

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Social Security Administration
Office of the Inspector General,

Petitioner,

v.

Erica Ortega

Docket No. C-14-1519

Decision No. CR4786

Date: February 6, 2017

DECISION

The Inspector General (IG) for the Social Security Administration (SSA) charges that Respondent, Erica Ortega, violated section 1129 of the Social Security Act (Act), because, while acting as a representative payee for her minor child, she converted his benefits to her own use or otherwise mishandled his funds. The IG proposes imposing against Respondent Ortega a \$7,000 civil money penalty (CMP) plus a \$15,037 assessment in lieu of damages (total penalty: \$22,037).

For the reasons set forth below, I agree that Respondent Ortega improperly converted her child's disability benefits and that she deliberately misled SSA about her actions. I find the penalty 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.; 20 C.F.R. §§ 404.315, 404.1505. The minor child of an eligible individual may also be entitled to benefits on the wage-earner's account. Act § 202(d)(1); 20 C.F.R. § 404.350.

If the child is awarded benefits, SSA will generally pay them to a representative payee, commonly referred to as “rep payee.” 20 C.F.R. § 404.2010(b); *see* Act § 205(j)(1)(A). 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 interest, 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 the rep payee 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 performing her responsibilities as a rep payee.

20 C.F.R. §§ 404.2035; 404.2040(a). Significantly, the *rep payee* must account for the benefits she receives on the child’s behalf, and, when asked by SSA, must establish that she spent those funds appropriately. Act § 205(j)(3)(D) and (E); 20 C.F.R. § 2035(e). SSA is not obligated to establish that the rep payee misused the benefits.

In this case, when SSA awarded Social Security Disability benefits to Petitioner Ortega, it also awarded benefits to her then three-year-old child, Angel, and named her the child’s rep payee. IG Ex. 3. SSA now alleges that Respondent Ortega improperly converted \$15,037 of her son’s benefits to her own use. Respondent Ortega denies any wrongdoing and claims that she has always acted in her son’s best interests and “tried her best to comply with the very complicated Social Security rules regarding her son’s benefits.” P. Br. at 1.

The parties agree that an in-person hearing is not necessary and that the case may be decided based on their written submissions. Petitioner and Respondent’s Joint Motion (December 27, 2016). The parties have submitted briefs (OIG Br.; Resp. Br.) and

exhibits. The IG submitted 17 exhibits (OIG Exs. 1-17), but withdrew OIG Ex. 16. Respondent submitted 24 exhibits (Resp. Exs. 1-24), including the written declaration of Tracy Hurtado (Resp. Ex. 24), asking that it be admitted by agreement of the parties.

In the absence of any objections, I admit into evidence OIG Exs. 1-15, 17 (including OIG Ex. 8A) and Resp. Exs. 1-24. *See* Order Summarizing Prehearing Conference at 2.

Issues

The issues before me are: 1) while acting as representative payee for her son, did Respondent Ortega knowingly convert to improper uses her son's Social Security disability insurance benefits; and 2) if so, is the \$22,037 proposed penalty (\$7,000 CMP + \$15,037 assessment in lieu of damages) reasonable?

Discussion

1. *SSA has a basis for imposing penalties because, while acting as rep payee for her minor child, Respondent Ortega knowingly converted to her own use his Social Security disability insurance benefits.*¹

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 § 1129A(3); *see* 20 C.F.R. § 498.102(b).

On June 4, 2012, Respondent Ortega applied for Social Security disability insurance benefits on her own behalf and on behalf of her son, Angel. OIG Ex. 1. On July 5, 2012, SSA advised her of her responsibilities as rep payee and warned that she could be subject to monetary penalties if she did not comply with them. Among those responsibilities, SSA directed her to report any changes in her child's address (mailing or residence) and to report any change in custody, i.e., if the child "leaves your care or custody." OIG Ex. 2 at 3, 4.

Shortly thereafter, Respondent Ortega was awarded benefits. In a notice dated July 15, 2012, SSA advised her that, effective April 2011, her son, Angel, was entitled to monthly child's benefits on her account and that she would be his rep payee. OIG Ex. 3 at 1. SSA reminded her that she was required to report any changes in the information she had provided, and it sent her "A Guide for Representative Payees." OIG Ex. 3 at 2; *see* Resp. Ex. 3. The agency also sent Respondent a \$10,675 check, representing Angel's

¹ My findings of fact/conclusions of law are set forth, in italics and bold, in the discussion captions of this decision.

retroactive benefits. Beginning August 2012, it deposited \$725 per month into the bank account she held on the child's behalf. OIG Ex. 3 at 1; OIG Ex. 4. As of January 31, 2013, SSA had paid Respondent Ortega \$15,037 in child's benefits.

Respondent's initial misrepresentation. The first problem with all of this is that Respondent Ortega lost custody of her child well *before* she even applied for benefits and well before SSA sent her his first check. Angel did not reside with her at any time while she acted as rep payee, and Respondent did not report that critical fact to SSA. Indeed, she affirmatively misled the agency about his living situation.

At the time Respondent Ortega applied for benefits, her former domestic partner, Angelica Gallardo, had custody of the child, and Respondent Ortega had limited, supervised visitation. OIG Ex. 10 at 5-6; OIG Ex. 11; OIG Ex. 17 at 1 (Gallardo Decl. ¶¶ 1, 2); Resp. Ex. 4 at 2. It seems that Ms. Gallardo learned about Angel's Social Security benefits when she was denied public assistance based on his purported income. OIG Ex. 9 at 1; OIG Ex. 17 at 2 (Gallardo Decl. ¶5). In January 2013, she contacted SSA and provided the agency with court documents establishing that she had primary custody of Angel. OIG Ex. 8 at 1-2 (Stokes Decl. ¶ 4); OIG Ex. 8A at 1; OIG Ex. 9 at 1, 2; OIG Ex. 10 at 6.

Court records establish that Ms. Gallardo had custody of the child from April 18 until May 13, 2011. OIG Ex. 11 at 2. On May 13, 2011, the parties agreed to share custody, and the court issued an order granting joint custody. However, Respondent Ortega violated the court order in July 2011, when she took the child to Mexico. The court awarded Ms. Gallardo custody effective *July 19, 2011*. Respondent Ortega was allowed limited, supervised visitation. OIG Ex. 11 at 2. Respondent Ortega returned to the U.S. in early September 2011. She was arrested and detained for about 36 days. When released on bond, she lived with Ms. Gallardo and Angel for a short time. According to the court reports, Respondent Ortega moved out at the end of *March 2012*. Resp. Ex. 4 at 1-2.

Thus, reliable evidence confirms Ms. Gallardo's assertions that she was Angel's custodial parent and that she and Respondent Ortega have not resided in the same household since before SSA awarded Angel's benefits. OIG Ex. 8 at 2 (Stokes Decl. ¶ 4). Ms. Gallardo also told SSA that, since July 2012, she had received no cash or other monetary assistance from Respondent Ortega on Angel's behalf and that she never gave Respondent Ortega custody of the child, not even temporarily. OIG Ex. 12. No reliable evidence refutes these claims.

SSA's investigation. Responding to Ms. Gallardo's accusations, representatives from SSA contacted Respondent Ortega. In an interview conducted on January 23, 2013, she answered questions posed by SSA Claims Representative Caitlin Stokes (nee Bryan). Her responses were contradictory, and many were verifiably false.

- She told SSA Claims Representative Stokes that she had custody of Angel; she later said that she and Ms. Gallardo shared custody. Neither claim was true. As noted above, court records confirm that she lost custody effective July 2011. Although she lived with Ms. Gallardo and Angel from about October 2011 through March 2012, she never regained custody and lived separate and apart from her son from late March on. OIG Ex. 8A at 1; Resp. Ex. 4 at 2.

Moreover, Special Agent Joseph Joyce went to the apartment building where Respondent Ortega lived from May 1, 2012 through April 30, 2013. He interviewed the apartment manager and Respondent Ortega's neighbors. All confirmed that Angel had not lived with Respondent during that time. OIG Ex. 13 at 3, 4 (Joyce Decl. ¶¶ 12, 13).

- With respect to how she spent her child's funds, Respondent Ortega told Claims Rep Stokes that she purchased a certificate of deposit in Mexico, valued at \$1700 to \$2700. But when Claims Rep Stokes told her that, pursuant to SSA policy, she would have to return the conserved funds, she claimed that she purchased the Mexican CD with "family funds." OIG Ex. 8 at 2 (Stokes Decl. ¶ 6); OIG Ex. 8A at 1. She also said that she bought Angel a bedroom set, and some expensive toys. OIG Ex. 8 at 2 (Stokes Decl. ¶ 6); OIG Ex. 8A at 1.
- She claimed that Ms. Gallardo knew Angel had been awarded benefits and that she had given Ms. Gallardo a total of \$5800 *in three lump sum payments*. She had no evidence that she had done so, not even ATM receipts or a bank statement. OIG Ex. 8 at 2 (Stokes Decl. ¶ 6); OIG Ex. 8A at 1.

Rep payee report. When Claims Rep Stokes spoke to Respondent Ortega in January, she directed her to submit her custody paperwork and receipts, and to complete a written statement (SSA Form 795) and a rep payee report (SSA Form 623) to account for the \$15,037 that SSA had paid her in child's benefits. OIG Ex. 8 at 2 Stokes Decl. ¶ 6). Respondent Ortega did not return the requested documents until April 25, 2013. OIG Ex. 8A at 2.

In the rep payee report, she checked "yes" that the beneficiary continued to live with her, although she then wrote in the word "partially." OIG Ex. 5 at 1. Again, this was false. That she had been awarded limited visitation did not qualify as his living with her, which she well knew or should have known. Significantly, although directed to do so, she did not explain her ambiguous answer nor provide the beneficiary's current address, suggesting a deliberate effort to withhold the truth. She also reported spending \$7,875 for Angel's food and housing and \$3,320 for "other things" (clothing, education, medical, dental, recreation, personal items). *Id.* In this section, she wrote in "even trips to Mexico[,] other trips." She indicated that she had saved none of the benefits. *Id.*

The Mexico trip, to which Respondent Ortega alluded, occurred in July 2011. She removed Angel from Colorado in defiance of a court order. When she returned, she was arrested on kidnapping charges. *See* OIG Ex. 8A at 2.

Ultimately, Respondent Ortega accounted for just \$11,195 of the \$15,037 that SSA had paid her, leaving unexplained a balance of \$3,842.

Respondent's additional claims. In a written statement, submitted with her rep payee report, Respondent Ortega conceded that she kept at least some of her son's money for herself, paying herself "the daily life expenses for my son" back to the years 2010 and 2011 "since that is what retroactive means. . . ." She wrote that she spent the rest of the money on a bedroom set, TV, bed linens, and some toys, totaling "about \$1,200." OIG Ex. 6 at 1. She produced an April 2012 receipt for furniture purchases, including the items she claimed she bought for Angel – a high definition television and a queen-size bed and mattress. OIG Ex. 7 at 2, 4.

She then wrote, "I was still in and out of the house and I either was spending overnight with them at their place or they would spend the night at my place," apparently referring to Angel and Ms. Gallardo, with whom Angel was then living. She also claimed that she gave Ms. Gallardo a total of \$5,000 in two lump sums of \$2,500, the first because Ms. Gallardo lost her house and needed a place to live, and the second so that she could buy furniture. She claimed that she gave Ms. Gallardo an additional \$2,000 so that she could buy a car. Respondent Ortega wrote that all of these expenses were related to her son. OIG Ex. 6.

Special Agent Joyce interviewed Respondent Ortega on October 17, 2013. This time she claimed that, from July 2012 through January 2013, she paid Ms. Gallardo *four* cash lump sum amounts. She also claimed that she gave her \$600 a month in child support, \$2,500 to \$3,500 for a new apartment and furniture, and money for a new car. OIG Ex. 13 at 4-5 (Joyce Decl. ¶ 14b). She conceded that review of her banking information would not show any payments. She claimed that she cashed her own and Angel's checks for retroactive benefits, and kept the cash in a bag in her home.²

Respondent also offered inconsistent and incomplete explanations as to who posted her \$4,000 bail following her arrest on charges of kidnapping. When Special Agent Joyce suggested that Ms. Gallardo paid her bail (thus contradicting her claim that Ms. Gallardo was penniless but for the funds Respondent Ortega provided), Respondent Ortega

² Respondent's counsel told Special Agent Joyce that, in the state custody proceedings, she would subpoena Ms. Gallardo's financial records. She opined that those records would reflect deposits of the cash Respondent claimed to have given her. OIG Ex. 13A at 1. Respondent has not produced any such records.

claimed that she paid the money herself. When asked the source of those funds, she said that Ms. Gallardo paid the money initially and that she repaid both Ms. Gallardo (\$2,000) and the bail bondsman (\$2,000). Respondent Ortega also claimed that she was receiving \$2,000 per month in worker's unemployment insurance from her prior employer (a job she left in 2010). OIG Ex. 13 at 5 (Joyce Decl. ¶ 14d).³

Respondent's section 1129 violations. Based on all of this, I agree that Respondent Ortega knowingly converted to her own use her son's disability insurance benefits and that she deliberately and repeatedly misled SSA about her son's residence and how she spent his benefits. Specifically:

- She repeatedly and falsely claimed custody of the child, so that SSA named her representative payee with access to his benefits;
- She falsely claimed that she put Angel's money into a Mexican CD, withdrawing the assertion when told that she would have to return the money;
- She has never credibly accounted for the \$15,037 she received as Angel's rep payee. Instead she offered multiple inconsistent and unsupported claims that she gave cash to Ms. Gallardo. But she produced not one shred of corroborating evidence in support of any such transaction, not even a bank withdrawal slip. She justified this complete absence of documentation by claiming that she cashed Angel's lump sum benefit check and kept those funds, along with her own, in a bag, doling it out to Ms. Gallardo. I find this dubious, particularly since the evidence shows that, at least as early as August 2012, she had a bank account into which SSA deposited Angel's monthly benefits (approximately \$725 per month from August 2012 through January 2013). IG Ex. 3 at 3-8. She has not explained why she cannot obtain bank receipts for withdrawals of the funds deposited directly into Angel's bank account.

And if, in fact, she kept her money and Angel's in the same bag, she comingled their funds, which, because they did not live in the same household, violated federal regulations. 42 C.F.R. 404.2035(b).

Moreover, Claims Rep Stokes made a good point: court records document that Respondent Ortega and Ms. Gallardo had "a strained, tumultuous relationship." It is hard to believe that Respondent Ortega would willingly have given Ms. Gallardo large sums of cash without documentation. OIG Ex. 8A at 2; *see* OIG

³ But inasmuch as Respondent Ortega was disabled when she applied for benefits, she probably should not have been entitled to unemployment benefits, which generally require that the recipient be ready, willing, and able to work.

Ex. 11 at 5 (referring to “the level conflict and acrimony between the parties”); Resp. Ex. 4.

- In further support of her claim that every month she gave money to Ms. Gallardo, Respondent points to a financial statement Ms. Gallardo filed in the child custody proceedings. The statement indicates that she receives \$700 a month in Social Security benefits for the child. Resp. Ex. 10 at 2. But the statement was prepared and signed March 26, 2013, approximately two months *after* SSA named Ms. Gallardo the child’s rep payee, so she was receiving the child’s benefits directly from SSA when she filled out the form. OIG Ex. 9 at 1.
- Respondent admitted that she “repaid herself” for expenses she incurred in 2010 and 2011, including her 2011 trip to Mexico. First, as his parent, Respondent was legally obligated to support her child, and neither she nor Angel was eligible for benefits prior to April 2011. Under no circumstances, could she use his funds to repay herself for expenses that predated the effective date of his eligibility. *See* 20 C.F.R. § 404.2040(a).

With respect to repaying herself for expenses incurred when she absconded to Mexico with the child, I find this a misuse of beneficiary funds. Removing the child from the country in defiance of a court order cannot be considered in the beneficiary’s best interests. 20 C.F.R. § 404.2035(a). Moreover, she cannot reimburse herself for expenses related to an unlawful action.

- Respondent Ortega produced receipts, dated May 2, 2012, for a high definition television set and a bedroom set. OIG Ex. 7 at 1-3. She maintains that the purchases were for the child’s benefit. The timing of these purchases is suspect. She bought the items shortly after she moved out of Ms. Gallardo’s and Angel’s home and was, presumably, setting up her own household. At that time she did not have custody of the child and she was not allowed to take Angel to her home. Her visitation was limited to two hours, twice a week, at St. Vrain Family Center “or some other facility that is acceptable to the parties.” OIG Ex. 10 at 6. Thus, Angel would not even have had access to the purchases, so they were not used for the beneficiary’s “current maintenance.” *See* 20 C.F.R. § 404.2040(a). The family court did not relax its visitation order, allowing home visits, until six months later. IG Ex. 11 at 7. In any event, a queen-sized bed is hardly appropriate for a toddler.

Respondent defends herself by attacking Ms. Gallardo’s veracity, describing her as angry and vindictive, and, thus, unreliable. As is obvious from state court records, the two women have an acrimonious relationship; neither misses the opportunity to level venomous accusations against the other. But, as the above discussion establishes, Ms. Gallardo’s statements in this case are, for the most part, independently supported by

persuasive evidence. For her part, Respondent Ortega has come forward with virtually no reliable evidence establishing how she spent Angel's benefits.⁴ She concedes that, when she applied, SSA advised her that "she would have to provide proof that the monies were used for the support of her child," but complains that SSA's instructions did not specify "exactly what type of records were required to show that the money was spent for the benefit of the child." Resp. Br. at 7. I find this complaint disingenuous. Respondent has not run afoul of some abstruse record-keeping requirement; she has produced virtually *no records* establishing that she spent any portion of that \$15,037 for the support of the child.

Respondent also complains that she did her best to comply with complicated rules. In fact, the rules she violated were straight-forward: tell SSA the truth about your child's living arrangements and do not keep your child's benefits for yourself. Any complications were of her own making, beginning with her misrepresenting the child's living situation.

Finally, citing 20 C.F.R. § 404.2040, Respondent argues that, because she is Angel's biological parent, she is entitled to use his benefit money for herself, so long as his current needs are met. In fact, the regulation provides that, if the beneficiary's current needs are met, the rep payee may use part of the payments for the support of the beneficiary's *legally dependent* spouse, child, and/or parent. 20 C.F.R. § 404.2040(c). Inasmuch as Angel's custodial parent was applying for public assistance, it seems unlikely that his current needs were being met. But even if they were, Respondent was not his "legally dependent" parent. A three-year-old is simply not legally obligated to support his parent.

2. The IG proposes reasonable penalties: a \$7,000 CMP and \$15,037 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

⁴ I do not consider reliable Tracy Hurtado's written declaration, which seems to be based on hearsay and misinformation and is, in important respects, contradicted by the more reliable court records. For example, she implies that Ms. Gallardo gave Respondent written permission to take the child to Mexico. Resp. Ex. 24 at 2 (Hurtado Decl. ¶ 6). This claim is undermined by Respondent's criminal conviction on kidnapping-related charges. She claims that she lived with Respondent and Respondent's unidentified son (presumably Angel) from September 2012 until April 2014. Resp. Ex. 24 at 2 (Hurtado Decl. ¶ 12). This is belied by court records (OIG Ex. 11) and Special Agent Joyce's investigation. OIG Ex. 13 at 3, 4, (Joyce Decl. ¶¶ 12, 13).

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); 42 C.F.R. § 498.104.

The IG proposes a CMP of \$22,037 (reduced from \$25,037), which represents a \$7,000 penalty plus \$15,037 as an assessment in lieu of damages. *See* IG Ex. 15. These amounts are well within the IG’s statutory authority. The \$7,000 CMP (reduced from \$10,000) represents a fraction of the Respondent’s potential liability (\$35,000) for seven converted payments (the July check plus six subsequent bank deposits). The assessment in lieu of damages represents the amount of benefits Respondent Ortega converted to her own use, without adding to it any part of the statutorily-authorized enhancement.

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.

Two of these factors favor keeping the penalty low. First, Respondent Ortega has no history of prior offenses. Second, her financial disclosure form indicates that she has limited resources and income. Resp. Ex. 23.⁵

On the other hand, the remaining factors justify imposing maximum penalties. As the above discussion shows, from the time she applied for benefits, Respondent Ortega deliberately and repeatedly misled SSA as to Angel’s custody and residence. She was named rep payee based on those misrepresentations. When SSA staff investigated, asking her directly whether she had custody, she repeated the lie. With respect to how

⁵ Initially, Respondent Ortega did not return to the IG a financial disclosure form for its use in determining her ability to pay a penalty. Because she bears the burden of establishing that her financial condition prevents her from paying the penalty, the IG did not consider her financial condition when it assessed the \$10,000 CMP. *SSA v. Clara Sloan*, DAB CR1081 (2003); *Recommended Decision to Decline Review*, App. Div. Dkt. No. A-04-03 at 2 (Feb. 9, 2004 (finding “no basis to disturb the ALJ’s . . . legal conclusions.”)). However, during these proceedings she submitted the form, which shows that she has limited resources and income. Based on these representations, the IG lowered the CMP from \$10,000 to \$7,000.

she spent Angel's benefits, she has never adequately accounted for that money. Instead, she has offered multiple, inconsistent and incredible explanations.

Her degree of culpability is substantial and more than justifies the penalty imposed.

Conclusion

Respondent Ortega violated section 1129 of the Act when she improperly converted the beneficiary's disability benefits to her own use. She repeatedly misled SSA about child custody arrangements and how she spent his money. I therefore consider it reasonable to impose this relatively low CMP of \$7,000 and the \$15,037 assessment in lieu of damages, which merely requires her to return the money she misspent.

/s/
Carolyn Cozad Hughes
Administrative Law Judge