be used for the beneficiary's current needs or saved for his future needs. She said that she understood that she could be liable for repayment and could be punished by fine, imprisonment, or both, if found guilty of misusing his benefits. She promised:

- to use the payments for the beneficiary's current needs and to save any currently unneeded benefits for future use;
- to file an accounting report on how the payments were used and to make all supporting records available for review if requested by SSA;
- to reimburse any losses suffered by the beneficiary due to her misuse of his funds;
- to notify SSA if the beneficiary dies, leaves her custody, changes his living arrangements or is no longer her responsibility;

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<sup>3</sup> Beneficiary Freeman is married to Respondent's sister, Pamela Freeman. SSA Ex. 11 at 1 (Freeman Decl. ¶ 1). It seems that Beneficiary Freeman's wife also receives Social Security Disability benefits, and Respondent Whitehead acts as her representative payee as well. SSA Ex. 11 at 2 (Freeman Decl. ¶ 8).

SSA Ex. 1 at 9. On the request form, SSA repeated, in writing, that: “payments must be used for the claimant’s current needs or saved if not currently needed”; Respondent could be liable for repayment of any amounts not used for the beneficiary’s needs; she must account for the benefits when SSA asks her to; and she must keep records of how the benefits are spent. SSA Ex. 1 at 11, 13.

On May 11, 2009, SSA began sending the benefit checks, payable to Respondent Whitehead “for Terry R. Freeman.” SSA Ex. 2 at 21, 22. Between May 11, 2009, and May 3, 2010, SSA sent her checks totaling \$52,724.96. SSA Ex. 2 at 20-38.

Beneficiary Freeman, however, was very unhappy with the manner in which Respondent managed his benefits, complaining that “[s]tarting in May 2009, and continuing each month through May 2010, Mrs. Whitehead misused some portion of my monthly benefits.” SSA Ex. 11 at 2 (Freeman Decl. ¶14).

On May 20, 2010, Beneficiary Freeman’s sister, June Beale, became his new rep payee. They retained an attorney, Gerald Brown, and complained to SSA that Respondent Whitehead had misused beneficiary funds; they also filed a misuse complaint with the Sheriff’s Office for Madison County, Georgia. After an initial investigation, the sheriff’s office referred the matter to SSA, which brought this action. SSA Ex. 1 at 21; SSA Ex. 2 at 3, 6-8, 10, 14-15; SSA Ex. 3 at 3-4; SSA Ex. 10 at 1, 4 (Beale Decl. ¶¶ 5, 10, 12).<sup>4</sup>

Overwhelming – and largely undisputed – evidence establishes that SSA may rightfully impose penalties against Respondent Whitehead. From receipt of Beneficiary Freeman’s first check, she knowingly converted his funds to her own and to other improper uses.

Co-mingling of funds. As noted above, regulations mandate that Respondent Whitehead keep Mr. Freeman’s benefits separate from her own funds and show that he is their owner. 20 C.F.R. § 404.2035(b). Although she assured SSA that she complied with these requirements, in fact, she did not.

In applying to be the rep payee, Respondent Whitehead told SSA that she did not have a bank account and declined the option of having Beneficiary Freeman’s funds deposited directly into an account set up for him with herself as payee. SSA Ex. 1 at 9, 11. In fact, she had a bank account, held solely in her own name, and she immediately began depositing Beneficiary Freeman’s checks into that account. She did not put his name on the account, but held his funds in her own name throughout her tenure as rep payee. Resp. Response at 1; Resp. Ex. 5. Then, in a statement dated February 23, 2011, she falsely told SSA that she deposited Beneficiary Freeman’s checks into an account at First

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<sup>4</sup> Ms. Beale’s declaration states that she became the rep payee on May 20, 2012, which is obviously a typographical error.

Citizens Bank in hers and Terry Freeman's names. SSA Ex. 2 at 39. I consider this a deliberate deception. Terry Freeman's name first appears on the account ("Terry Freeman by Nancy B. Whitehead, Rep Payee") in August 2010, three months *after* she was removed as his rep payee, when she was no longer receiving and depositing his checks into the account. R. Ex. 5, at 36. Respondent does not explain why she so belatedly added his name, but, inasmuch as she knew that SSA was investigating her performance, I can reasonably infer that she did so to obscure the fact that she kept his benefits under her own name.

Payments for "outstanding debts." Notwithstanding SSA's explicit warnings and her own written assurances, Respondent Whitehead did not use all of Beneficiary Freeman's benefits to cover his current needs, and she saved nothing for his future use. Rather, she kept portions of these funds for herself or paid them to her sister and unnamed others. SSA Ex. 4 at 3, 5, 9; SSA Ex. 1 at 21.

I discuss below Respondent's paying her sister \$10,000 from beneficiary funds and her paying \$15,000 of his money as a down payment on a house held in her own name. In addition, she has admitted that she used beneficiary funds to "repay" those who contributed toward Beneficiary Freeman's living expenses before he began receiving benefits:

- In a February 23, 2011 statement to SSA Special Agent Mike Davis, she claimed that she "used all funds [she] received from SSA on behalf of Freeman to settle past or present debts of Freeman and pay Freeman's living expenses. . . ." SSA Ex. 2 at 40;
- Responding to his request for an accounting, she gave Attorney Brown handwritten notes and bank statements listing payments totaling \$6,520.24, which, she claimed, represented Beneficiary Freeman's outstanding debts to her and other family members for expenses incurred in 2008 and the first half of 2009. SSA Ex. 1 at 21; SSA Ex. 4 at 3, 5, 10-16; SSA Ex. 2 at 16-17; *see* SSA Br. at 7.
- In her first written declaration, she reiterates that she financially assisted her sister and Beneficiary Freeman during 2008, but, contradicting her earlier statements, says that she "did not expect nor . . . use any of Terry's benefits to reimburse myself for the assistance I provided them during 2008." R. Ex. 1 at 1 (Whitehead Decl. ¶ 4);
- In the same declaration she claims that, soon after becoming his rep payee, at the beneficiary's request, she "made several payments for debts and expenses such as delinquent medical, doctor, and dental bills." R. Ex. 1 at 1-2 (Whitehead Decl. ¶ 4).

Respondent Whitehead's co-mingling of funds and less-than-reliable record-keeping makes it difficult to ascertain exactly how much she paid for Beneficiary Freeman's past debts and to whom she made those payments. The accounting she gave to Attorney Brown reflects relatively small payments for old debts to J. Adams (\$100 in July 2009), S. Treadwell (\$70 in July 2009, \$140 in August 2009, \$150 in September 2009, and \$25 in October 2009) and B. Barnett (\$132 in November 2009). SSA Ex. 4 at 20-22; Resp. Ex. 5 at 8, 11; *but see* Resp. Ex. 5 at 14 (showing an additional \$100 payment to J. Adams in August 2009); Resp. Ex. 5 at 17 (showing \$100 payment – not \$150 – to S. Treadwell in September 2009).

In another document, also provided to Attorney Brown, she itemizes the \$6,520.24 “outstanding debt” that Beneficiary Freeman purportedly owed to her and other family members, which she said *she repaid out of his funds*. SSA Ex. 4 at 3, 5. Comparing this list to the annotated copies of cancelled checks (dated July 2008 through June 2009), it seems that she and her sister Pamela were Beneficiary Freeman's principal, perhaps sole, “creditors.” SSA Ex. 4 at 10-16. From this, I conclude that Respondent Whitehead paid these beneficiary funds to herself and her sister Pamela.

Respondent Whitehead justifies her actions by claiming that she was paying off the beneficiary's debts and that she did so “in an open manner. . . with the honest belief that such was in the best interests of [Beneficiary Freeman].” Resp. Br. at 3. For his part, Beneficiary Freeman denies ever having asked Respondent Whitehead to pay any debt he incurred prior to May 2009. SSA Ex. 11 at 2 (Freeman Decl. ¶ 11).

The regulations explicitly do not require a rep payee to use benefit payments to satisfy debts incurred “prior to the first month for which payments [were] certified.” Further, they authorize her to repay those earlier debts “only if the current and reasonably foreseeable needs of the beneficiary are met.” 20 C.F.R. § 404.2040(d).<sup>5</sup>

No evidence establishes that Beneficiary Freeman had any legal obligation to pay to Respondent, her sister, or any other family member any purported “debts.” Prior to assuming her role as representative payee, Respondent Whitehead unequivocally assured SSA that Beneficiary Freeman owed her no money: “Terry R. Freeman does not owe me any money and I do not expect him to in the future.” SSA Ex. 1 at 8; SSA Ex. 7 at 2. Generally, a creditor may *not* serve as a rep payee unless SSA is assured that the

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<sup>5</sup> According to June Beale, Beneficiary Freeman's needs were not being met. For example, he had no supplemental medical insurance or life insurance. His teeth had been removed, but he had no dentures. SSA Ex. 10 at 2 (Beale Decl. ¶ 10).

individual or institution poses no risk to the beneficiary, presents no substantial conflict of interest, and satisfies other criteria. 20 C.F.R. § 404.2022(e).<sup>6</sup>

It seems that the bulk of the checks Respondent points to as evidence of Beneficiary Freeman's debts are checks paid to or on behalf of his wife. *See, e.g.* SSA Ex. 4 at 10-16. Respondent cites no support, and I am aware of none, for the proposition that one spouse must reimburse another for their shared household expenses. *See* SSA Ex. 11 at 2 (Freeman Decl. ¶ 12) (acknowledging that, although his wife paid living expenses while he was unable to work, he paid them prior to that).

Respondent also claimed reimbursement for transportation costs to which she was probably not entitled. She lists car payments of approximately \$220 per month from June 2009 through May 2010, as well as payments for tags, car insurance and repairs.<sup>7</sup> SSA Ex. 4 at 20-22; *see also, e.g.*, Resp. Ex. 5 at 8, 9, 11, 12, 15, 23, 25, 27, 29, 32. Yet, she claims that she was entitled to more than \$800 for transporting the beneficiary to his medical appointments "since he had no automobile." SSA Ex. 4 at 3 (deducting \$870 from the lump sum check); SSA Ex. 4 at 6 (claiming \$870 for "transportation to Dr. appointments" from 9/19/08-5/31/10); SSA Ex. 4 at 19, 43 (justifying \$830 in transportation costs from 6/1/09-5/11/10).

Finally, Respondent can hardly claim to have acted "in an open manner" inasmuch as she lied to SSA about making these payments. In a Rep Payee report, signed and dated June 21, 2010, she told SSA that, of the \$49,260 in benefits received between June 1, 2009 and May 31, 2010, she spent \$25,150 "for the beneficiary's food and housing *between 06/01/2009 and 05/31/2010.*" She also reported that she spent \$24,110 "on other things for the beneficiary such as clothing, education, medical, and dental expenses, recreation, or personal items *between 06/01/2009 and 05/31/2010.*" SSA Ex. 2 at 18 (emphasis added). She did not disclose payments for debts allegedly incurred prior to June 1, 2009.

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<sup>6</sup> A creditor would also have to be one of the following: 1) a relative living in the same household; 2) the beneficiary's legal guardian or representative; 3) a licensed or certified care facility; 4) a qualified organization authorized to collect a fee; 5) an administrator, owner, or employee of the facility in which the beneficiary lives; or 6) any other individual SSA deems appropriate based on a written determination. Had she told SSA that Beneficiary Freeman owed her money, Respondent Whitehead would likely not have been allowed to act as his rep payee, particularly since she also acted as Pamela Freeman's rep payee, which presents a substantial conflict of interest (as the evidence here well illustrates). *See* SSA Ex. 1 at 4 (Williams Decl. ¶¶ 12, 15).

<sup>7</sup> Although she paid no car loan in June, she made a double payment in July. SSA Ex. 4 at 21.



Respondent well knew that she was required to spend Beneficiary Freeman's money for his current maintenance or to save it for his future needs. 42 C.F.R. §§ 404.2035(a); 404.2040(a). She assured SSA, in writing, that she would do so. SSA Ex. 1 at 9, 11, 13. Making payments to herself and to her sister cannot be considered spending the money for the use and benefit of the beneficiary; because she did so, she is subject to penalties under section 1129.

\$10,000 payment to Respondent's sister/Beneficiary Freeman's wife. In her submissions to Attorney Brown, Respondent Whitehead conceded that she paid \$10,000 from Beneficiary Freeman's benefit checks to her sister Pamela, claiming that she was repaying a 2005 debt: "Terry Freeman borrowed Pamela Freeman's inheritance from her mother in 2005 and promised to pay it back to her when he received his lump sum payment from Social Security." SSA Ex. 4 at 3; *see* SSA Ex. 2 at 16. Inasmuch as Terry Freeman did not apply for benefits until *July 25, 2006*, he would have had no expectation in 2005 of receiving any lump sum disability check, so I doubt that he then promised to repay any loans when his disability check came in. SSA Ex. 1 at 3 (Williams Decl. ¶ 8). In any event, Respondent Whitehead seems to have partially abandoned this position, and she no longer refers to any 2005 promise to repay.

Still, in her February 23, 2011 statement to Special Agent Davis, she said that Terry borrowed Pam's \$10,000 inheritance back in 2005 and that the couple had separated numerous times. When, in 2009, she received Beneficiary Freeman's check for back benefits, she took \$10,000 and placed it in Pamela's account. SSA Ex. 2 at 4, 41. This statement is consistent with the documentary evidence and strongly supports the proposition that Respondent converted the funds to an improper use.

Respondent's own written declaration is conspicuously silent on her giving \$10,000 to her sister. Resp. Ex. 1. Pamela Freeman, however, claims that "[w]hen Terry got his lump sum from SSA[,] he told Nancy to put \$10,000 in the bank for me that he had borrowed when I got my inheritance from my parents." Resp. Ex. 2 at 2 (P. Freeman Decl. ¶ 9). Beneficiary Freeman denies this. He says that he merely asked Respondent Whitehead to put any remaining funds (after purchase of the house) into a savings account for him. SSA Ex. 11 at 2-3 (Freeman Decl. ¶¶ 15, 16).

Any claim that Respondent properly repaid a debt is undermined by her failure to disclose her actions. In her June 21, 2010 Rep Payee Report, she deliberately misled SSA about the payment. As discussed above, she falsely claimed that she spent all of the beneficiary funds on his immediate needs (food, housing, clothing, medical expenses, personal items, etc.). SSA Ex. 2 at 18.

Absolutely no evidence shows that Beneficiary Freeman was legally obligated to pay \$10,000 to his wife. I do not find credible Pamela Freeman's claim – which even Respondent Whitehead does not currently make – that her husband instructed Respondent

to give his money away. Moreover, Beneficiary Freeman needed a rep payee because he was not capable of managing his own funds. Respondent Whitehead had a duty to spend those funds properly. By giving away one-third of his past-due benefits, she misused those funds and is subject to penalty under section 1129.

Down-payment on a house held in the Whiteheads' names. Using Beneficiary Freeman's disability funds for the down payment, on August 13, 2009, Respondent Whitehead and her husband, Claude Whitehead Jr. (also called Junior Whitehead), purchased a house in their own names for \$65,000. SSA Ex. 1 at 19-20; SSA Ex. 2 at 40. Respondent then charged Beneficiary Freeman \$722 a month to live in the house, although she later lowered the payments to \$600.

Respondent Whitehead told Special Agent Davis that she agreed to assist Terry and Pamela in purchasing a home. She bought the house for \$65,000, putting \$15,000 down, which she took from Terry's lump sum benefit check. She said that Terry agreed to pay her \$722 per month for ten years, to be taken from his benefits check. As part of the agreement, he also had to allow her to continue as his representative payee. She collected \$722 per month from September through December 2009, but, when Terry complained, she lowered the payments to \$600 per month. SSA Ex. 2 at 40; SSA Ex. 5 at 3. He later told her that he no longer wanted to purchase the house, and he moved out. She did not return his \$15,000 down payment, but said that she applied it to debts the beneficiary incurred before he began receiving his benefits. SSA Ex. 2 at 5, 40; SSA Ex. 5 at 4.

According to Beneficiary Freeman, Respondent Whitehead and her husband offered to finance the purchase of a house for him and his wife. She agreed to put \$25,000 from his lump sum check as a down payment on the house, the remainder to be deposited in the in a savings account for him. He claims, however, that she told him that the house cost \$85,000; he learned of the actual price from his siblings, who checked the public records. She did not tell him that the house was purchased solely in the Whiteheads' names. SSA Ex. 11 at 3 (Freeman Decl. ¶ 16).

Nothing in writing memorializes any house-purchase agreement between Respondent Whitehead and Beneficiary Freeman, nor has Respondent provided any documents describing the financing arrangements between the house sellers and the Whiteheads. Even assuming that she intended eventually to transfer title of the house to the beneficiary, she jeopardized his interests and violated the regulations because she did not show his ownership of the property. 20 C.F.R. § 404.2035(b).<sup>8</sup> Further, by her own admission, she tied his maintaining his interest in the property to her remaining as his representative payee, which is a blatant conflict of interest and plainly improper. *See,*

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<sup>8</sup> In the State of Georgia, as in most jurisdictions, transactions concerning land sales are enforceable only if they are in writing and signed by the parties. *See, e.g.,* Ga. Code Ann. § 13-5-30 (statute of frauds).

*e.g.*, 20 C.F.R. § 404.2022(e). She did not advise SSA of this arrangement, even though it affected her performing her responsibilities as rep payee. *See* 20 C.F.R. § 404.2035(f). Her refusal to return his money, leaving him with neither an enforceable interest in the property nor his \$15,000 down payment, constitutes an improper conversion and justifies SSA's imposing a penalty under section 1129.

Excessive rent. After purchasing the house, Respondent Whitehead wrote monthly "rent" checks from beneficiary funds, payable to her husband, Junior. SSA Ex. 4 at 4. For the first four months, she took \$722 a month. When Beneficiary Freeman complained, she reduced the amount to \$600. Resp. Ex. 1 at 2-3 (Whitehead Decl. ¶ 9); SSA Ex. 11 at 4 (Freeman Decl. ¶¶ 18, 19); Resp. Ex. 5 at 14, 17, 51, 59, 65, 67, 68, 70. SSA asserts that the amounts she charged were excessive; the fair rental value of the house was \$400 per month. SSA Ex. 1 at 5-6 (Williams Decl. ¶ 20); *see* SSA Ex. 1 at 15-19. Respondent argues that \$722 does not represent a monthly rent payment; it represents the cost of a lease/purchase, which "would typically be much larger than rent." Resp. Br. at 5; Resp. Ex. 4 (Thompson Decl. ¶ 5). She also suggests that the monthly payment covered property taxes and insurance, as well as lease/purchase. Resp. Ex. 1 at 3 (Whitehead Decl. ¶ 9). She does not provide a breakdown of these purported costs. In fact, the record includes copies of cancelled checks, payable to the Madison County Tax Commissioner, which show that she paid property taxes separately. In January 2010, for example, Respondent wrote a \$600 check to Junior Whitehead and a \$400 check to the Madison County Tax Commissioner. On both checks, she indicates that the payment is for the same property, the house she bought using beneficiary funds. Resp. Ex. 5 at 65; *see also* Resp. Ex. 5 at 52 (showing an additional payment to the tax assessor in November 2009).

Because Respondent neither explains nor documents her financial arrangements for purchasing the house, I cannot tell whether she paid cash for it or financed the \$50,000 balance. In either event, I see no support for considering this transaction a lease/purchase, entitling her to monthly payments greater than either the fair market rent or a reasonable mortgage payment. Either Respondent improperly purchased the house, using beneficiary funds and then rented it to him at an inflated rate or, if I accept her assertions, the beneficiary was purchasing the house through her. If purchasing the house through her, his down payment exceeded 23% of the purchase price, and his monthly payments should not have exceeded a reasonable mortgage payment. That Respondent fails to provide any evidence of financing leads to the inescapable inference that she charged Beneficiary Freeman more than the monthly payment that was actually due, assuming she financed the house herself, or than would have been due had she financed the house through a financial institution.<sup>9</sup>

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<sup>9</sup> Although rough, it seems that national mortgage rates in 2009 were about 5%, perhaps a bit lower on a 10-year loan in the State of Georgia. At 5%, the monthly payments on a \$50,000 ten-year loan would be about \$530. [www.usbank.com/calculators](http://www.usbank.com/calculators).

Respondent probably should not have set herself up as the beneficiary's landlord and/or mortgage holder, but, having done so, she was obligated to operate at arm's length and was not entitled to profit from the arrangement.<sup>10</sup> Her conduct was plainly improper and subjects her to penalty under section 1129.

***2. The IG proposes reasonable penalties: a \$70,000 CMP and \$66,616 assessment in lieu of damages.***

The statute allows SSA to impose a CMP of "not more than \$5,000 for each" conversion of benefits to an improper use. Act §1129(a)(3). Consistent with the statute, the implementing regulation explains that the IG may impose a penalty of not more than \$5,000 "for each time the representative payee receives a payment under title II . . . for the use and benefit of another individual, and who converts such payment, or any part thereof, to a use that [she] knew or should have known was other than for the use and benefit of [the beneficiary]." 20 C.F.R. §§ 498.103(b).

SSA may also impose an assessment in lieu of damages of not more than twice the amount of benefits or payments converted. Act § 1129(a)(3); 20 C.F.R. § 498.104.

The IG proposes a CMP of \$136,616, which represents a \$5,000 penalty for 14 converted payments (\$70,000) plus \$66,616, which represents twice the amount of the converted benefits, as an assessment in lieu of damages.

Number of violations. With respect to the CMP, Respondent Whitehead argues that each of her purportedly improper disbursements came from just one check, a lump-sum payment of \$31,376.72, dated August 12, 2009, so, at most, Respondent is liable for a single \$5,000 CMP. Resp. Br. at 3. SSA argues that Respondent is liable for each conversion to an improper use, without considering from which check or checks the funds derived. SSA Response at 4. Neither party points to any compelling support for its position, although SSA cites legislative history, which says that a CMP "of up to \$5,000 may be imposed for each violation. . . ." S. Rep. No. 108-176, at 13 (2003). In SSA's view, "each violation" means each time the rep payee misspends any funds. Thus, giving \$10,000 to her sister would be one violation, and using \$15,000 to buy a house in her own name would be a separate violation, even if all of the funds came from the same check.

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<sup>10</sup> Neither has Respondent explained why she held Beneficiary Freeman responsible for 100% of the rental payments. Her sister, Pamela, also lived in the house, and rent checks indicate that payment was made on Pamela's behalf. Resp. Ex. 5 at 14, 17, 51, 59, 65, 67.

In the absence of a written agency policy or regulatory comment, I am reluctant to accept SSA's position. Under the statute and regulation, SSA may find a violation and impose a CMP only if two criteria are met: 1) the rep payee receives a payment; and 2) the rep payee converts all or part of that payment to an improper use. This suggests (although it does not compel) that each CMP must be tied to a separate payment. I recognize that this interpretation subjects a rep payee to a relatively small CMP, even though she misspends a large sum, so long as that sum is taken from a single check. On the other hand, SSA also has the authority to impose an assessment in lieu of damages, which is tied to the amount misused. Congress may reasonably have decided to authorize two different types of penalties: one based on the number of infractions (CMP); and the other based on the total amounts misused (assessment).

I need not resolve the issue, however, because the evidence in this case establishes that Respondent Whitehead converted all or part of at least 14 payments.

First, Respondent received a total of 18 payments and Respondent Whitehead deposited all or part of each payment into an account in her own name. SSA Ex. 2 at 21-38. Arguably, every time she improperly deposited beneficiary funds into her own bank account, she misused those funds and subjected herself to a CMP. *See* 20 C.F.R. § 404.2035(b).

Second, Respondent co-mingled the funds from multiple checks, and her record-keeping is such that it is not possible to track a specific expenditure to a specific check. She may not unilaterally attribute the misspent funds to one check. Absent evidence to the contrary, I find it more reasonable to assume that the first funds deposited into the account are the first funds withdrawn ("first-in, first-out," commonly referred to as FIFO).

On August 12, 2009, SSA issued a lump-sum check in the amount of \$31,476.72 to Respondent Whitehead for Beneficiary Freeman. SSA Ex. 2 at 27. Respondent's bank records show that she deposited \$25,000 into her account on August 21, 2009. Resp. Ex. 5 at 12.<sup>11</sup> At that time, \$4,519.94 was already in the account, representing all or portions of the five immediately preceding deposits:

- August 3 check of **\$1,332.40**, of which she deposited **\$1300** on August 4;

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<sup>11</sup> Respondent withheld \$6,476.72, which is not accounted for, but may have been the money she paid (to herself and her sister or other family members) for Beneficiary Freeman's purported past living expenses. *See* SSA Ex. 4 at 3. SSA issued an additional check for \$192.80 on September 1, 2009, which is also unaccounted for. SSA Ex. 2 at 29.

- July 9 checks of **\$250** and **\$1,697.54**, which she deposited on July 9 and 14, respectively;
- July 2 check of **\$1,495.60**, of which she deposited **\$1,000** on July 3;
- June 3 check of **\$1,554**, of which she deposited **\$1,500** on June 4.

SSA Ex. 2 at 20, 22-26; Resp. Ex. 5 at 3, 6, 9, 13.

On September 3, 2009, Respondent withdrew \$25,000 from the account, apparently giving \$10,000 to her sister and using \$15,000 to purchase the house. Resp. Ex. 5 at 12, 14. Applying FIFO principles, I find that this withdrawal represents funds taken from six checks, the five listed above and the lump sum payment. The balance remaining in the account after she made this withdrawal (\$4,069.30) is attributable to the lump-sum check. Thus, she is subject to CMPs of up to \$5,000 for each of the six checks from which she misused funds.

From September 2009 through May 2010, Respondent paid beneficiary funds to herself and her husband as rent. As discussed above, these payments were excessive, and each represents a misuse of beneficiary funds. Again applying the principle of FIFO, I find that the September and October rent checks, which cleared on September 15 and October 14, 2009, respectively, were paid out of the lump sum check. Resp. Ex. 5 at 12, 14, 15, 17. By October 15, however, the lump-sum funds had been effectively depleted, and all subsequent rent checks came out of the ten benefit checks issued between September 3, 2009, and May 3, 2010, inclusive. SSA Ex. 5 at 15.<sup>12</sup>

Amount of the damages. Because of Respondent's shoddy record-keeping – and her deliberate efforts to conceal certain expenditures – I cannot pinpoint the exact amount of the damages. SSA alleges that she converted more than \$33,308.24 to improper uses. The record here more than supports this figure:

- She gave **\$10,000** to her sister.
- She spent **\$15,000** to purchase a house in her own name and the name of her husband.
- She kept at least **\$6,520.24** for herself and unidentified others, claiming repayment of old debts.

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<sup>12</sup> The balance in the account on October 15 was \$3,144.64, which represents the remnants of the lump-sum check plus deposits from two additional benefit checks, dated September 3, 2009 (\$1,428.80) and October 2, 2009 (\$1,524.80). SSA Ex. 2 at 28, 30; Resp. Ex. 5 at 16.

- She charged the beneficiary excessive rent for living in the house that his funds helped to purchase. Based on the evidence in this record, he had nothing more than a rental interest in the property, so he should not have been paying more than \$400 per month (fair rental value) for the nine months he lived there. For four months Respondent paid herself \$322 more per month than the fair rental value (total \$1,288). For the remaining five months, she paid herself \$200 per month more than the fair rental value (total \$1,000). She thus misappropriated an additional **\$2,288**.

These sums total **\$33,808.24**.<sup>13</sup>

Appropriateness of penalty. I am specifically authorized to affirm, deny, increase, or reduce the penalties proposed by the IG. 20 C.F.R. § 498.220. In determining the appropriateness of the penalty, I must consider: 1) the nature of the statements and representations and the circumstances under which they occurred; 2) the degree of culpability of the person committing the offense; 3) the history of prior offenses of the person committing the offense; 4) the financial condition of the person committing the offense; and 5) such other matters as justice may require. 20 C.F.R. § 498.106.

SSA has imposed CMPs of \$5,000 per violation and an assessment equal to twice the sum of the benefits converted, which represent the maximum penalties. On the other hand, SSA was conservative in determining the number of violations and the amount misused.

I have considered Respondent's financial condition, to the extent possible, based on the limited information she supplies and her well-demonstrated lack of veracity. Her financial disclosure form is hardly a model of clarity. She submits no documentary evidence supporting her claims of limited financial resources. Nevertheless, she declares that she and her family would be devastated by a large civil money penalty. Resp. Ex. 1 at 4 (Whitehead Decl. ¶ 14). According to her disclosure form, she receives only \$544 per month net in Social Security benefits.<sup>14</sup> Her husband's income (combined federal benefits plus "net rental inc[ome]") adds an additional \$2,374 per month. In addition they derive \$1,708 income from a "security deed," although she does not explain what that means. SSA Ex. 9 at 3. They have approximately \$4,685 in the bank, and she lists

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<sup>13</sup> I recognize that SSA bases its penalty on a lower amount (\$33,308). In my order for additional development, I pointed out the apparent discrepancy between the amount SSA identifies as misused and the amount set forth in SSA's December 14, 2011 notice letter (\$33,308). In the absence of any objection from SSA, I affirm the lower amount, even though the evidence could support higher damages.

<sup>14</sup> Based on Respondent Whitehead's declaration, her monthly Social Security benefits appear to have increased, to \$564 per month. R. Ex. 1 (Whitehead Decl. ¶ 13).

ownership interests in three pieces of real estate, which she values at \$200,000, \$64,000, and \$88,000, respectively. SSA Ex. 9 at 4. She claims to have one-third interest in these properties, but does not identify the other owners (presumably one of them is her husband), or their relationships to the properties. She lists a fourth property, purchased for \$120,000, on which she still owes \$94,037.87. SSA Ex. 9 at 5. She claims that, except for her small disability benefit, all of the family income and assets belong to her husband. SSA Ex. 9, at 3. I reject this claim as wholly unsubstantiated, particularly since, as SSA points out, Georgia is an equitable distribution state. In any event, her real estate holdings represent significant assets, and she has not reliably demonstrated that she is unable to pay the penalties imposed.

I recognize that Respondent Whitehead has no history of prior offenses. However, as the above discussion shows, the circumstances surrounding Respondent's misuse of funds, her deliberate and ongoing efforts to conceal her actions, and her refusal to return the beneficiary's money – actions for which she is completely culpable – all justify the maximum penalties.

Notably:

- Respondent Whitehead told SSA that she had no bank account, even though she had one in her own name. She refused direct deposit, but deposited beneficiary checks into the account under her own name, telling SSA that she held the funds in the beneficiary's name. When SSA began its investigation, she put the beneficiary's name on the account, even though she was no longer his rep payee and was no longer receiving his benefit checks.
- Respondent told SSA that Respondent owed her no money, but then she took his funds as repayment for past financial assistance.
- Respondent told the beneficiary's attorney that she used his benefit funds to repay herself for past financial assistance. Yet, she told this tribunal that he owed her no money and that she did not reimburse herself from his funds. She did not then account for the substantial missing sums.
- Respondent affirmatively misled SSA about how she spent the benefits. She did not disclose to SSA that she kept funds to repay old debts, including \$10,000 for her sister; she did not tell SSA about purchasing the house with beneficiary funds. In fact, she deliberately deceived the agency, reporting that she used all funds to cover his then current maintenance (from June 1, 2009 through May 31, 2010).
- She purchased a house in her own name without any written evidence that the beneficiary owned an interest in the property.



