Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Social Security Administration, Inspector General,
Petitioner,

v.

Michelle Valent,
Respondent.

Docket No. C-13-984

Decision No. CR3261

Date: June 11, 2014

DECISION

There is no basis for the imposition of a civil money penalty (CMP) or an assessment in lieu of damages (assessment), pursuant to section 1129(a)(1) of the Social Security Act (the Act) (42 U.S.C. § 1320a-8(a)(1)), against Respondent, Michelle Valent.

I. Procedural History

The Counsel for the Inspector General (IG) of the Social Security Administration (SSA) notified Respondent, Michelle Valent, by letter dated June 3, 2013, that the SSA IG proposed imposition of a CMP of $100,000 and an assessment of $68,547 against Respondent, pursuant to section 1129 of the Social Security Act (Act) (42 U.S.C. § 1320a-8).[1] The SSA IG cited as the basis for the CMP and assessment that during the period September 2009 through January 2013, Respondent failed to report to SSA that she worked while she received Social Security Disability Insurance Benefits (DIB) and

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[1] The current version of the Act is available at http://www.ssa.gov/OP_Home/ssact/ssact-toc.htm.

she falsely reported during an April 2012 Continuing Disability Review (CDR) that she had not worked since 2004. SSA IG Exhibit (SSA Ex.) 4.

Respondent requested a hearing pursuant to 20 C.F.R. § 498.202, [2] by letter dated June 11, 2013. The case was assigned to me for hearing and decision and the parties were notified by letter dated July 12, 2013, that I would convene a prehearing conference by telephone on August 8, 2013, at 11:00 a.m. Eastern Time. The prehearing conference was convened by telephone as scheduled. The substance of the prehearing conference is memorialized in my Scheduling Order and Notice of Hearing issued on August 9, 2013 (Scheduling Order).

Pursuant to the Scheduling Order, the SSA IG and Respondent were required to file and exchange lists of exhibits and witnesses and copies of proposed exhibits not later than December 13, 2013, and prehearing briefs not later than December 30, 2013. Scheduling Order ¶¶ IV, IX. SSA timely filed its exchange of witness lists, witness statements, and proposed exhibits and a copy of its prehearing brief. Respondent failed to file her exchange by December 13, 2013 as required by the Scheduling Order. Therefore, on December 19, 2013, I issued an order for Respondent to show cause why her case should not be dismissed for abandonment or as a sanction. Respondent responded to the order to show cause on December 27, 2013, and filed her exchange of lists of exhibits and witnesses and copies of proposed exhibits, but did not file her prehearing brief by December 30, 2013 as required. On January 6, 2014, the SSA IG requested sanctions, including dismissal of this case, because Respondent failed to timely file her exchange and she failed to timely file her prehearing brief. The SSA IG argues that Respondent's delayed exchange and failure to file a prehearing brief prejudiced the SSA IG, but the SSA IG does not specifically articulate the prejudice suffered. Pursuant to section 1129(b)(4) of the Act and 20 C.F.R. § 498.214, I may sanction a party or attorney for failure to comply with an order or procedure, for failure to defend, or for such other conduct that interferes "with the speedy, orderly, or fair conduct of the hearing." The sanction must reasonably relate to the severity and nature of the conduct. Authorized sanctions include: drawing a negative factual inference or deeming a fact admitted or established in the case of refusal to provide or permit discovery; prohibiting a party from introducing evidence; striking pleadings; staying proceedings; dismissal of the case; default judgment against the offending party; ordering the offending counsel or party to pay fees and costs caused by the failure or misconduct; or refusal to consider a motion or pleading not filed in a timely manner. In this case, Respondent's failure to timely file her

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[2] References are to the 2012 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

exchange and failure to file a prehearing brief caused no delay of the trial in this case and the SSA IG has failed to specifically identify any prejudice that warrants punishing Respondent. Accordingly, the SSA IG motion for sanctions is denied.

On January 14, and 15, 2014, a hearing was convened by VTC. The SSA IG, represented by Penny Collender, Esq. and Erin Justice, Esq., appeared by VTC from New York City. Respondent appeared by VTC from Livonia, Michigan represented by Marianne McCauley. I participated by VTC from Kansas City with the court reporter. Witnesses testified by VTC from Livonia, Michigan, Baltimore, and San Diego. A transcript of the proceedings was prepared. The SSA IG offered SSA Exs. 1 through 18, which were admitted as evidence. Tr. 37-38. Respondent offered Respondent's exhibits (R Ex.) 1 through 6, which were admitted as evidence. Tr. 38-39. The SSA IG called the following witnesses: Resident Agent in Charge (RAC) Adam Lowder; Special Agent (SA) Kathryn Krieg; Alan Watt, the confidential source; Respondent Michelle Valent; Mark McCauley, Respondent's brother and purported employer; and B. Chad Bungard, Counsel to the SSA IG. Respondent called no witnesses.

The SSA IG filed a post-hearing brief (SSA Br.) on March 26, 2014. Respondent also filed her post-hearing brief (R. Br.) on March 26, 2014. Respondent filed a post-hearing reply brief (R. Reply) on April 10, 2014. The SSA IG filed a post-hearing reply brief (SSA Reply) on April 11, 2014. The parties reply briefs were received on April 14, 2014, and the record was considered closed and the case ready for decision.

II. Discussion

A. Applicable Law

Pursuant to title II of the Act, an individual who has worked in jobs covered by Social Security for the required period of time, who has a medical condition that meets the definition of disability under the Act, and who is unable to work for a year or more because of the disability, may be entitled to monthly cash disability benefits. 20 C.F.R. §§ 404.315-404.373. Pursuant to title XVI of the Act, certain eligible individuals are entitled to the payment of Supplemental Security Income (SSI) on a needs basis. To be eligible for SSI payments, a person must meet U.S. residency requirements and must be: (1) 65 years of age or older; (2) blind; or (3) disabled. Disability under both programs is determined based on the existence of one or more impairments that will result in death or that prevent an individual from doing his or her past work or other work that exists in substantial numbers in the economy for at least one year. 20 C.F.R. §§ 416.202, 416.905, 416.906. Additionally, a person must have limited income and resources to be eligible for SSI. 20 C.F.R. §§ 416.202(c) and (d), 416.1100-.1182, 416.1201-.1266. All assets, other than a car and a primary residence, are considered resources when determining whether an individual has "limited" resources. 20 C.F.R. § 416.1210. The income and resources of a spouse or other individuals in a household are also subject to being

considered. 20 C.F.R. §§ 416.1201-.1204; 416.1802. SSI is not at issue in this case as Respondent received no benefits under that program.

Section 1129(a)(1) of the Act authorizes the imposition of a CMP or an assessment against:

> (a)(1) Any person . . . who –
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> > (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 or benefits or payments under title VIII or XVI, that the person knows or should know is false or misleading,
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> > (B) makes such a statement or representation for such use with knowing disregard for the truth, or
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> > (C) omits from a statement or representation for such use, or otherwise withholds disclosure of, a fact which the person knows or should know is material to the determination of any initial or continuing right to or the amount of monthly insurance benefits under 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 . . . .

The Commissioner of SSA (the Commissioner) delegated the authority of section 1129 of the Act to the IG:

> (a) The Office of the Inspector General may impose a penalty and assessment, as applicable, against any person who it determines in accordance with this part—
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> > (1) Has made, or caused to be made, a statement or representation of a material fact for use in determining any initial or continuing right to or amount of:
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> > > (i) Monthly insurance benefits under title II of the Social Security Act; or

> (ii) Benefits or payments under title VIII or title XVI of the Social Security Act; and
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> (2)(i) Knew, or should have known, that the statement or representation was false or misleading, or
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> (ii) Made such statement with knowing disregard for the truth; or
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> (3) Omitted from a statement or representation, or otherwise withheld disclosure of, a material fact for use in determining any initial or continuing right to or amount of benefits or payments, which the person knew or should have known was material for such use and that such omission or withholding was false or misleading.

20 C.F.R. § 498.102(a). A material fact is a fact that the Commissioner may consider in evaluating whether an applicant is entitled to benefits or payments under titles II, VIII, or XVI of the Act. Act § 1129(a)(2); 20 C.F.R. § 498.101. Individuals who violate section 1129 are subject to a CMP of not more than $5,000 for each false or misleading statement or representation of material fact or failure to disclose a material fact. Violators are also subject to an assessment in lieu of damages, of not more than twice the amount of the benefits or payments made as a result of the statements, representations, or omissions. Act § 1129(a)(1); 20 C.F.R. § 498.103(a).

In determining the amount of the CMP to impose, the SSA IG must consider: (1) the nature of the subject statements and representations and circumstances under which they occurred; (2) the degree of culpability of the person committing the offense; (3) the person's history of prior offenses; (4) the person's financial condition; and (5) such other matters as justice requires. Act § 1129(c); 20 C.F.R. §498.106(a).

Section 1129(b)(2) of the Act specifies that the Commissioner shall not decide to impose a CMP or assessment against a person until that person is given written notice and an opportunity for the determination to be made on the record after a hearing at which the person is allowed to participate. The Commissioner has provided by regulations at 20 C.F.R. pt. 498 that a person against whom a CMP is proposed by the SSA IG may request a hearing before an ALJ of the Departmental Appeals Board (the Board). The ALJ has jurisdiction to determine whether the person should be found liable for a CMP and/or an assessment and the amount of each. 20 C.F.R. §§ 498.215(a), 498.220(b). The person requesting the hearing, the Respondent, has the burden of going forward and the burden of persuasion with respect to any affirmative defenses and any mitigating circumstances. 20 C.F.R. § 498.215(b)(1). The SSA IG has the burden of going forward as well as the burden of persuasion with respect to all other issues. 20 C.F.R.

§ 498.215(b)(2). The burdens of persuasion are to be judged by a preponderance of the evidence. 20 C.F.R. § 498.215(c).

B. Issues

Whether there is a basis for the imposition of a CMP pursuant to section 1129(a)(1) of the Act and 20 C.F.R. § 498.102(a).

Whether there is a basis for the imposition of an assessment pursuant to section 1129(a)(1) of the Act and 20 C.F.R. § 498.102(a).

Whether the CMP and assessment proposed are reasonable considering the factors specified by section 1129(c) of the Act and 20 C.F.R. § 498.106(a).

Whether or not Respondent may be liable for an overpayment of Social Security benefits and whether or not she continues to meet the requirements for payment of Social Security benefits are not issues before me.

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the statement of pertinent facts and my analysis. I have carefully considered all the evidence and the arguments of both parties, although not all may be specifically discussed in this decision. I discuss the credible evidence given the greatest weight in my decision-making.[3] I also discuss any evidence that I find is not credible or worthy of weight. The fact that evidence is not specifically discussed should not be considered sufficient to rebut the presumption that I considered all the evidence and assigned such weight or probative value to the credible evidence that I determined appropriate within my discretion as an ALJ. There is no requirement for me to discuss the weight given every piece of evidence considered in this case, nor would it be consistent with notions of judicial economy to do so. Charles H. Koch, Jr., *Admin. L. and Prac.* § 5:64 (3d ed. 2013).

1. Respondent was entitled to receive DIB under section 223 of the Act for at least 24 months.

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[3] "Credible evidence" is evidence that is worthy of belief. *Black's Law Dictionary* 596 (18th ed. 2004). The "weight of evidence" is the persuasiveness of some evidence compared to other evidence. *Id.* at 1625.

2. Pursuant to section 221(m)(1)(b) of the Act, the Commissioner is prohibited from considering any work activity of Respondent as evidence that Respondent was no longer disabled and no longer entitled to DIB.

3. Respondent's work activity after she received DIB for at least 24 months is not a fact that the Commissioner was permitted to evaluate to determine if Respondent was entitled to continuing receipt of DIB, and therefore, not a material fact within the meaning of section 1129(a)(2) of the Act or 20 C.F.R. § 498.101.

4. Although Respondent failed to report work activity in violation of the regulation, the fact she engaged in work activity was not a material fact and the failure to report is not a basis for the imposition of a CMP or an assessment under section 1129 of the Act.

5. The SSA IG failed to show by a preponderance of the evidence that Respondent knew or should have known that her work activity was a material fact that she failed to report because, pursuant to section 221(m) of the Act, her work activity is not material as a matter of law.

a. Allegations

Counsel to the SSA IG, B. Chad Bungard, notified Respondent, Michelle Valent, by letter dated June 3, 2013, that the SSA IG proposed imposition of a CMP of $100,000 and an assessment of $68,547 against Respondent, pursuant to section 1129 of the Social Security Act (Act) (42 U.S.C. § 1320a-8). The SSA IG cited as the basis for the CMP and assessment that during the period September 2009 through January 2013, Respondent failed to report to SSA that she worked while she received DIB and she falsely reported during an April 2012 CDR that she had not worked since 2004. The SSA IG notice indicates that the SSA IG determined that Respondent committed 41 separate violations, one violation for each of the 41 months beginning September 2009 and continuing through January 2013, that she omitted or failed to report that she worked as a customer service representative for War Era Veterans Alliance where she earned $400 per week, while collecting DIB payments. The SSA IG notice also indicates that Respondent falsely reported on April 20, 2012, that she had not worked since 2004. The SSA IG advised Petitioner that rather than imposing the maximum CMP of $5,000 per violation and twice the amount of benefits improperly received, he proposed a reduced CMP of $100,000 and an assessment of $68,547, the actual amount of benefits received. SSA Ex. 4. Mr. Bungard testified that the only basis for the CMP was the 41 months from September 2009 through January 2013 that Respondent failed to report the material fact that she worked for War Era Veteran's Alliance. Tr. 361-62.

The SSA IG alleges before me Respondent knowingly withheld material information from SSA for 41 months, from September 2009 through January 2013, by failing to report that she worked for War Era Veterans Alliance. SSA Br. at 10-11. The SSA IG also alleges that Respondent falsely stated to SSA on one occasion that she had not worked since 2004. SSA Br. 12. The SSA IG requests that I approve a combined CMP and assessment of $ 168,547. SSA Br. at 14; SSA Reply at 10.

SSA has the burden to establish by a preponderance of the evidence, that is, that it is more likely than not, that Respondent failed to report the material fact that he worked while receiving DIB. 20 C.F.R. §§ 498.102(a), 498.215(b)(2) and (c).

b. Facts

The SSA IG evidence shows that Respondent filed for DIB on October 29, 2003. She was determined disabled and entitled to DIB payments with a disability onset date of March 25, 2003, based on the primary diagnosis of affective disorders, which refers to a set of psychiatric diseases including depression, bipolar disorder, and anxiety disorder. Her prior work was as a receptionist or administrative assistant from 1988 to March 2003. A CDR completed on March 31, 2010, resulted in continuation of her entitlement to DIB. In January 2012, the SSA IG received an allegation that Respondent had been working as a customer service representative for War Era Veterans Alliance, LLC since 2009. Respondent was interviewed by a SSA Claims Representative on April 20, 2012. During the interview, Respondent completed forms and statements in which she stated that she had not worked since 2004 and listed no work since 2004. SSA Ex. 9 at 7; SSA Ex. 12 at 1-2. Respondent's maiden name was Michelle L. McCauley. SSA Ex. 12 at 2.

On September 12, 2013, an SSA Technical Expert, Deborah Buchholz, completed a special work determination report. SSA Ex. 12. The Technical Expert determined that Respondent started working for War Era Veteran's Alliance, owned by Respondent's brother and sister-in-law, Mark and Marianne McCauley, on September 1, 2008.[4] The Technical Expert concluded that Respondent's brother paid her $400 per week, an average of $1733.33 gross pay per month. SSA determined that Respondent's earnings were substantial gainful activity; Respondent's trial work period was September 2008 through May 2009; her entitlement to DIB ended with June 2009; and the last check to which she was entitled was issued for August 2009. SSA determined that Respondent was overpaid $49,795.90 in benefits for herself and $15,608.00 for her daughter. SSA

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[4] The registered agent for War Era Veterans Alliance, LLC is Marianne McCauley. SSA Ex. 14; R. Ex. 1 at 1; R. Ex. 3.

Ex. 12 at 8; SSA Ex. 1 at 22. The amount of the overpayment to Respondent is different in this document than the amount stated in SSA Ex. 1 at 21-22, and SSA Ex. 3 at 12.

SSA notified Respondent by letter dated December 5, 2012 that based on review of her work and earnings for March 2003 through December 2012 she may not be eligible for DIB payments beginning with September 2009 and continuing thereafter. Respondent was invited to send in information within ten days. SSA Ex. 3 at 1. SSA advised Respondent that SSA records show that Respondent worked from January 2003 to December 2004 for Hanover Grove Consumer Housing and from September 2008 and continuing for War Era Veterans Alliance. SSA Ex. 3 at 2. The SSA letter advised Respondent that her trial work period was September 2008 through May 2009, with continuing entitlement to DIB during that period. SSA Ex. 3 at 3. SSA notified Respondent by letter dated January 14, 2013, that her entitlement to DIB payments ended beginning September 2009. SSA Ex. 3 at 6. The SSA notice advised Respondent that because her checks were not stopped until January 2013, she was overpaid $52,938.90. SSA Ex. 3 at 7. Respondent was also advised by a letter from SSA dated January 14, 2013, that her daughter was no longer eligible to receive payments, and that her daughter was overpaid $15,608 in benefits. SSA Ex. 3 at 12.

SA Kathryn Krieg prepared an initial report of investigation for the period February 13, 2012 to June 8, 2012. The case was assigned to her by RAC Lowder on February 13, 2012. Subsequently, she obtained a copy of Respondent's Michigan driver's license photograph and her address information from the license. She determined that Respondent was receiving DIB payments, and that she had no reported wages since 2004. On or about March 14, 2012, she conducted surveillance of Respondent's home in Macomb, Michigan and the War Era Veterans Alliance office in Chesterfield Township, Michigan, where Respondent was reportedly working. Her report does not indicate that she saw Respondent or established her presence at either location. SSA Ex. 1 at 2-3. SA Krieg opined that Respondent may have been working from home. On April 2, 2012, she referred the allegations against Respondent to SSA for a CDR and more development. Tr. 124-25; SSA 1 at 3. On or about May 9, 2012, SA Krieg received a copy of a letter from Alan Watt to the SSA IG with other documents. On May 10, 2012, SA Krieg conducted more surveillance at Respondent's residence and the War Era Veterans Alliance. Her report fails to show that she saw Respondent or established her presence at either location. On May 23, 2012, she interviewed Alan Watt about his allegations that Respondent was working for War Era Veterans Alliance. Watt told her that Respondent either worked at the office or at home. Watt stated that Respondent's brother, Mark McCauley owns War Era Veterans Alliance and that it was common knowledge that Respondent was collecting Social Security. Watt told SA Krieg that probably half the employees are paid under the table. He told SA Krieg that he believed Respondent was paid $10 to $15 per hour and worked full-time or close to full-time. He told SA Krieg that he believed that Respondent was already working for War Era Veterans Alliance when he started in May 2009. He quit working for War Era Veterans

Alliance on April 18, 2011, and that was his last contact with Respondent. SSA Ex. 1 at 1-6.

Alan Watt testified consistent with the statements recorded by SA Krieg. He admitted in response to my questions at hearing that he was only present in the Michigan office one or two days a month from June 2009 through August 2010, for one to four hours at a time. He estimated that Respondent was at the office 50 to 75 percent of the time that he was present. Tr. 191-93. He also testified that he had contact with Respondent when he called in and she answered the phone on roughly a daily basis until August 2010 and then about 30 percent of the time when he called later in the day from August 2010 until he left the company in April 2011. Tr. 193-95. I find that Mr. Watt's credibility regarding his assertions as to Respondents work activity is significantly limited by his by his limited opportunity to observe Respondent and her activities.

SA Brian Reitz prepared a Status Report for the period June 8, 2012, in which he recorded an interview with Aimee Konal who worked at War Era Veterans Alliance. Konal told SA Reitz and his partner, SA Judith Amaro, that she was not an official employee but worked there off and on for two years and was paid under the table. Konal told the agents that Respondent answered the telephone for War Era Veterans Alliance from her home. Konal told the agents that when she started at War Era Veterans Alliance Respondent worked in the office answering phone about 32 hours or more each week, earning $8 to $10 per hour, but for the past year she had been working from home. Konal did not know how much Respondent earned or how many hours she worked, but she believed she worked a lot based on work-related messages she received from Respondent. SSA Ex. 1 at 9-10. Aimee Konal completed a written sworn statement which is consistent with the agent's summary. SSA Ex. 7.

SA Krieg completed a status report for the period June 8, 2012 to June 12, 2012, in which she records interviews with Respondent and others. On June 8, 2012, SA Krieg, RAC Lowder, SA Amaro, and SA Reitz interviewed Jacquie Scalet, and employee of War Era Veterans Alliance at the War Era Veterans Alliance office. Scalet told the agents that Respondent helped War Era Veterans Alliance by answering the phone from her home. Scalet denied knowing Respondent's hours or pay. Scalet stated that Respondent used to work in the office but that had ended in Spring 2011 when Respondent started working from her home. Scalet stated that she started working for War Era Veterans Alliance in 2010 and that Respondent worked there prior to that. Scalet provided contact information for Mark McCauley. SSA Ex. 1 at 11-13; Tr. 53, 106-07.

SA Krieg and RAC Lowder interviewed Respondent at her residence on June 8, 2012. Respondent denied working for War Era Veterans Alliance but stated that a year prior she had trained some people and that she answered the phones a few times for the business. Respondent denied knowledge of her photograph, biography, or a description of her work on the War Era Veterans Alliance website. She stated that her voice is on the War Era

Veterans Alliance telephone recording. Respondent told the agents that she will answer the telephone for War Era Veterans Alliance when an employee is sick and that she does so from the office. Respondent denied having an email associated with War Era Veterans Alliance. Respondent admitted that she had a specific phone for answering War Era Veterans Alliance phone calls at home. Respondent stated that Mark McCauley has paid some bills for her. She denied working for War Era Veterans Alliance except for here and there and she denied receiving cash payments for work or money from McCauley. Respondent stated that she was last at the War Era Veteran Alliance office in 2010 when she filled-in for Adrianne Watt and that she would fill in approximately two to three times a week. She stated that she did tell neighbors that she worked. SSA Ex. 1 at 13-15; Tr. 54-59, 109-15, 146-48.

SA Krieg and RAC Lowder interviewed Respondent's husband on June 8, 2012. He denied that Respondent worked for War Era Veterans Alliance for pay. SSA Ex. 1 at 15.

SA Krieg and SA Amaro interviewed Mark McCauley on June 8, 2012. McCauley told them that Respondent is his sister and he does not consider her an employee of War Era Veterans Alliance. He stated that he gives Respondent money as he promised his dad to take care of her. McCauley stated that Respondent had no schedule or set hours; he did give her a phone that she could answer if she choose to; and that she could not work in an office environment. He stated that he gifts her $12,000 per year whether or not she answers a phone; but he subsequently stated that he gives her $400 per week, which would amount to $20,800. McCauley referred to Respondent as Missy. He agreed that Respondent was listed on the War Era Veterans Alliance website as "Vale." McCauley admitted that Respondent did answer phones for the business and scheduled people to attend the financial classes he taught but he denied knowing how much she actually worked. SSA Ex. 1 at 15-17; Tr. 98, 115-21.

SA Krieg prepared a status report for the period October 10, 2012 to January 14, 2013. SA Krieg reported that Deborah Buchholz, an SSA employee, determined that Respondent was overpaid $68,546.90, which included an overpayment of DIB of $52,938.90 and an overpayment of CIB to her child in the amount of $15,608. SSA 1 at 21-22. The SSA IG has offered no evidence of the actual amount of monthly DIB and CIB benefits Respondent and her child received during the pertinent period.

SA Krieg referred the matter to the US Attorney but criminal prosecution was declined because the evidence was insufficient to show that the money given to Respondent was earnings rather than a gift. SSA Ex. 1 at 21-22; SSA Ex. 2. SA Krieg referred the matter to the SSA IG and closed her investigation on February 12, 2013. SSA Ex. 1 at 23. RAC Adam Lowder sent a letter dated January 11, 2013, to the US Attorney, Detroit Michigan to confirm that the US Attorney declined to prosecute Respondent. RAC Lowder summarized in his letter some of the investigative findings, including that DIB payments

to Respondent were terminated in January 2013, resulting in an overpayment of $68,546. SSA Ex. 2 at 1.[5]

Respondent does not dispute that she signed a statement on April 20, 2012, in which she stated "I have not worked since 2004." SSA Ex. 8. Respondent also does not dispute that on April 20, 2012, she completed a "Work Activity Report – Employee" on which she wrote "I have not worked since 2004." SSA Ex. 9 at 7. She also checked the no box in response to the question of whether she had any "employment income or wages" since her disability onset date. SSA Ex. 9 at 1. Mr. Bungard testified that the checked no box and the statement on the "Work Activity Report – Employee" were not a basis for the CMP proposed. He testified that the only basis for the CMP was the 41 months from September 2009 through January 2013 that Respondent failed to report the material fact that she worked for War Era Veteran's Alliance. Tr. 361-62.

Respondent does not dispute that on June 7, 2012, she was listed on the War Era Veterans Alliance website as Michelle Vale and described as the "voice of War Era Veterans" who had been "taking calls and managing all War Era Veterans Alliance calendars for over four years." SSA Ex. 13 at 58.

Mark McCauley submitted a letter in which he stated that he gifted money to Respondent and he asked that she do little things for War Era Veterans Alliance to help her sense of self-worth. R. Ex. 2. Mr. McCauley testified that he and his wife worked together to form War Era Veterans Alliance but his wife is the owner. Tr. 254-55. He admitted that it was possible that he told SA Krieg that Respondent answered phones and scheduled classes for him. He admitted that he gave Respondent a phone, albeit for her personal use. He also admitted that calls for War Era Veterans Alliance would ring on the phone that he provided Respondent and she could answer if she chose to. Tr. 257-59, 282-83. He explained that he gave her a phone that was billed to him with all the other phones he used for his homes and offices. Tr. 284-85. He testified that he never paid Respondent but gifted her about $12,000 per year, which he understood to be the Internal Revenue Service limit at the time. Tr. 262-63, 277. He agreed that the "Michelle Vale" listed on the website (SSA Ex. 13 at 58) was his sister, Michelle Valent, but he testified that he had nothing to do with creating or maintaining the website. Tr. 264-64. He testified that War Era Veterans Alliance was not his company and he had nothing to do with paying staff, but he did not deny that he may have stated to SA Krieg that one War Era Veterans Alliance employee may have been paid in cash and that he would ensure that they were

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[5] SA Krieg provided a declaration dated December 10, 2013, which is consistent with her investigative reports. SSA Ex. 16. RAC Adam Lowder also submitted declaration that is consistent with SA Krieg's investigative reports. SSA Ex. 17.

being paid legally in the future. Tr. 268-69. He testified that he was told by an SSA representative that it was permissible to give his sister money. Tr. 270. When asked about whether he gave his sister $400 per week or $12,000 per year, which would have been less than $400 per week, he testified that he may have been referring to giving Respondent $400 one week but he could not recall with certainty. Tr. 271-73, 278-79.

Respondent testified that she did not work for War Era Veterans Alliance and that she only trained one person on how to operate the telephones. She testified that she was given a phone to use at home by War Era Veterans Alliance but it was so she could reach the McCauley's. She testified that she only answered as War Era Veterans Alliance when told to do so by Marianne McCauley. She testified that she did record the stories of some veterans that called. She denied that Mark McCauley gave her money but testified that he did pay some of her bills. She admitted that she did airport runs for the McCauley's. Tr. 206-52.

c. Analysis

The SSA IG proposes to impose a CMP of $100,000 for the 41 months from September 209 through January 2013, during which Respondent failed to report that she worked for War Era Veterans Alliance. The SSA IG also proposes an assessment in lieu of damages in the amount of $68,547, the amount of DIB and CIB payments Respondent and her child allegedly received during the pertinent period. I conclude that there is no basis to impose either a CMP or an assessment.

A beneficiary entitled to cash benefits for a period of disability, such as Respondent, is required to promptly notify SSA when his or her condition improves; when he or she returns to work; when he or she increases the amount of work performed; or when earnings increase. 20 C.F.R. § 404.1588(a). The term "work" as used in 20 C.F.R. § 404.1588(a) is not specifically defined in either the Act or the regulations. According to 20 C.F.R. § 404.1571:

> The work, without regard to legality, that you have done during any period in which you believe you are disabled may show that you are able to work at the substantial gainful activity level. If you are able to engage in substantial gainful activity, we will find that you are not disabled. . . . Even if the work you have done was not substantial gainful activity, it may show that you are able to do more work than you actually did. We will consider all of the medical and vocational evidence in your file to decide whether or not you have the ability to engage in substantial gainful activity.

This regulation indicates that any work activity may impact the determination of whether or not one can perform substantial gainful activity and the determination of entitlement or continuing entitlement to Social Security benefits. Therefore, the regulation supports an interpretation that all work activity should be reported – no matter how minimal, whether for pay or profit or not, whether legal or illegal, or whether in support of a charitable or volunteer organization – which is consistent with the SSA IG's position. Tr. 364. However, 20 C.F.R. § 404.1572 creates potential confusion about whether all work activity need be reported. The regulation defines "substantial gainful activity" as work activity that is both substantial and gainful. "Substantial work activity" is defined as significant physical or mental activity. "Gainful work activity" is work of the kind that is usually done for pay or profit whether or not there is pay or profit. 20 C.F.R. § 404.1572(a) – (b). However, the regulatory language suggests that not all work activity need be reported, even if it rises to the level of substantial gainful activity. The regulation states that, generally, hobbies, activities of daily living, household tasks, club activities, school attendance, and social programs are not considered substantial gainful activity. 20 C.F.R. § 404.1572(c); Social Security Ruling 83-33: *Titles II and XVI: Determining Whether Work Is Substantial Gainful Activity –Employees.* The evidence does not show that Respondent was actually informed about what activities amounted to work within the meaning of the regulation for which reporting was required by 20 C.F.R. § 404.1588(a). Respondent argues that it was not explained to her what was considered work that had to be reported and, therefore, she did not intentionally or unintentionally omit to report a material fact. P. Br. 2-4. However, the broad reading of the regulation to require reporting of all work is consistent with the purpose of the Act and the language of the regulation is sufficient notice to Respondent of what to report.

Respondent's argument is that she did no work for War Era Veterans Alliance. Respondent's argument is not persuasive. Respondent and Mark McCauley admitted in testimony that Respondent answered the phone for War Era Veterans Alliance and she did some scheduling, at least occasionally. Therefore, I conclude that Respondent did engage in some work activity for the benefit of War Era Veterans Alliance. The preponderance of the evidence does not show whether Respondent was actually paid for her work or that she only received gifts from her brother, Mark McCauley unrelated to work at War Era Veterans Alliance. The evidence also does not show that Respondent's work rose to the level of "substantial gainful activity;" or when and how frequently gainful work activity was actually performed. It is not necessary to resolve these specific fact issues given the decision in this case.

Pursuant to section 1129(a)(1)(C) of the Act and 20 C.F.R. § 498.102(a), the SSA IG may impose a CMP and an assessment in lieu of damages against anyone, if the following elements are satisfied:

(1) The person:
    (a) omits from a statement or representation a **material fact** or otherwise withholds disclosure of a **material fact**
    (b) for use in determining
        (i) an initial or a continuing right to DIB benefits, or
        (ii) the amount of those benefits; and
(2) The person knows or should know the fact is **material** to the determination of
    (a) any initial or continuing right to, or
    (b) the amount of monthly benefits; and
(3) The person knows, or should know, that
    (a) the statement or representation with such omission is false or misleading, or
    (b) the withholding of such disclosure of the **material fact** is misleading.

Act § 1129(a)(1)(C); 20 C.F.R. § 498.102(a). A material fact is a fact that the Commissioner may consider in evaluating whether an applicant is entitled to benefits or payments under the Act. Act § 1129(a)(2); 20 C.F.R. § 498.101. Generally, the fact that a beneficiary is engaging in work is material because the Commissioner may consider that fact in evaluating whether the beneficiary is entitled initially and to continuing disability payments or the amount of those payments. 20 C.F.R. §§ 404.315-.321, 404.401(a), 404.1505, 404.1510, 404.1589-.1591. A statement of fact or an omitted fact is material under the Act and most federal statutes, if it "has the natural tendency to influence, or was capable of influencing the decision" of the Commissioner. *U.S. v. Miller*, 621 F.Supp.2d 323, at 331 (W.D. Va. 2009) *aff'd* 394 Fed. App'x 18 (4th Cir. 2010), *citing Kungys v. U.S.*, 485 U.S. 759, 770 (1988). Whether a statement of fact or omitted fact is material does not depend on whether the Commissioner was deceived or whether any decision would have been different. *U.S. v. Henderson*, 416 F.3d, 686, at 694 (8th Cir. 2005). Therefore, normally I would conclude that Respondent's failure to report that she engaged in work activity, no matter how minimal that work activity or how infrequent, was an omission or failure of Respondent to report a material fact subjecting her to a CMP and assessment under section 1129(a)(1)(C) of the Act.

Respondent benefits however from a provision of the Act not addressed by the SSA IG, specifically section 221(m) of the Act, which provides:

> (1) In any case where an individual entitled to disability insurance benefits under section 223 or to monthly insurance benefits under section 202 based on such individual's disability (as defined in section 223(d)) has received such benefits for at least 24 months—

> (A) no continuing disability review conducted by the Commissioner may be scheduled for the individual solely as a result of the individual's work activity;
>
> **(B) no work activity engaged in by the individual may be used as evidence that the individual is no longer disabled;** and
>
> (C) no cessation of work activity by the individual may give rise to a presumption that the individual is unable to engage in work.
>
> (2) An individual to which paragraph (1) applies shall continue to be subject to—
>
> (A) continuing disability reviews on a regularly scheduled basis that is not triggered by work; and
>
> (B) termination of benefits under this title in the event that the individual has earnings that exceed the level of earnings established by the Commissioner to represent substantial gainful activity.

Act § 221(m) (emphasis added). The foregoing section of the Act is implemented, at least in part, by 20 C.F.R. § 404.1590(i), 71 Fed. Reg. 66,840, 66,843-66,850 (Nov. 17, 2006).

Respondent was found disabled and entitled to DIB with an onset date of March 25, 2003 (SSA Ex. 12 at 1); which is more than six years before September 2009, the earliest date that the SSA IG alleges Respondent engaged in gainful work activity that she failed to report (SSA Ex. 4). Pursuant to section 221(m)(1)(B) of the Act, Congress prohibited the Commissioner from considering work activity of an individual entitled to DIB for at least 24 months, as evidence that the individual is no longer disabled. Because Congress prohibited consideration of Respondent's work activity as evidence that she was no longer disabled, her work activity is not a fact that the Commissioner may consider in evaluating whether Respondent continued to be entitled to benefits or payments under the Act. Therefore, Respondent's work activity is not material within the meaning section 1129(a)(2) of the Act and 20 C.F.R. § 498.101. Accordingly, Respondent's failure to report her work activity for War Era Veterans Alliance is not, as a matter of law, a failure

to report a material fact for which a CMP or assessment is authorized under section 1129(a)(1).[6]

III. Conclusion

For the foregoing reasons, I conclude that there is no basis for the imposition of a CMP or assessment in this case.

/s/
Keith W. Sickendick
Administrative Law Judge

STATEMENT OF APPEAL RIGHTS PURSUANT TO 20 C.F.R. § 498.221

> (a) Any party may appeal the decision of the ALJ to the DAB by filing a notice of appeal with the DAB within 30 days of the date of service of the initial decision. The DAB may extend the initial 30-day period for a period of time not to exceed 30 days if a party files with the DAB a request for an extension within the initial 30-day period and shows good cause.
>
> * * * *
>
> (c) A notice of appeal will be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions, and identifying which finding of fact and conclusions of law the party is taking exception to. Any party may file a brief in opposition to exceptions, which may raise any relevant issue not addressed in the exceptions, within 30 days of receiving the notice of appeal and accompanying brief. The DAB may permit the parties to file reply briefs.
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> (d) There is no right to appear personally before the DAB, or to appeal to the DAB any interlocutory ruling by the ALJ.

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[6] Section 221(m) of the Act does not relieve Respondent of her obligation to report work activity to the Commissioner pursuant to 20 C.F.R. § 404.1588(a). Section 221(m) also does not prevent the Commissioner from considering whether Respondent was no longer entitled to DIB because she engaged in substantial gainful activity.

> (e) No party or person (except employees of the DAB) will communicate in any way with members of the DAB on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.
> (f) The DAB will not consider any issue not raised in the parties' briefs, nor any issue in the briefs that could have been, but was not, raised before the ALJ.
> (g) If any party demonstrates to the satisfaction of the DAB that additional evidence not presented at such hearing is relevant and material and that there were reasonable grounds for the failure to adduce such evidence at such hearing, the DAB may remand the matter to the ALJ for consideration of such additional evidence.
>
> * * * *
>
> (i) When the DAB reviews a case, it will limit its review to whether the ALJ's initial decision is supported by substantial evidence on the whole record or contained error of law.(j) Within 60 days after the time for submission of briefs or, if permitted, reply briefs has expired, the DAB will issue to each party to the appeal and to the Commissioner a copy of the DAB's recommended decision and a statement describing the right of any respondent who is found liable to seek judicial review upon a final decision.

Respondent’s request for review by the DAB automatically stays the effective date of this decision. 20 C.F.R. § 498.223.