Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Social Security Administration, Inspector General,
Petitioner,

v.

Salvatore Cappetta,
Respondent.

Docket No. C-12-1302

Decision No. CR3260

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, Salvatore Cappetta.

I. Procedural History

The Counsel for the Inspector General (IG) of the Social Security Administration (SSA) notified Respondent, Salvatore Cappetta, by letter dated July 26, 2012, that the SSA IG proposed imposition of a CMP of $106,000 and an assessment of $95,167.20 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 Respondent failed to report to SSA that he worked while he received Social Security Disability Insurance Benefits (DIB) and while his children received children's benefits (CIB) from November 2002 through April 2011. SSA IG Exhibit (SSA Ex.) 17.

---

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

Respondent requested a hearing pursuant to 20 C.F.R. § 498.202, [2] through counsel, Charles J. Riether, by letter dated September 18, 2012. The case was assigned to me for hearing and decision and the parties were notified by letter dated October 16, 2012, that I would convene a prehearing conference by telephone on October 29, 2012 at 11:00 a.m. Eastern Time (ET). The parties were advised by email dated October 26, 2012, that the prehearing conference was rescheduled to November 5, 2012 at 11:00 a.m. ET due to the anticipated arrival of Hurricane Sandy. A prehearing conference was convened by telephone on November 5, 2012 at 11:00 a.m. ET. Counsel for the SSA IG participated but neither Respondent nor his attorney appeared. The substance of the prehearing conference is memorialized in my Scheduling Order & Notice of Hearing issued on November 5, 2012 (Scheduling Order).

The Scheduling Order set the hearing to be conducted by video teleconference (VTC) on March 5 and 6, 2013. The Scheduling Order also set the schedule for prehearing development. Respondent filed no objections to the Scheduling Order.

On January 4, 2013, the SSA IG timely requested that Respondent produce documents. Pursuant to the Scheduling Order ¶ III Respondent was required to respond not later than January 18, 2013.

Pursuant to ¶ IV of the Scheduling Order, SSA IG and Respondent were required to file lists of exhibits and witnesses and copies of proposed exhibits not later than February 1, 2013. On February 1, 2013, the SSA IG timely filed and served its list of proposed witnesses and exhibits and copies of proposed exhibits and requested subpoenas for three witnesses. Respondent did not file his lists of exhibits and witnesses or proposed exhibits as ordered. Pursuant to ¶ V of the Scheduling Order, the parties were required to file any objections to proposed exhibits and witnesses not later than February 19, 2013. Respondent filed no objections.

On February 12, 2013, I issued an order for Respondent to show good cause not later than February 22, 2013, why this case should not be dismissed for abandonment as counsel for Respondent had failed to appear at the prehearing conference and failed to comply with the Scheduling Order. On February 14, 2013, the SSA IG moved for dismissal for abandonment explaining that in addition to Respondent's failure to appear and file his exchange, he also failed to respond to the SSA IG timely request for production of documents in violation of ¶ III of the Scheduling Order. Pursuant to 20 C.F.R.

---

[2] References are to the 2011 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

§ 498.213(c), Respondent had 10 days or until February 25, 2013 to file a response to the motion. On February 19, 2013, I stayed further development of the case pending Respondent's response to my order to show cause, the SSA IG's motion to dismiss, and my subsequent ruling. As a result, the hearing set for March 5 and 6, 2013, was cancelled. On February 20, 2013, I issued an order for Respondent to show good cause not later than March 4, 2013, why Respondent's attorney and Respondent should not be sanctioned for failure to appear at the prehearing conference; failure to comply with the Scheduling Order; failure to respond to the SSA IG's Request for Production; and failure to defend this action.

On February 22, 2013, Respondent's attorney filed a pleading styled, "Respondent's Objection to Petitioner's Motion to Dismiss and or Sanctions." No other responses to my orders to show cause were received. Respondent's counsel asserted in the pleadings filed that: he represented Respondent pro bono and had done so since May 2012; Respondent's Social Security benefits were discontinued at some unspecified time and Respondent did not know why until Respondent received discovery responses from an unidentified party on January 18, 2013; Respondent had no witnesses to call at the hearing in this case other than those already noticed by the SSA IG; Respondent had no evidence of earnings; and Respondent denied the allegations that he was employed by Peter Cameron or paid wages. Respondent's counsel also stated that Respondent required additional time to review this case and respond to the SSA IG discovery request. Respondent stated that he was ready, willing, and able to cross-examine the SSA IG witnesses; and to permit further discovery related to or inspection of his home. Respondent's counsel represented that he personally suffered from symptoms of a health condition; and he continued to grieve due to the death of his wife in December 2010. Respondent requested that a new scheduling order be issued so that he could respond to the SSA IG discovery request and that the hearing be rescheduled.

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.

On April 15, 2013, I imposed sanctions against Respondent. My decision to impose sanctions included the following considerations: Respondent and counsel did not deny that there was no appearance on Respondent's behalf at the prehearing conference on November 5, 2012 and no explanation why there was no appearance; Respondent failed

to comply with my Scheduling Order; Respondent failed to respond to the SSA IG's request for production; it was necessary to stay development of this case to allow Respondent and counsel to show cause; and the hearing set for March 5 and 6, 2013 had to be postponed. I concluded that Respondent and his counsel's conduct clearly delayed case development, trial, and decision in this case. I also concluded that Respondent and his counsel negligently failed to defend this case or willfully failed to comply with my Scheduling Order, which had an adverse impact upon my docket and caused prejudice to the SSA IG due to the delay and need to address the complications Respondent caused. I concluded that, while Respondent's February 22, 2013 filing showed that Respondent had not abandoned his case, which would have required dismissal, a sanction was clearly appropriate to ensure that Respondent and his counsel did not cause further delay in this case, either negligently or intentionally. I did not consider the excuses offered by Respondent's counsel sufficient cause to excuse violations of procedures and my Scheduling Order. The fact that Respondent's counsel was receiving no fee for his services was no excuse. Respondent's counsel requested no clarification of the requirements of the Scheduling Order or relief from those requirements. Counsel's personal problems are no excuse for failure to provide adequate representation. The SSA IG urged that I dismiss Respondent's case as a sanction, or that I impose other sanctions authorized by the Act and regulations. But, I concluded that the severe sanction of dismissal was not appropriate at that time based upon Respondent's and his counsel's failings. However, I concluded that lesser sanctions were appropriate with the more severe sanction reserved for any future failures or misconduct. Counsel for Respondent was admonished that any further failures or misconduct may be grounds for imposing the more severe sanction against Respondent, for imposing costs and fees against Respondent's counsel, and may cause transmission of orders imposing sanctions to the Connecticut Judicial Branch Statewide Grievance Committee.

The following additional sanctions were imposed on April 15, 2013:

1. Respondent failed to file a list of proposed exhibits and waived the right to do so;

2. Respondent failed to file a list of proposed witnesses and waived the right to do so;

3. Respondent failed to file proposed exhibits and waived the right to do so; and

4. Respondent failed to file any objection to the SSA IG's request for subpoenas for Salvatore Cappetta, Elisabetta Cappetta, and Peter Cameron, and waived the right to do so.

I specified in my April 15, 2013 Order imposing sanctions that Respondent's rights to attend the trial with counsel or a representative, to confront and cross-examine all witnesses, and such other due process rights as are granted by the Act and regulations were preserved.

Also on April 15, 2013, I ordered Respondent to respond in proper form to the SSA IG's request for production of documents not later than May 3, 2013. I also ordered that the parties confer and recommend hearing dates by May 3, 2013. The SSA IG advised me on May 2, 2013, that the IG was available for hearing on July 16, 17, or 23, 2013. On May 3, 2013, Respondent advised me that he was available for a one day trial on July 16, 17, 18, or 19, 2013.

On May 7, 2013, I issued an Order setting the hearing for July 16, 2013. I also scheduled a final prehearing conference for July 8, 2013, and the filing of prehearing briefs for July 1, 2013. On July 8, 2013, I issued subpoenas for the July 16 hearing and the parties were provided notice of the specific hearing location. The final prehearing conference was convened on July 8, 2013. During the prehearing conference, Respondent orally moved for a 30-day postponement of the case to permit counsel for Respondent to obtain qualified co-counsel. Counsel for the IG orally opposed the motion citing prejudice secondary to any further delay in bringing this case to trial. Counsel for Respondent was instructed to file his motion for postponement in writing. On July 9, 2013, Respondent filed a written request for postponement of up to 90 days. On July 11, 2013, counsel for SSA IG filed a response to Respondent's motion for postponement, withdrawing the prior objection to a 30-day postponement but objecting to a 90-day postponement. The SSA IG also requested that sanctions be imposed against Respondent.

On July 11, 2013, I postponed the hearing set for July 16, 2013, and ordered that not later than July 16, 2013, counsel for the parties consult and file a joint status report advising me of their availability for a one-day hearing to be convened by VTC. I also ordered that Respondent respond to the IG's motion for sanctions not later than July 26, 2013. On July 26, 2013, Respondent submitted his response to the motion for sanctions and requested that the hearing be postponed for an unspecified period until Respondent could retain the services of Alan B. Rubenstein.

On August 7, 2013, counsel for the SSA IG advised me that despite her attempt, she was unable to confer with Respondent's counsel and she advised me of the IG's availability for hearing. Respondent failed to advise me of his availability for hearing. On August 27, 2013, I issued an order for Respondent to appear for a hearing on Wednesday, September 25, 2013 and for a final prehearing conference on Thursday, September 19, 2013. I advised Respondent that his failure to appear would be treated as a waiver of his right to further participation in these proceedings.

The final prehearing conference was convened in this case by telephone on September 19, 2013. Counsel for Respondent advised me that on September 17, 2013, he filed a motion for postponement, a request to take a deposition, and a motion to amend Respondent's witness list and to submit medical evidence. Counsel for the IG confirmed that she had received Respondent's motions. Counsel for the IG orally advised me that the IG opposed each motion. I advised the IG's counsel that her oral opposition was adequate under the circumstances and no written opposition need be filed. Respondent requested that the hearing scheduled for September 25, 2013, be postponed for 120 days to permit him to obtain other counsel and to permit him to engage in discovery. Because the motions were not received by my office, I requested that Respondent's counsel forward copies by email so that I could consider the motions and issue a ruling.

On September 20, 2013, Respondent filed a motion to admit some of his medical records. On September 23, 2013, I issued a ruling denying Respondent's motions for a postponement, to amend his witness and exhibits list, to file additional exhibits, and to take a deposition or for a subpoena duces tecum. I also ordered Respondent and his counsel to appear at the hearing on September 25, 2013. My rationale is set forth in detail in my ruling dated September 23, 2013. Respondent filed another motion on September 23, 2013, offering additional medical evidence and the motion was denied during the hearing on September 25, 2013. Transcript (Tr.) 34-42.

On September 25 and November 20, 2013, a hearing was convened by VTC. The SSA IG appeared by VTC from Baltimore, MD; Respondent appeared by VTC from New Haven, Connecticut; I participated by VTC from Kansas City, MO; with the court reporter and Attorney Advisor Whitney Fisler participating from my office in Washington, DC. Joscelyn Funnié, Esquire, appeared on behalf of Petitioner, the SSA IG. Respondent was represented by Charles Riether. A transcript of the proceedings was prepared. The SSA IG offered SSA exhibits (SSA. Exs.) 1 through 19. Tr. 22. SSA Exs. 1 through 12; SSA Ex. 13 pages 1 through 3, and 9 through 12; SSA Exs. 14-15; and SSA Ex. 17 were admitted. Tr. 32, 50-51, 71, 89, 95, 107, 109-110, 115. No exhibits offered by Respondent were admitted as substantive evidence but any documentary evidence submitted by Respondent remains with the record for any subsequent review. Tr. 34-42. The SSA IG called the following witnesses: Chad Bungard, counsel to the SSA IG; Respondent, Salvatore Cappetta; Elisabetta Cappetta, Respondent's wife; Peter Cameron, Respondent's purported employer; Gulrukh Niazi, SSA Claims Representative; and SSA IG Special Agent (SA) Sarah Hanson.

The SSA IG filed a post-hearing brief (SSA Br.) on February 25, 2014. Respondent also filed his post-hearing brief (R. Br.) on February 25, 2014. The SSA IG filed a post-hearing reply brief on March 21, 2014. Respondent failed to timely file a reply brief. After inquiry by my staff, Respondent's counsel advised staff by email on April 17, 2014 that further reply was waived. The record was then considered closed and 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 –
>
> > (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,
> >
> > (B) makes such a statement or representation for such use with knowing disregard for the truth, or
> >
> > (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—
>
> (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:
>
> (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
>
> (2)(i) Knew, or should have known, that the statement or representation was false or misleading, or
>
> (ii) Made such statement with knowing disregard for the truth; or
>
> (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 he 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.

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 he 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 he 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.

---

[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.

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

a. Allegations

Counsel to the SSA IG, B. Chad Bungard, notified Respondent by letter dated July 26, 2012, that the SSA IG proposed to impose against Respondent a CMP of $106,000 and an assessment in lieu of damages of $95,167.20, a total penalty of $201,167.20. The SSA IG notice stated that the CMP was based on Respondent's failure to disclose that during the period November 2002 through April 2011, he worked for Cameron Construction, Inc. The SSA IG notice indicates that the IG determined that Respondent committed 53 separate violations, one violation for each of the 53 months beginning December 2006 and continuing through April 2011, that he failed to report that he worked for Cameron Construction, Inc. The notice explains that there may be no CMP or assessment for withholding or failure to report material facts prior to December 2006, as the effective date of section 1129 of the Act and 20 C.F.R. § 498.102(a)(3) was November 26, 2006. 71 Fed. Reg. 28574, 28575 (May 17, 2006). The SSA IG notice indicates that the assessment was calculated as twice the $47, 583.60 in DIB payments received by Respondent and his children during the period December 2006 through April 2011. SSA Ex. 17 at 1.

The SSA IG alleges before me that Respondent committed 53 separate violations under section 1129(a)(1) of the Act during the period December 2006 through April 2011, by failing to disclose to SSA that he worked for Cameron Construction while he and his children received DIB and CIB payments. The SSA IG further alleges that Respondent and his children improperly received $47,583.60 of DIB payments during the period December 2006 through April 2011. The SSA IG requests that I approve a combined CMP and assessment of $201,167.20. SSA Br. at 1-2.

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

SSA records reflect that SSA determined that Respondent was disabled and entitled to DIB with an onset of disability on January 15, 1997, due to rheumatoid arthritis, heart condition, and headaches. He reported being self-employed doing construction in 1996,

1997, 1998, and 1999, with net income over $400 only in 1997 and 1996. On October 26, 1998, Respondent was contacted and reported owning a construction business; he reported that he no longer ran the business; a former employee ran the business; and he went to the job less than 15 hours per month just to see how it was going. SSA Ex. 1 at 1-2, 6.

The SSA IG does not dispute that Respondent is medically eligible for benefits and the SSA IG stipulated to his disability based on medical factors. Tr. 37-40.
On June 16, 2009, an anonymous concerned citizen contacted SSA and reported that the lifestyle of Respondent's family was questionable because: Respondent was in the process of completing a large home renovation, including an apartment and an above ground pool; Respondent received disability benefits and both he and his wife earned wages; Respondent bragged about the money he earned working for Peter Cameron Construction for the last 10 years, money that was paid under-the-table; and Respondent worked daily from 7:30 a.m. to 4:30 p.m.

SSA IG presented Reports of Investigation prepared by SA Hanson that reflect that an investigation of Respondent was initiated on June 24, 2009, officially opened and assigned to her on July 1, 2009, and continued until November 21, 2011. SSA Exs. 3, 5-14. SA Hanson determined based on SSA records that Respondent was found disabled due to erythematous conditions (includes discoid lupus), based on an application filed September 15, 1998, with a date of entitlement of September 1997; and that he had no reported earnings for 1999 through 2008. On July 16, 2009, she had Respondent's record flagged to reflect that there was an open SSA IG investigation assigned to her and that no action was to be taken on the case, including no notices and no contacts with the Respondent. SSA Ex. 3 at 2-3. SA Hanson located records for Peter Cameron and his businesses, which included Cameron Construction and Remodeling. SA Hanson determined that Respondent's wife and children received benefits on his account at one time but none were in pay status on July 17, 2009, when she inquired. SSA Ex. 3 at 4-5. SA Hanson learned that no review of Respondent's work had been done since his initial application; SSA had not sent Respondent any notices regarding work or request for work history and Respondent had reported no work activity; and no continuing disability review had been done. SSA Ex. 3 at 7. SA Hanson determined that Respondent's wife, Elisabetta Cappetta received $253 in benefits from 1997 through 2005. She determined that the following children of Respondent received benefits during the periods indicated but she did not state the amount of benefits paid each child: Rosanna Cappetta, September 1997 to November 2007; Daniela Cappetta, September 1997 to June 2005; Aniello Cappetta, September 1997 to November 2003; Salvatore Cappetta, Jr., September 1997 to June 2001. SSA Ex. 3 at 7-8.

On July 27, 2009, SA Hanson received photographs of Respondent and his wife, and Peter Cameron and his wife from the Connecticut Department of Motor Vehicles (DMV). She also obtained information from the DMV regarding the vehicles owned by Respondent and his wife, the Cameron's, and Cameron Construction. SSA Ex. 5 at 2.

On August 26, 2009, SA Hanson conducted surveillance of Respondent while SA Kevin Rogers conducted surveillance of Peter Cameron. SA Hanson began her surveillance at Respondent's home at about 6:30 a.m. She noted that the home had no siding but rather a house-wrap material like Tyvek® and appeared to be under a remodel or construction; she noted an above ground pool; and she observed a three car garage with a room above that appeared to be under construction. She saw Respondent water the lawn. She observed Respondent move a red Chevy Avalanche pickup to a different location on the property. When a small black sedan left Respondent's driveway, she drove her surveillance vehicle around the block and when she returned the pickup was gone. Approximately 16 minutes later the pickup returned driven by Respondent with either a large white window or a bathtub on the back. Subsequently, she saw Respondent measuring the large white item in the bed of the pickup. She ended the simultaneous surveillances at 8:30 a.m. At 9:57 a.m. she drove by Respondent's residence and saw him leaning out of a window in the garage and the large white item was still on the pickup. SSA Ex. 6.

SA Hanson and SA Stephen Brown interviewed Peter Cameron on November 6, 2009. SA Hanson's Report of Investigation reflects that Peter Cameron identified Respondent from a photograph. Peter Cameron told SA Hanson that: Respondent worked for him for approximately the past eight years; Respondent was paid by the job; Respondent worked three to five hours per day when he worked; the amount of pay depended upon the job and could be $50, $100, or $500 per job; Respondent would do any type of work; Respondent could work several weeks in a month and make $700 to $800 or more; he paid Respondent cash; he paid Respondent from $150 to $1,500 per week depending upon the job but that he did not pay Respondent $20,000 or $30,000 in a year. SSA Ex. 7 at 1-3; Tr. 122-25. On February 23, 2010, SA Hanson and SA Brown interviewed Peter Cameron again. SA Hanson reported that Peter Cameron said that Respondent's work for him included tiling backsplashes, walls, and floors; hanging doors; trim work, framing, and taping sheetrock. Peter Cameron also stated that he no longer heard from Respondent, who did no work for him after the investigators first came around on November 6, 2009. SSA Ex. 9 at 2.

SA Hanson and SA Brown interviewed Respondent on November 6, 2009. SA Hanson's report reflects that Respondent told her that he suffers from rheumatoid arthritis and lupus and he had a stroke the prior year. Respondent stated that he works once in a while doing little things and, if there is heavy work, he has friends who help. Respondent stated that he would make a couple hundred dollars and maybe he could work a few hours. SA Hanson reported that Respondent told her that he worked for Peter Cameron

once in a while, doing little things and he had done so for years. SSA Ex. 7 at 4-6; Tr. 116-22. SA Hanson and SA Brown continued their interview of Respondent on November 9, 2009. SA Hanson reported that during this second interview, Respondent stated that his business dissolved in 1998; he did not work after 1998; he never went back to work; but he recently started helping out a friend; he denied being paid cash for work except he might be given $10 or $20 to buy cigarettes. An attorney, Vincent Gallo, entered the interview room and a designation of representation was executed. Respondent made a sworn statement. SSA Ex. 8 at 1-4; Tr. 86-87. In his sworn statement, Respondent stated that he had not been employed from 1998 to November 9, 2009, the date of the statement. SSA Ex. 8 at 6. In response to questions by SA Hanson, Respondent stated that he helped out Peter Cameron because Cameron helped him with his house; he was never paid by Cameron but he did receive a gift certificate for a couple hundred dollars from Cameron. Respondent also stated that Peter Cameron lied. SSA Ex. 8 at 4; Tr. 125-30.

SSA determined that Respondent's disability ceased effective November 1, 2010, with the last payment of DIB on January 1, 2011. SSA Ex. 13 at 9-11. SSA determined that Respondent was overpaid DIB in the amount of $85,325.10 for the period November 2002 through April 2011, based on the determination that Respondent was paid $1,500 per month during an eight year period that began on November 2001. SSA Ex. 11; SSA Ex 12 at 10. SSA also determined that Respondent's children were overpaid child benefits in the amount of $24,377.00. SSA Ex. 12 at 10.

SA Hanson testified in response to my questions that she asked Peter Cameron general questions. SA Hanson surmised based on Cameron's responses to general questions that Respondent had worked for him on and off for eight years, he paid Respondent cash, and the amount paid depended upon the job and varied from $150 to $1500 per week. Mr. Cameron was not asked and did not disclose how much he paid Respondent over the course of a year. But he denied paying Respondent $20,000 to $30,000 per year. SA Hanson admitted in response to questions from Respondent's counsel that she definitely did not know how much Respondent was paid by Mr. Cameron. Tr. 154-58. In response to my questioning, SA Hanson indicated that an analysis of Respondent's and his family's reported income, resources, liabilities, and expenses did not reflect that Respondent was receiving significant amounts of unreported cash income. Tr. 178-83.

Respondent testified that he met Peter Cameron in 2000, and they became friends. Tr. 248. He testified that he never worked for Peter Cameron but he gave him construction related advice. Tr. 250-51. He testified that he did do little things such as going to get coffee and cigarettes. He denied telling SA Hanson that he used to do things for Cameron or that he worked for Cameron and that if heavy work was involved friends helped. He admitted that he received $50 to $100 when doing things for Cameron but stated the money was a gift. He testified that Peter Cameron gave him a gift at Christmas and also when Respondent went to Italy. Tr. 253-55. Respondent denied that he worked

but agreed that he knew that if he worked he had to report the work to SSA. Tr. 301-02. On cross-examination Respondent denied working for Peter Cameron but admitted that he received minimal gifts from him. Tr. 315.

Elisabetta Cappetta, Respondent's wife, testified that Respondent did not work for Peter Cameron. Tr. 322-23, 333.

Peter Cameron testified that he has known Respondent for 15 years, having met him through a mutual friend. Tr. 344. Cameron testified that he and Respondent were friends but that they have not spoken due to the investigation by SSA. Tr. 344-455. At hearing he denied that Respondent ever worked for him but testified that Respondent would show-up at job sites and run to the store for him if he needed materials. Tr. 345-47. He denied paying Respondent wages but by running errands for him Respondent was paying back for work Cameron did on his house. Tr. 350. Peter Cameron testified that sometimes he called Respondent and requested his help and sometimes Respondent just showed-up. Tr. 350-51. He testified that he gave Respondent gifts at Christmas; he gave him money for his kids' birthdays; and he gave him a couple hundred bucks when he went to Italy. Tr. 352. He also gave Respondent money to go get coffee and donuts and for the gas Respondent used going to the store. Tr. 352. He denied telling SA Hanson that Respondent did tiling, taping, sheetrock, backsplashes, grout or mortar work. Tr. 353-54. On cross-examination, Mr. Cameron testified that he did not pay Respondent wages, by check or otherwise. Tr. 355.

Gulrukh Niazi, an SSA Claims Representative, testified that she determined that Respondent had worked based on the investigator reports and she input the information to stop his receipt of benefits. Tr. 365, 370-74. She also determined that Respondent was engaged in substantial gainful activity. She testified that to qualify as substantial gainful activity pay for work had to be $940 per month in in 2008 and $980 per month in 2009, and that was the limit on how much an individual could earn per month and still be entitled to receive DIB payments. She testified that she determined the amount of Respondent's earnings based on the statements of Peter Cameron to the investigators. Tr. 375-77. Her opinion that Respondent engaged in substantial activity is not credible as the evidence of record, including the statements of Cameron as recorded by the investigators, does not support a finding that Respondent actually earned more than the substantial gainful activity amount or an equivalent in any month. The evidence is also insufficient to show that Respondent's work for Cameron was substantial gainful activity based on either earnings or level of activity.

SSA IG failed to offer any admissible evidence of the monthly or total amount of DIB payments to Respondent or the CIB payments for his children for the period of December 2006 to November 6, 2009, the period in issue. SSA IG offered copies of an email marked as SSA Ex. 16. However, Respondent's objection to the document for lack of authentication was sustained subject to the document being reoffered with a proper

foundation. Tr. 28-33. The SSA IG failed to reoffer the document. The SSA IG alleges in the July 26, 2012 notice of proposed CMP and assessment that Respondent and his children improperly received $47,583.60 in DIB and children's benefits from December 2006 through April 2011. Respondent does not concede that either his DIB or the CIB payments were improper. The SSA IG evidence does not support the amount alleged in the July 26, 2012 notice.

There is no dispute that there is no evidence of work activity after November 2009. Tr. 104.

c. Analysis

The SSA IG proposes to impose a CMP of $2,000 per month for each of the 53 months from December 2006 through April 2011, during which Respondent failed to report that he worked for Peter Cameron, a total CMP of $106,000. The SSA IG also proposes an assessment in lieu of damages in the amount of $95,167.20, twice the $47,583.60 amount of DIB and CIB payments Respondent and his children 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. 421. 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). However, Respondent does not defend on the basis that he did not know what activity qualified as work that he had to report. In fact, he admitted at hearing that he knew if he worked, he was supposed to report to SSA. Tr. 301-02.

Respondent's argument is that he did no work for Cameron Construction or Peter Cameron. Respondent's argument is not persuasive. Respondent admitted that he ran errands for Peter Cameron and that he received money, items of value, or in kind labor on his house from Peter Cameron. Tr. 253-55, 315. Therefore, I conclude that Respondent did engage in some gainful work activity for Peter Cameron. The evidence does not show that the work rose to the level of "substantial gainful activity;" or when and how frequently gainful work activity was actually performed. The SSA IG conceded at hearing that no gainful work activity was performed after about November 6, 2009. 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 he 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 him 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 January 15, 1997 (SSA Ex. 1 at 1-2); which is more than five years before November 2002, the earliest date that the SSA IG alleges Respondent engaged in gainful work activity that he failed to report (SSA Ex. 17). 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 he was no longer disabled, his 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 his work activity for Cameron Construction 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).[4]

---

[4] Section 221(m) of the Act does not relieve Respondent of his 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 he engaged in substantial gainful activity.

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.

(d) There is no right to appear personally before the DAB, or to appeal to the DAB any interlocutory ruling by the ALJ.

(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.