

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

The Inspector General of the Social Security Administration,

v.

Carolyn Cole,

Respondent.

Docket No. C-12-1154

Decision No. CR3150

Date: March 12, 2014

DECISION

The Inspector General (I.G.) of the Social Security Administration (SSA) notified Respondent, Carolyn Cole, that he proposed to impose a civil monetary penalty and assessment on her because she withheld disclosure of her alleged common law marriage from SSA while she received Social Security widow's insurance benefits (WIB). Respondent disputed the I.G.'s allegations and filed a request for hearing. Because I find that Respondent was not common law married by February 1, 2005, I conclude Respondent did not withhold disclosure of a material fact related to her WIB. Therefore, I deny the I.G.'s proposal to impose a penalty and assessment on Respondent.

I. Background and Procedural History

Respondent married James Keith Cole in March 1964. September 12, 2013 Hearing Transcript (Tr.) 61; SSA Exhibit (Ex.) 1, at 1. She was married to him until he passed away on September 20, 1999. Tr. 62; SSA Ex. 2.

On December 17, 2004, Respondent filed an application for WIB (first WIB application) based on Mr. Cole's Social Security record. Respondent indicated on the application that she was last married to Mr. Cole. By signing the application, Respondent agreed to promptly notify SSA if she remarried and indicated that all of the statements made on the

application were true. SSA Ex. 3, at 19-21. SSA approved Respondent for WIB. SSA Ex. 3, at 67.

On March 17, 2011, Respondent filed an application for WIB (second WIB application) based on a common law marriage between her and Alex John Moore; the application indicated that the marriage commenced on July 10, 2003. SSA Ex. 3, 16-18. On April 18, 2011, SSA approved Respondent's WIB application and started to pay Respondent benefits based on Mr. Moore's Social Security record rather than Mr. Cole's record. SSA Ex. 3, at 64.

In June 2011, Brian Cooper, the SSA claims representative (CR) who took Respondent's second WIB claim, made a "Fraud or similar fault determination or referral" asserting that Respondent's common law marriage in 2003 precluded Respondent from receiving WIB on Mr. Cole's record. SSA Ex. 3, at 67-68. Specifically, CR Cooper indicated that Respondent misrepresented on her first WIB application that she was not married when she was common law married to Mr. Moore and, because the common law marriage occurred before Respondent turned 60, Respondent should not have received any benefits on Mr. Cole's record. SSA Ex. 3, at 67-68. CR Cooper's referral resulted in an I.G. investigation.

The I.G. special agent's investigation primarily consisted of obtaining Respondent's second WIB application with supporting documents and SSA computer records, and conducting an interview with Respondent. SSA Ex. 3. In February 2012, the I.G. initiated contact with Respondent as part of the civil monetary penalty (CMP) process and Respondent, through counsel, responded. SSA Exs. 5-7. On July 19, 2012, the I.G. sent a notice to Respondent proposing to impose a CMP on Respondent of \$51,000 and an assessment in lieu of damages of \$96,482. SSA Ex. 8. The CMP notice accused Respondent of falsely stating in her first WIB application that she was not married when she was married to Mr. Moore and that Respondent failed to subsequently report her marriage to Mr. Moore while receiving WIB benefits on Mr. Cole's Social Security record. SSA Ex. 8, at 1. Although the I.G. acknowledged that Respondent's alleged false statement in the first WIB application was no longer actionable because it was outside the statute of limitations, the I.G. concluded that an appropriate CMP was \$1,000 per monthly benefit payment from December 2006 through February 2011 because Respondent failed to report her common law marriage during that time. SSA Exs. 8, at 2; 10, at 2-3. Further, the I.G.'s proposed assessment was calculated as one and a half times that of the \$64,282 Respondent received in WIB benefits from December 2006 to February 2011. SSA Exs. 8, at 2; 10, at 3.

In response to the July 19, 2012 CMP notice, Respondent, though counsel, filed a request for hearing before an administrative law judge and an "Answer." SSA Ex. 9.

Respondent's Answer stated that Respondent was common law married in August 2009 to Mr. Cole, but that Respondent mistakenly indicated on the second WIB application

that July 10, 2003, was the date of the common law marriage; Respondent asserted that July 10, 2003, is the date Respondent initially met Mr. Moore. SSA Ex. 9, at 3.

On September 5, 2012, I held a prehearing conference with the parties' counsel and summarized the substance of that conference in my September 5, 2012 Order Scheduling Submissions of Briefs and Documents. On March 14, 2013, I issued an order directing the parties to submit the written direct testimony for all of their proposed witnesses with the exception of Respondent, who, because she was called as a witness for both parties, would provide direct testimony in person. *See* 20 C.F.R. § 498.216(b). Both parties submitted written direct testimony for its witnesses. I held a hearing in this case on September 12, 2013, in which I heard testimony from Respondent and Lora Upshaw, Respondent's daughter. I admitted the parties' proposed exhibits into the record either before or during the hearing (SSA Exs. 1-12 and R. Exs. 1-5). Following the hearing, the parties submitted post hearing briefs and replies to those briefs. This matter is now ready for decision. 20 C.F.R. § 498.220(c).

II. Issue

Whether Respondent withheld disclosure of a material fact for use in determining a continuing right to or amount of Social Security benefits or payments, which Respondent knew or should have known was material for such use and that such withholding was misleading. 42 U.S.C. § 1320a-8(a)(1)(C).

III. Jurisdiction

Individuals against whom the I.G. proposes to impose a CMP have a right to a formal hearing on the record before the CMP is imposed. 42 U.S.C. § 1320a-8(b)(2). Respondent filed a timely request for an administrative law judge hearing. 20 C.F.R. § 498.202. Departmental Appeals Board administrative law judges adjudicate SSA CMP cases. *See* 20 C.F.R. § 498.201 (definition of *ALJ*). Therefore, I have jurisdiction to decide this case.

IV. Findings of Fact, Conclusions of Law, and Analysis¹

SSA administers the Social Security Act's old age and survivors insurance benefit payments. Widows who meet certain criteria may receive WIB. 42 U.S.C. § 402(e). Except for widows who seek disability benefits, a widow must not have remarried before the age of 60 in order to be eligible for WIB. 20 C.F.R. § 404.335(e). The law of the state in which the widow's deceased husband maintained a permanent home when he

¹ My findings of fact and conclusions of law are set forth in italics and bold font.

died determines whether the widow was married for Social Security purposes. 20 C.F.R. §§ 404.303 (definition of *permanent home*), 404.344-45.

The present case involves two WIB applications Respondent filed with SSA based on the records of Messrs. Cole and Moore. The issue as to whether Respondent is liable for a CMP and/or assessment turns on whether Respondent and Mr. Moore were common law married under Kansas law and, if so, from what date was the common law marriage effective. There is no dispute that Respondent never informed SSA of a common law marriage until she filed her second WIB application in 2011. Tr. 57. It is also clear from the record that SSA placed Respondent on notice when filing the first WIB application that she needed to disclose any marriage occurring before or after she applied for WIB. SSA Ex. 3, at 20. Therefore, if Respondent was common law married before she turned 60 years old on February 1, 2005, then she might be liable under 42 U.S.C. § 1320a-8(a)(1)(C) for withholding a material fact related to the determination of Respondent's continued entitlement to WIB on Mr. Cole's account. However, if Respondent was never common law married, or was common law married after February 1, 2005, then Respondent is not liable for a CMP or assessment because Respondent either had no obligation to report a non-marriage or Respondent's common law marriage was no longer a material fact in the determination of her continued right to benefits. See 20 C.F.R. § 404.335(e)(1) (marriages after 60 years of age do not affect entitlement to WIB).

In order for me to decide whether a common law marriage between Respondent and Mr. Moore existed on February 1, 2005, or earlier, I must determine whether the courts where Mr. Moore was domiciled at the time of his death would have considered Respondent to be "validly married." 42 U.S.C. § 416(h)(1)(A)(i); *Cf. Keen v. Keen*, 201 U.S. 319, 321 (1906) ("the question [as to] what facts constitute a common-law marriage is purely a local one"). There is no dispute that at the time of his death, Mr. Moore had his permanent residence in Kansas. SSA Ex. 4. Therefore, I must apply Kansas case precedent to determine whether a Kansas court would have considered Respondent common law married to Mr. Moore. See e.g., Social Security Ruling (SSR) 88-14 (performing analysis using relevant state court cases to determine whether an individual was common law married).²

The I.G. has the burden of proving by a preponderance of the evidence that a common law marriage existed on or before February 1, 2005. 20 C.F.R. § 498.215(b); see also *Driscoll v. Driscoll*, 552 P.2d 629, 632 (Kan. 1976) ("The burden of proving a common law or consensual marriage rests upon the party asserting it."); *Cf. SSR 87-5c* (applying state law to conclude that SSA had the burden of overcoming a state law presumption in a case involving the validity of a second marriage).

² SSRs represent binding interpretations and precedent that the Commissioner of Social Security has adopted. 20 C.F.R. § 402.35(b)(1). SSRs may be found on the internet at: http://ssa.gov/OP_Home/rulings/rulings.html.

It is important to note the issues that are not part of my consideration as to whether Respondent is liable for a CMP and/or assessment. Although the I.G. asserts that Respondent falsely stated in her first WIB application filed in 2004 that she was not remarried, this allegation is barred by a six-year statute of limitations. 42 U.S.C. § 1320a-8(b)(1). Further, the I.G. did not base its proposed CMP and assessment on Respondent's second WIB application. Therefore, any question as to the truthfulness of the information in that application cannot serve to uphold a CMP and/or assessment in this case.

A. Respondent was not common law married to Alex John Moore on or before February 1, 2005.

“The validity of common-law marriages has long been recognized in [Kansas]. The basic elements essential in establishing the existence of such marriage relationship are: (1) capacity of the parties to marry, (2) a present marriage agreement, and (3) a holding out of each other as husband and wife to the public.” *Sullivan v. Sullivan*, 413 P.2d 988, 992 (Kan. 1966). “Generally, the existence of such a marriage is a fact to be proved as other facts are.” *Driscoll*, 552 P.2d at 632.

As fully explained below, I find based on the evidence of record that Respondent and Mr. Moore were not common law married before February 1, 2005, under the applicable standard provided in Kansas case law.

1. Respondent and Alex John Moore had the capacity to marry prior to February 1, 2005.

In the state of Kansas,

Capacity to marry relates to whether or not a legal impediment exists to entering into a marriage contract. Accordingly, the term “capacity to marry” involves such diverse matters as mental or physical capacity, the absence of a spouse, whether a marriage would be incestuous, and the party being of sufficient age to marry.

Estate of Hendrickson, 805 P.2d 20, 21 (Kan. 1991).

The evidence of record indicates that after September 20, 1999, neither Mr. Cole nor Respondent had any impediment to marry. Mr. Cole's previous marriages appear to have ended in divorce, the latest of which ended on January 1, 1999. Respondent's only marriage ended on September 20, 1999, when Mr. Cole passed away. Further, it is clear that both Respondent and Mr. Moore were old enough to marry. SSA Exs. 3, at 19; 4, at 1. Neither party has alleged that there was a lack of capacity to marry; therefore, I find

that Respondent and Mr. Cole had the capacity to marry from September 21, 1999 through February 1, 2005.

2. Respondent and Alex John Moore did not have a present marriage agreement prior to February 1, 2005.

In Kansas, the “law . . . is very clear that an indispensable constituent of a common-law marriage is the existence of a present marriage agreement. . . . However, the present marriage agreement need not be in any particular form.” *Estate of Keimig*, 528 P.2d 1228, 1230 (Kan. 1974) (internal citations and quotations omitted).

The evidence of record is insufficient to support a finding that Respondent and Mr. Moore had a present marriage agreement before February 1, 2005. Respondent testified that she was going to marry Mr. Moore after Mr. Moore recovered from his illness, which did not happen. Tr. 115-116; SSA Ex. 3, at 10. In fact, Respondent informed SSA of this in her second WIB application. SSA Ex. 3, at 25. This testimony is also corroborated by the following statement in a May 26, 2011 letter that Lora Upshaw sent to SSA in support of Respondent’s second WIB application:

I know [Mr. Moore] loved [Respondent] and had asked her twice to marry him, but she wanted to wait until he was well, unfortunately that did not happen.” [Mr. Moore] considered her [h]is spouse, introduced her as his wife, even bought her cards stating “My Wife.” I mentioned to [Mr. Moore] once about her not being his wife after reading such a card and he stated she might as well be, I love her like she is.

SSA Ex. 3, at 41. Consistent with Ms. Upshaw’s view that Mr. Moore and Respondent were not married, Respondent testified unequivocally that she did not consider herself married to Mr. Moore until she spoke with an SSA representative who stated that Respondent was common law married to Mr. Moore. Tr. 15. Respondent also testified that she did not know that the state considered her married to Mr. Moore until after Mr. Moore passed away. Tr. 20. Significantly, Respondent stated: “In my heart and mind I’ve never felt that we were married. We were just living together.” Tr. 21. When asked specifically if she was married to Mr. Cole at the time she filed her first WIB application, Respondent answered in the negative. Tr. 64. Again, Respondent’s testimony is consistent with Ms. Upshaw’s testimony. Tr. 127, 131.

Although Respondent stated that she lived with Mr. Moore, she clarified that they did not share a single residence until 2007. Respondent testified that Mr. Moore and Respondent met on July 10, 2003, and did not live together at all for several months. Tr. 64, 66-67. Even though they often would stay overnight at the same place from 2003-2007, they each had their own homes; Mr. Moore paid a mortgage on his house and Respondent

paid rent for her house. Tr. 67. Although Respondent indicated on the second WIB application that Mr. Moore and Respondent lived together starting in 2003, she testified that by living together she really meant that they stayed at each other's houses for periods of time, shifting back and forth. Tr. 33-34; SSA Ex. 3, at 10, 76. It was not until 2007 that Mr. Moore purchased a new house in Pomona, Kansas, that would serve as their joint residence. Tr. 35, 67-68. Ms. Upshaw's testimony agrees with Respondent's that Mr. Moore and Respondent did not begin living together until they moved to the house in Pomona. Tr. 124-125. However, even after they moved into the house in Pamona, Respondent still did not think of her relationship with Mr. Moore to be husband and wife.

A review of the rest of the record supports Respondent's testimony detailed above. It was not until October 20, 2009, that Mr. Moore added Respondent's name to the deed of the house in which they lived. Significantly, Mr. Moore is twice described in the deed as "a single person." SSA Ex. 3, at 60-61. In 2008 Respondent and Mr. Moore opened a joint bank account for the purpose of paying bills at the house they now shared; however, it was not until 2009 that Mr. Moore added Respondent to his personal bank account, and Respondent and Mr. Moore always filed separate individual tax returns. Tr. 36-37, 93; R. Ex. 2. It is undisputed and clear from the record that Respondent kept Mr. Cole's surname and did not take Mr. Moore's name.

The evidence of record supports a conclusion that, under Kansas case law, Respondent and Mr. Moore did not have a present marital agreement. Respondent did not use Mr. Moore's surname, filed income taxes individually and in her own name, and Respondent only had a plan to marry Mr. Moore in the future when his health improved. *Anguiano v. Larry's Electrical Contracting, L.L.C.*, 241 P.2d 175, 178-179 (Kan. Ct. App. 2010); see *Sullivan*, 413 P.2d at 992 (upholding a trial court determination that a present agreement to marry was not proven because the individuals only planned to marry sometime in the future). While it is true that Respondent and Mr. Moore lived together for years, such evidence by itself does not compel a finding of a present agreement to marry. *Estate of Keimig*, 528 P.2d at 1231.

The I.G. has primarily relied on Respondent's second WIB application to prove the existence of a common law marriage between Respondent and Mr. Moore. Other than Respondent's own statements in the second WIB application, which will be addressed below, Respondent submitted statements from other individuals and copies of cards and letters sent from Mr. Moore to Respondent. SSA Ex. 3. However, as evaluated below, these statements provide insufficient evidence that a present agreement existed between Respondent and Mr. Moore before February 1, 2005.

Mr. Moore's cousin, Sharon Loftus-Myers, signed a SSA Form-753 on March 21, 2011, in which she answered the following question in the affirmative: "In your opinion, did (do) they maintain a home and live together as husband and wife?" SSA Ex. 3, at 29. She indicated that Respondent and Mr. Moore lived at various addresses from winter

2003 to February 2011. SSA Ex. 3, at 29. In response to the question why Ms. Loftus-Myers considered Respondent and Mr. Moore to be married, she stated that they “were jointly noted on the Deed of the property they purchased in Pomona and also on the [t]itles of two cars purchased after November 2009.” The reason she gave as to why they held joint property was that Mr. Moore wanted to protect Respondent after he died. SSA Ex. 3, at 30. Ms. Loftus-Myers also wrote a March 12, 2011 letter addressed to “To Whom It May Concern” in which she recounted that Mr. Moore introduced her to Respondent in July 2003, and that Mr. Moore held an auction in October 2009 to sell many of his possessions “so that [Respondent] would have sufficient funds to continue living at their joint property in Pomona for at least a couple more years subsequent to his death.” SSA Ex. 3, at 38.

Beyond her opinion that Respondent and Mr. Moore lived as husband and wife from winter 2003 until February 2011, Ms. Loftus-Myers’ statement provides limited support to determine that a common law marriage existed before February 1, 2005. Although Ms. Loftus-Myers considered them to be husband and wife, she admitted that she never heard them refer to each other as husband and wife. Further, when explaining why she believed they were married, she cited a deed for property with both of their names, conveyed on October 20, 2009 (SSA Ex. 3, at 60-61) and titles to cars purchased in 2009, dates much too late to provide support for a common law marriage by February 1, 2005. SSA Ex. 3, at 30. Further, Ms. Loftus-Myers recounted Mr. Moore’s reason for adding Respondent to the deed and car titles and it was not because they were married, but simply to financially protect Respondent. Ms. Loftus-Myers also attributed financial considerations related to their “joint property in Pomona,” as to the reason Mr. Moore held an auction in 2009.

Respondent’s sister, Bonnie Kildew, signed a SSA Form-753 on March 23, 2011, in which she answered the following question in the affirmative: “In your opinion, did (do) they maintain a home and live together as husband and wife?” SSA Ex. 3, at 32. She indicated that Respondent and Mr. Moore lived together as husband and wife from December 2003 until February 2011. SSA Ex. 3, at 32. In response to the question why Ms. Kildew considered Respondent and Mr. Moore to be married, she stated in total that they “both lived in the same house together, when they were introduced to others it was this is my wife or husband.” SSA Ex. 3, at 31.

With the exception of Ms. Kildew providing dates between which Respondent and Mr. Moore lived together, Ms. Kildew’s statements lack exactness with regard to time. In testimony presented in this case, Ms. Kildew clarified that the first time she heard that Respondent and Mr. Moore hold themselves out as married was following a dinner party in 2009 that Respondent and Mr. Moore held. R. Ex. 5, at 1. Because Ms. Kildew was not present for the party, the first time she heard Mr. Moore refer to Respondent as his wife was in 2010 when Respondent and Mr. Moore visited Ms. Kildew in Wisconsin. R. Ex. 5, at 1. Further, Ms. Kildew testified that “[a]t no time before my conversation with

[Respondent] after this dinner party did I ever hear, either directly or indirectly, [Respondent] or Mr. Moore hold themselves out to be ‘married’ to the other.” R. Ex. 5, at 1. It is important to note that the I.G. called Ms. Kildew to be cross-examined, but later withdrew this request. Therefore, Ms. Kildew’s testimony is uncontested and her March 2011 statement does not support a determination that Respondent and Mr. Moore were common law married before February 1, 2005.

Mr. Moore’s cousin, John L. Zimmerman, signed a SSA Form-753 on March 25, 2011, in which he answered the following question in the affirmative: “In your opinion, did (do) they maintain a home and live together as husband and wife?” SSA Ex. 3, at 34. He indicated that Respondent and Mr. Moore lived together as husband and wife from 2003 until 2011. SSA Ex. 3, at 32. In response to the question why Mr. Zimmerman considered Respondent and Mr. Moore to be married, he ambiguously stated in total that “[a]ll activities and planning were done as Husband and Wife.” SSA Ex. 3, at 33. Although Mr. Zimmerman indicated that he considered them husband and wife, he admitted that he never heard Respondent and Mr. Moore actually refer to each other as husband and wife. SSA Ex. 3, at 34. Therefore, aside from further confirming that Respondent and Mr. Moore commenced living together in 2003, Mr. Zimmerman’s statement does not support a determination that Respondent and Mr. Moore were common law married before February 1, 2005.

Marrel and Charlotte Macy signed a letter, addressed to “To Whom it May Concern,” on March 4, 2011, in which these individuals stated that they knew Respondent and Mr. Moore for the preceding eight years through an organization called “the Power of the Past.” SSA Ex. 3, at 35. The letter states that Respondent and Mr. Moore “were together as a couple at all the meetings and other activities they attended” and that “[w]e never thought of [Respondent and Mr. Moore] as singles but always as a couple.” SSA Ex. 3, at 35. This letter only indicates that Respondent and Mr. Moore attended an organization together and that they were perceived as “a couple.” This letter provides no direct evidence to establish a common law marriage commencing before February 1, 2005. In fact, the lack of a statement that Respondent and Mr. Moore held themselves out as a married couple detracts from the conclusion that Respondent and Mr. Moore were common law married during the relevant period.

Richard and Mary Mullins signed a letter, addressed to “To Whom it May Concern,” on March 4, 2011, in which these individuals stated that they knew Respondent and Mr. Moore for the preceding nine years and that “[t]hey were two of our best friends.” SSA Ex. 3, at 36. The Mullins indicated that they knew Respondent and Mr. Moore lived together for eight years. Interestingly, the Mullins stated that Respondent and Mr. Moore “could not have loved each other any more if they had been married.” SSA Ex. 3, at 36. In addition to confirming that Respondent and Mr. Moore started to live together in 2003, this letter detracts from the conclusion that a common law marriage existed because the Mullins clearly did not believe that Respondent and Mr. Moore were actually married.

Barbara Dougan signed a letter, addressed to “To Whom it May Concern,” on March 6, 2011, in which she stated that Mr. Moore introduced her to Respondent in 2003 and that Respondent and Mr. Moore “lived together as partners for more than a 7 year period.” SSA Ex. 3, at 37. Ms. Dougan ended her letter by stating the following: “They were a beautiful couple who truly loved each other and lived as if they were a married couple.” SSA Ex. 3, at 37. Once again, this letter confirms that Respondent and Mr. Moore commenced living together in 2003; however, Ms. Dougan made it clear that she did not think they were actually married because Respondent and Mr. Moore only loved and lived with each other “as if they were a married couple.”

Sylvia Starkey signed a letter, addressed to “To Whom it May Concern,” on March 13, 2011, in which she stated that she knew Mr. Moore and Respondent since late 1995 or early 1996. Ms. Starkey reports in the letter that “they lived together as a couple from, to the best of my knowledge, 2003 until [Mr. Moore] died.” SSA Ex. 3, at 39. This letter confirms that Respondent and Mr. Moore started living together in 2003, but only identifies them as living as a couple, and not a married couple. Therefore, this letter does not support a finding of a common law marriage.

Bobby and Donna Saile signed a letter, addressed to “To Whom it May Concern,” on March 15, 2011, in which these individuals stated that Respondent and Mr. Moore “have been together for eight years” and “purchased a small place in Pomona, Ks. about two years ago.” SSA Ex. 3, at 40. This statement indicates that Respondent and Mr. Moore have been together since 2003 and owned property together in 2009; however, it does not directly show that they were common law married.

To the extent that many of the individuals above indicated that, in their opinion, Respondent and Mr. Moore lived together as a husband and wife, such evidence, by itself, only leads to the conclusion that Respondent and Mr. Moore cohabitated under Kansas law. *Marriage of Sedbrook*, 827 P.2d 1222, 1227 (Kan. Ct. App. 1992) quoting *Biltgen v. Biltgen*, 250 P. 265 (1926). Further, “[t]he general reputation of the parties with respect to being married or single does not prove or disprove the marriage agreement itself.” *Freeman’s Estate*, 231 P.2d 261, 263 (Kan. 1951). Therefore, the statements summarized above do not prove that a present marriage agreement existed between Respondent and Mr. Moore before February 1, 2005.

Finally, the record includes several undated cards from Mr. Moore to Respondent indicating his affection for her. SSA Ex. 3, at 42-57. Only two of these actually address Respondent as his wife. SSA Ex. 3, at 42-45. However, at least one of these two cards is from February 1, 2011, and the other is no older than 2007. *See* Tr. 18-19, 125-126. Therefore, these cards do not have a bearing on my determination regarding the existence of a present marriage agreement before February 1, 2005.

Based on the evidence of record, I find that Respondent and Mr. Moore did not have a present agreement to be married before February 1, 2005.

3. Respondent and Alex John Moore did not hold themselves out to the public as husband and wife prior to February 1, 2005.

The third element in the Kansas Supreme Court's test to determine whether a common law marriage was created is whether the parties held themselves out to the public as being husband and wife. The evidence of record does not reveal that a preponderance of the evidence supports a finding that Respondent or Mr. Moore held themselves out as husband and wife before February 1, 2005.

In September 2009, Mr. Moore appears to have indicated that Respondent was his "SPOUSE" for emergency contact purposes for a hospital. R. Ex. 1. In October 2009, Mr. Moore appears to have told a physician that he was married. SSA Ex. 3, at 59. Based on the dates of these documents, they do not prove that Mr. Moore and Respondent publicly held themselves out as husband and wife before February 1, 2005.

The record is very clear that Mr. Moore referred to Respondent as his wife during a dinner party that they held in August 2009 at their house. Mr. Moore said that he and his wife (i.e., Respondent) thanked the guests for coming to the party. Tr. 88. Although Respondent did not publicly correct Mr. Moore's statement (Tr. 88), Respondent answered in the negative when two woman guests at the party inquired if Respondent had married Mr. Moore. Tr. 21.

Mr. Moore's statement at the August 2009 dinner party seems to be the first time that either Mr. Moore or Respondent ever publicly stated they were married. Donna Eichenberger testified that she was present at the August 2009 party and heard Mr. Moore make "the announcement to the crowd that they were now married." R. Ex. 1. However, Ms. Eichenberger also testified that "[a]t no time before August 2009 did I ever hear, either directly or indirectly, Ms. Cole or Mr. Moore hold themselves out to be 'married' to the other." R. Ex. 1. Bonnie Kildew testified that she was not present at the August 2009 party, but learned of Mr. Moore's statement from Respondent herself. R. Ex. 5, at 1. Further, Ms. Kildew testified that "Mr. Moore introduced Ms. Cole as his wife" during an October 2010 visit with Ms. Kildew. R. Ex. 5, at 1. Finally, Ms. Kildew testified that at no time before October 2010 did she ever hear Mr. Moore refer to Respondent as his wife, and at no time before hearing of the August 2009 party did she directly or indirectly hear Respondent or Mr. Moore hold themselves out as being married. R. Ex. 5, at 1-2. Ms. Upshaw testified that she knew Mr. Moore considered himself married to Respondent, but does not appear to have known this until 2010 or 2011. Tr. 132.

Based on the evidence in the record, I find that Respondent and Mr. Moore did not publically hold themselves out as married before February 1, 2005.

B. Respondent did not violate 42 U.S.C. § 1320a-8(a)(1)(C) because she did not withhold from SSA a material fact for use in determining her continuing eligibility for WIB on James Keith Cole's Social Security record.

The I.G. proposed to impose a CMP and assessment against Respondent for withholding from disclosure her common law marriage to Mr. Moore from 2006 to 2011. 42 U.S.C. § 1320a-8(a)(1)(C). The specific basis for the proposed CMP and assessment required the I.G. to prove that Respondent withheld a material fact from SSA (i.e., a common law marriage) that would have been used in determining Respondent's continued right to receive WIB from Mr. Cole's Social Security record.

In order for a fact to be "material" for purposes of 42 U.S.C. § 1320a-8(a)(1)(C), that fact must be "one which the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under subchapter II of this chapter or subchapter VIII of this chapter, or eligible for benefits or payments under subchapter XVI of this chapter." 42 U.S.C. § 1320a-8(a)(2).

In the present case, an alleged common law marriage between Respondent and Mr. Moore would have had to have occurred before Respondent turned 60 years in order for it to have been a material fact in determining whether Respondent should continue to be entitled to WIB on Mr. Cole's Social Security record. After Respondent turned 60 years of age, remarriage was irrelevant for both the issues of entitlement to WIB and to the amount of WIB payments Respondent would receive. 20 C.F.R. § 404.335(e); SSR 80-60; *see also* 42 U.S.C. § 402(e)(3); SSR 87-7c. As indicated above, the record in this case does not support a finding that Respondent and Mr. Moore were common law married by February 1, 2005, which was Respondent's sixtieth birthday. Therefore, I conclude that Respondent did not violate 42 U.S.C. § 1320a-8(a)(1)(C) because she did not withhold a material fact (i.e., a common law marriage) from SSA.

C. Respondent testified credibly in this case.

The I.G. posits that Respondent has provided significantly conflicting statements and testimony concerning the existence and effective date of a common law marriage to Mr. Moore; therefore, Respondent is not to be believed. However, based on the record in this matter, it is clear that a combination of events have resulted in tremendous confusion about Respondent's relationship to Mr. Moore.

SSA officials throughout this case have not appreciated the complex nature of determining a common law marriage. As detailed below, an SSA representative provided incorrect information to Respondent and another failed to meaningfully assess whether

Respondent was common law married. The SSA special agent who investigated this matter failed to adduce any evidence of the alleged common law marriage, save for the documents Respondent submitted with the second WIB application and computer records from SSA. Finally, I.G. counsel in this case did not cite one Kansas case to support the contention that Respondent was in fact common law married to Mr. Moore. It is not surprising that Respondent, an individual who is not a lawyer, would be confused by the events leading to her second WIB application.

After Mr. Moore passed away, Respondent went to a funeral home with her daughter and two of Mr. Moore's children to make necessary plans for Mr. Moore's remains. Tr. 75-76. Respondent never told the funeral home that she was Mr. Moore's wife. Tr. 75-76, 111-112. However, after the visit, Respondent noted that the death certificate indicated that Respondent was Mr. Moore's wife. SSA Ex. 4, at 1. She contacted the funeral home and was told that the funeral home had been in contact with a government official who decided, apparently based on the fact Respondent and Mr. Moore owned a house together, that Respondent and Mr. Moore were married. Tr. 22, 76-77, 112.

Possibly based on the information in the death certificate, Respondent received a letter from SSA indicating that it would pay her a death benefit due to Mr. Moore's passing. Tr. 77. Respondent called a telephone number on the letter and spoke to an SSA representative named Elizabeth Cook and informed her that Respondent should not receive the death benefit. Tr. 77. Ms. Cook asked respondent how long Respondent and Mr. Moore were together and, after hearing that it had been eight years, opined that Respondent had been common law married to Mr. Moore. Tr. 77-78. Ms. Cook set up an appointment for Respondent with the Lawrence, Kansas SSA District Office so that Respondent could file a WIB claim; Ms. Cook stated that if Respondent did not qualify for benefits, the district office would let her know, but that "it won't hurt to try." Tr. 57, 78. SSA deposited the death benefit in Respondent's account. Tr. 78. Respondent testified that absent the statement from Ms. Cook, Respondent did not think she was common law married to Mr. Moore. Tr. 25.

Respondent went to the appointment at Lawrence, Kansas SSA District Office and met with CR Cooper on March 17, 2011. CR Cooper assisted Respondent with the second WIB application in which it indicates that Respondent has been common law married since July 10, 2003. Tr. 78-79; SSA Ex. 3, at 17. However, also on March 17, 2011, Respondent made a handwritten statement on a Form SSA-795 in which she stated that "Alex Moore and I have been together since July 10, 2003"; significantly, she did not indicate she was married on that date. SSA Ex. 3, at 22. Respondent also indicated that she and Mr. Moore had been together, not married, from July 2003 when an SSA special agent later interviewed her as part of his investigation. SSA Ex. 3, at 76. On a Form SSA-754-F4, Respondent provided incorrect information in response to a variety of specific questions on that form. SSA Ex. 3, at 24. However, it is significant that CR Cooper's testimony fails to indicate that he did anything more than simply take a claim

application. He did not state that he attempted to help determine if Respondent had been common law married or to inform her of the significant problem that a second WIB application would cause her given her entitlement to WIB based on the first application. SSA Ex. 12. CR Cooper's limited interaction with Respondent during the appointment to apply for WIB is corroborated by Respondent. Tr. 78-79.

Respondent submitted some supporting documentation, which Ms. Upshaw transmitted to CR Cooper by fax. Significantly, in that May 26, 2011 letter, Ms. Upshaw made it clear that Respondent "was told by someone in your office that she would qualify for [Mr. Moore's] [Social Security] benefits as they were common law married." SSA Ex. 3, at 41. Then Ms. Upshaw informed CR Cooper that Respondent planned to marry when Mr. Moore was better, but this did not happen. SSA Ex. 3, at 41. Respondent had actually informed SSA of this in her second WIB application. SSA Ex. 3, at 25. Further, as evaluated above in detail, CR Cooper was provided with unconvincing statements of multiple individuals to support the claim of a common law marriage. SSA Ex. 3, at 28-40. Despite this, CR Cooper not only approved Respondent's second WIB application,³ but made a fraud determination or referral based on Respondent's alleged common law marriage that commenced on July 10, 2003. SSA Ex. 3, at 67-68. Given how important the existence and effective date of the alleged common law marriage was and the poor evidence of a common law marriage that was submitted, CR Cooper needed to more fully develop Respondent's claim of an alleged common law marriage.⁴

Following CR Cooper's fraud referral, SSA's special agent conducted a cursory inquiry into Respondent's alleged common law marriage. This investigation was primarily limited to a review of the second WIB application and SSA computer records, a criminal background check, and an interview with Respondent. SSA Ex. 3, at 1-15.

Respondent testified at the hearing that she met Mr. Moore on July 10, 2003, and did not marry him on that date. She said she made a number of mistakes on the second WIB application, most of them dealing with setting a date for a common law marriage on July 10, 2003. I believe that Respondent has been truthful while testifying in this proceeding. She was not evasive. Sometimes she was confused, which is understandable given the complex nature of this case. Her explanation of the situation that is the subject of this

³ In an unrelated case, SSA failed to properly determine whether a claimant was common law married under Kansas law. *See Anguiano*, 241 P.2d at 177, 179.

⁴ Generally, in order to determine that a claimant for WIB was common law married, SSA's "[p]referred evidence" is a statement from the surviving alleged spouse and two of the deceased alleged spouse's blood relatives. *See* 20 C.F.R. § 404.726(b)(2). However, SSA CRs need to "develop" evidence of a common law marriage when there is lack of clarity in the documents submitted with the claim. *See* SSA Program Operations Manual System § GN00305.065(C) available at <https://secure.ssa.gov/poms.nsf/lnx/0200305065>.

proceeding has been generally consistent with the oral statement that she gave SSA's special agent. SSA Ex. 3, at 10-11. When using her own words, Respondent indicates that she has been together with Mr. Moore since July 2003, and not married since then. SSA Ex. Ex. 3, at 22, 76. As she and Ms. Upshaw testified, Respondent was under significant emotional strain when she made the second WIB application, due not only to Mr. Moore's death, but the death of Respondent's mother approximately a week later. Tr. at 73-74, 134-135. Respondent testified that given her state, she should not have filed the second WIB application on her own. Tr. at 79.

The I.G. raises Respondent's inability to explain why she hand wrote the date of July 17, 2002, on a card from Mr. Moore if she Respondent did not know Mr. Moore until July 10, 2003. Tr. 19-20; SSA Ex. 3, at 53. This card represents one document in a record that otherwise does not provide evidence that Respondent and Mr. Moore knew each other in 2002. Further, the date notation is not original to the card because Respondent, and not Mr. Moore, wrote the date. Tr. 19-20. Respondent provided a detailed account of her first meeting with Mr. Moore on July 10, 2003. Tr. 65. Ms. Upshaw was able to corroborate that they met in 2003 because she is the person who introduced Respondent and Mr. Moore. Tr. 124. Therefore, I conclude that this issue does not significantly undermine Respondent's credibility.

Respondent has never been arrested or convicted of a crime and has not been otherwise investigated by another government agency. Tr. 95-96; SSA Ex. 3, at 2. She has not previously committed a prior offense regarding Social Security programs. SSA Ex. 8, at 2. Respondent is not an attorney and does not understand the law related to common law marriage. Tr. 66. SSA told Respondent she was common law married and that she should submit the second WIB application. SSA then failed to properly investigate the claim, ultimately resulting in this case. Based on my observation of Respondent during her testimony and a review of the record as a whole, I determine that Respondent is generally credible.

V. Conclusion

In his decision, an administrative law judge may affirm, deny, increase, or reduce the penalties or assessments proposed by the I.G. 20 C.F.R. §c 498.220(b). Based on the foregoing, Respondent has not violated 42 U.S.C. § 1320a-8(a)(1)(C). Therefore, the I.G.'s proposed CMP and assessment are DENIED.

/s/
Scott Anderson
Administrative Law Judge