

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

The Inspector General of the Social Security Administration,

v.

Andre Watley,

Respondent.

Docket No. C-13-1179

Decision No. CR3710

Date: March 11, 2015

DECISION

The Inspector General (IG) of the Social Security Administration (SSA) proposed to impose on Respondent, Andre Watley, a \$5,000 civil monetary penalty (CMP) for each of 24 alleged violations of 42 U.S.C. § 1320a-8. Respondent disputed the SSA IG's allegations. For the reasons stated below, I conclude that Respondent is liable for a CMP based on 11 violations of 42 U.S.C. § 1320a-8. Further, I affirm the SSA IG's proposed penalty of \$5,000 for each violation. Therefore, Respondent is liable for a \$55,000 CMP.

I. Background and Procedural History

On December 17, 2007, Respondent filed applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) with SSA. SSA Exhibit (Ex.) 1. Respondent indicated on the SSI application that he: is disabled and has been disabled since May 25, 2000; does not "own any type of resource"; and has "not been accused or convicted of a felony or an attempt to commit a felony." SSA Ex. 1 at 1-2. Also on December 17, 2007, Respondent filed a DIB application. SSA Ex. 1 at 6-7. On December 24, 2007, Respondent signed a Form SSA-3369-BK (Work History Report) in which he indicated that in the preceding 15 years, Respondent had only been employed as

a cook from August 2005 through December 2006. SSA Ex. 2. SSA apparently denied this application and denied Respondent's request for reconsideration. SSA Ex. 21 at 3.

On June 12, 2009, Respondent filed new applications for DIB and SSI, alleging that his disability commenced January 1, 2004. SSA Ex. 3 at 1. Respondent again asserted that he did not own any type of resource and has not been accused or convicted of a felony or attempt to commit a felony. SSA Ex. 3 at 9. On September 14, 2009, Respondent completed and signed a Form SSA-3373-BK (Function Report – Adult). SSA Ex. 4. SSA denied Respondent's applications, at both the initial and reconsideration stages of review. SSA Ex. 21 at 3.

Respondent requested a hearing and, on May 25, 2010, an SSA Administrative Law Judge (ALJ) held a hearing on Respondent's claim. SSA Exs. 5, 6. Respondent amended his disability onset date to November 30, 2007. SSA Ex. 6. On July 9, 2010, the SSA ALJ issued a fully favorable decision in which he reopened Respondent's previous claims and found Respondent had been disabled since November 30, 2007. SSA Ex. 7. The ALJ found Respondent's testimony credible and gave "controlling weight" to the opinion of Respondent's physician. SSA Ex. 7 at 7-8. On July 20, 2010, Respondent provided the following additional information in support of his SSI application: Respondent has not been accused or convicted of a felony or attempt to commit a felony; and Respondent does not own any resources. SSA Ex. 8. In a July 26, 2010 Notice of Award, SSA informed Respondent that he was entitled to DIB beginning May 2008; however, SSA also stated that it could not pay Respondent at that time because he was convicted of a crime and imprisoned. R. Ex. 3. In a July 27, 2010 Notice of Award, SSA informed Respondent that he would receive SSI benefits and indicated the amount of back pay and monthly payments he would receive. SSA Ex. 9. This notice failed to account for Respondent's incarceration and Respondent was overpaid SSI benefits. SSA Ex. 9; SSA Ex. 33 at 2. In August 2010, SSA discontinued Respondent's SSI benefits "because [Respondent's] DIB was too high to qualify for SSI." SSA Ex. 33 at 2.

On or about August 26, 2011, the Wichita, Kansas Police Department informed the SSA IG's Kansas City Cooperative Disability Investigations (CDI) Unit that an article was published about Respondent and "his ice cream truck business." SSA Ex. 28 at 1. Between August 2011 and July 2012, the CDI unit conducted an investigation. SSA Ex. 28 at 2. The Wichita SSA office also conducted a continuing disability review for Respondent. SSA Ex. 33 at 1.

On July 11, 2012, SSA ceased Respondent's DIB benefits. SSA Ex. 33 at 2. Respondent requested reconsideration, but a hearing officer upheld the cessation of benefits in May 2013. SSA Ex. 33 at 2-3; R. Ex. 9. Respondent requested a hearing before an SSA ALJ and requested that SSA continue to pay his benefits pending his appeal. SSA agreed to continue paying benefits to Respondent. SSA Ex. 33 at 2-3.

On June 14, 2013, the SSA IG personally served a notice on Respondent proposing to impose a CMP of \$120,000 based on 24 alleged false statements in relation to Respondent's claims for DIB and SSI. Respondent filed a request for a hearing with the Civil Remedies Division and generally denied the allegations in the penalty notice. I was assigned to adjudicate this case and issued an Acknowledgement and Pre-Hearing Order (Pre-Hearing Order) establishing a submission schedule for prehearing exchanges. The Pre-Hearing Order required the parties to submit proposed exhibits and written direct testimony for all proposed witnesses (except when the witnesses are hostile or adverse witnesses), and for the parties to file objections to proposed exhibits and requests to cross-examine proposed witnesses. Pre-Hearing Order ¶ 2.

The parties filed their prehearing briefs (SSA Br. and R. Br.) and proposed exhibits. The SSA IG also filed a reply brief (SSA Reply Br.) with an attached exhibit marked Attachment A. After review of both parties' prehearing exchanges, I noted that Respondent objected to several of the SSA IG's proposed exhibits. Respondent also listed two witnesses but did not provide written direct testimony. The SSA IG listed witnesses and provided written direct testimony for all but two witnesses (Respondent Andre Watley and Sharron Griffin) the same two witnesses on Respondent's witness list. Respondent did not request to cross-examine any of the SSA IG's witnesses. The SSA IG did not file subpoena requests for the two witnesses for which no written direct testimony was submitted. Respondent also requested a stay in this proceeding pending a decision by an SSA ALJ regarding the cessation of Respondent's DIB benefits.

I held a prehearing telephone conference on November 17, 2014, the substance of which is summarized in my November 19, 2014 Order Following Prehearing Conference (November 19 Order). Counsel for both parties appeared at the conference. At the conference, the parties confirmed that neither of them intended to call any witnesses to testify at a hearing and that the parties agreed that I should issue a decision on the basis of the written record. Respondent's counsel indicated that the record in the case before SSA contained relevant medical documentation. I denied Respondent's motion for a stay because the SSA ALJ's decision would not directly impact the outcome of this case. However, I permitted Respondent time to obtain and submit any evidence from his case before the SSA ALJ that was relevant to the present case. Further, I ruled on the admission to exhibits into the record. I also permitted the SSA IG to submit additional declarations to authenticate SSA Exs. 17, 23, and 35 and permitted Respondent to file objections to those declarations. Finally, I gave Respondent an opportunity to file a written objection to the admission of Attachment A to the SSA IG's reply brief (as indicated below, I mark Attachment A as SSA Ex. 37).

In response to the November 19 Order, SSA timely filed two declarations, which I mark as SSA Exs. 38 and 39, supplementing the testimony of witnesses already entered into the record. SSA Exs. 28, 36. Respondent did not submit any additional exhibits.

II. Evidentiary Rulings

As discussed below, with the exception of SSA Ex. 35, I admit all of the proposed exhibits from the parties (i.e., SSA Exs. 1-34, 36-39 and R. Exs. 1-12) into the record.

At the prehearing conference, I entered Respondent's exhibits (R. Exs. 1-11) into the record without objection. November 19 Order at 3. Respondent had also submitted R. Ex. 12. Because the SSA IG did not object to that exhibit, I admit R. Ex. 12 into the record as well.

During the prehearing conference, I also entered SSA Exs. 1-16, 18-22, 24-34, and 36 into the record. Respondent did not object to most of those exhibits, but objected to some of them. I addressed those objections before entering the exhibits into the record. I reserved ruling on SSA Exs. 17, 23, and 35. November 19 Order at 3-4.

Respondent objected to SSA Exs. 17 and 23 because of hearsay and a lack of foundation. Respondent is concerned that the information in those exhibits, which relates to Respondent's criminal convictions, is not sufficiently reliable. However, as the SSA IG argues in response, I am not bound by the Federal Rules of Evidence. 20 C.F.R. § 498.217(b). Therefore, a hearsay objection, by itself, will not serve to preclude admission of these exhibits. Rather, such an argument goes to the weight that I should afford that evidence.

In regard to the foundation objection to SSA Ex. 17, the SSA IG submitted supplemental testimony from Lora Tarango, an employee with the Kansas City Police Department and a member of the SSA IG CDI unit investigating Respondent. This testimony provided a detailed explanation that the information in SSA Ex. 17 reflects the information she obtained during her investigation. I mark Ms. Tarango's supplemental testimony as SSA Ex. 38.

In regard to the foundation objection to SSA Ex. 23, the SSA IG provided supplemental testimony from Special Agent Jon Guilford. Agent Guilford testified that he created the SSA IG report marked as SSA Ex. 23 under the SSA IG's "policy to reduce investigative findings to writing." I mark Agent Guilford's supplemental testimony as SSA Ex. 39.

The supplemental testimony that the SSA IG provided is sufficient to overcome Respondent's objections related to a lack of foundation. Further, although Respondent objected to the supplemental testimony itself, Respondent provided no specific basis for the objections. Therefore, I admit SSA Exs. 17, 23, 38, and 39 into the record.

The SSA IG also submitted SSA Ex. 35. This exhibit is a video of a truck driving on a street and stopping near the curb. I summarized the discussion of this proposed exhibit at the prehearing conference as follows:

Counsel for the SSA IG stated that Special Agent Jon Guilford and other witnesses could authenticate this video, which she believes was taken from Respondent's facebook page. Respondent's counsel argued that the exhibit lacked foundation, that it is impossible to determine if Respondent appears in the video, and that the exhibit is not relevant. Counsel for the SSA IG responded that if Respondent could not be seen in the video, less weight could be given to this exhibit.

November 19 Order at 4.

The SSA IG did not submit supplemental testimony concerning this proposed exhibit. I agreed with Respondent that, when viewing the video, I could not see who was driving the vehicle. I also do not know where or how this video was obtained. Therefore, I exclude this exhibit as lacking authentication. Further, without testimony to provide additional information, this video has little or no probative value to outweigh the danger of unfair prejudice. 20 C.F.R. § 498.217(c).

Finally, the SSA IG proposed that a document it labeled as Attachment A to its reply brief ought to be admitted into the record. Respondent objected to this document as being untimely filed, i.e., not filed with the SSA IG prehearing exchange. However, the SSA IG argues that it is rebuttal evidence. Attachment A is composed of copies of the original application for a license to operate an ice cream truck filed by Respondent's former wife, Sharron Griffin, along with several subsequent applications to renew that license. One of the documents in Attachment A is the same as SSA Ex. 19.

In his prehearing brief, Respondent cited the SSA IG's proposed exhibits to show that ownership of the Ice Cream and More was Ms. Griffin's business and not Respondent's business. R. Br. at 3-4. Respondent cited to SSA Ex. 19 to show that Ms. Griffin renewed the license almost a year before there were allegations from the Wichita Police Department that Respondent was selling ice cream. R. Br. at 4. In its reply brief, the SSA IG argued that the Ice Cream and More business existed earlier than 2011 and the SSA IG submitted the documents in Attachment A to show Ms. Griffin first filed an application for a license in 2007. SSA IG Reply Br. at 3.

I will admit Attachment A, which I mark as SSA Ex. 37, into the record. "The ALJ will permit the parties to introduce rebuttal . . . evidence as to those issues raised in the parties' case-in-chief." 20 C.F.R. § 498.217(g). There is no doubt that the SSA IG submitted Attachment A in response to an issue Respondent raised in its prehearing exchange.

III. Issues

At the prehearing conference, I identified the issues I will decide in this case, pursuant to 42 U.S.C. § 1320a-8, as follows:

- 1) Whether Respondent made false statements to SSA in relation to Respondent's claims for Disability Insurance Benefits and Supplemental Security Income and withheld material information from SSA regarding Respondent's work activity, income, and resources between December 2007 and July 2012; and
- 2) If so, I will determine the appropriate civil monetary penalty, with consideration of the SSA IG's proposed penalty of \$120,000 and the statutory factors in subsection (c) of section 1129 of the Social Security Act and implementing regulations in 20 C.F.R. § 498.106.

November 19 Order at 2.

IV. Jurisdiction

Individuals against whom the SSA IG 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 ALJ hearing. 20 C.F.R. § 498.202. ALJs at the Departmental Appeals Board adjudicate SSA CMP cases. *See* 20 C.F.R. § 498.201 (definition of *ALJ*); *see also* 20 C.F.R. §§ 498.202-498.220. Therefore, I have jurisdiction to decide this case.

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

A person is subject to a CMP and assessment if he:

(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

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

(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.

42 U.S.C. § 1320a-8(a)(1).

The SSA IG has the burden of proving all facts in an SSA CMP case with the exception of the affirmative defenses and mitigating circumstances raised by a respondent.

20 C.F.R. § 498.215(b). The standard of proof is a preponderance of the evidence.

20 C.F.R. § 498.215(c). An ALJ must ultimately “determine whether the respondent should be found liable” for a CMP and/or assessment, and issue a decision in which he “may affirm, deny, increase, or reduce the penalties or assessments proposed by the Inspector General.” 20 C.F.R. §§ 498.215(a), 498.220(b).

A. Respondent stated to SSA in his December 17, 2007 SSI application, June 12, 2009 SSI application, and July 20, 2010 Review Statement Summary for SSI that he had not been accused or convicted of a felony or an attempt to commit a felony; however, Respondent had been arrested and/or convicted of multiple felonies prior to the dates on which he made those statements to SSA.

On December 17, 2007, Respondent filed applications for DIB and SSI. SSA Ex. 1. Respondent indicated on the SSI application that he had “not been accused or convicted of a felony or an attempt to commit a felony.” SSA Ex. 1 at 1-2.

On June 12, 2009, Respondent filed new applications for DIB and SSI. SSA Ex. 3 at 1. Respondent again asserted on the SSI application that he had not been accused or convicted of a felony or attempt to commit a felony. SSA Ex. 3 at 9.

On a July 20, 2010 Review Statement Summary for SSI, Respondent again stated that he had not been accused or convicted of a felony or attempt to commit a felony. SSA Ex. 8 at 1.

In 2011, an SSA IG CDI unit commenced an investigation of Respondent that included a check of law enforcement records. SSA Ex. 28 at 2. Ms. Tarango of the Kansas City Police Department conducted the law enforcement records investigation. SSA Ex. 38 at 2. Ms. Tarango testified that her search included a review of the Regional Justice

Information Service (REJIS) law enforcement database and the Kansas Criminal Justice Information System (KCJIS). SSA Ex. 38 at 2. She also obtained information from the Sedgwick County Court Clerk and the Wichita Kansas Police Department Investigations Unit. SSA Ex. 36 at 1.

Ms. Tarango testified that the KCJIS yielded 41 pages of Respondent's arrest history with information concerning the disposition for some of those charges. SSA Ex. 38 at 3; *see also* SSA Ex. 17 at 7-15. Ms. Tarango testified that she verified that the information was related to Respondent. SSA Ex. 38 at 2. She also testified that the information from the KCJIS is included in SSA Ex. 17. Further, Ms. Tarango testified that her investigation yielded the following arrest and conviction history for Respondent:

1995 – sale of opiates, opium or narcotic drugs and no drug tax stamp for marijuana or controlled substance (both felony convictions – received a 24 month prison sentence)

2000 – arrest for felony possession of depressants/stimulants/hallucinogenics/anabolic steroids (dismissed without prejudice)

2003 – felony drug conviction (30 month prison sentence)

2008 – felony convictions for two counts of possession of cocaine and for no tax stamp (record was closed in June of 2010)

2009 – arrested for felony conspiracy to sale of opiates, opium, narcotic drugs (crack cocaine) D.A. declined prosecution.

SSA Ex. 36 at 1-2.

Based on the evidence of record, I find that Respondent represented to SSA in 2007, 2009, and 2010 that he had not been arrested or convicted of a felony. I also find that Respondent was arrested no less than five times for felony offenses and convicted no less than three times from 1995 through 2009.

B. Respondent made or caused to make three statements or representations of material fact related to his criminal history, for use in determining an initial right to or amount of SSI benefits, that Respondent knew or should have known were false or misleading in violation of 42 U.S.C. § 1320a-8(a)(1).

The SSA IG alleged that Respondent made three false or misleading statements of fact material to his initial application for SSI related to his criminal record. Specifically, the relevant statements that the SSA IG alleged as being false, located in the second, sixth, and thirteenth bullets in the CMP notice, are:

- On [the December 17, 2007 SSI application, Respondent] falsely stated that [Respondent] had not been accused or convicted of a felony or an attempt to commit a felony.
- On [the June 12, 2009 SSI application, Respondent] falsely stated that [Respondent] had not been accused or convicted of a felony when, in fact, [Respondent] had been arrested and/or charged with numerous felonies beginning in at least 2005.
- On [the July 20, 2010] Review Summary [for SSI], [Respondent] falsely stated that as of June 1, 2009, [Respondent] had not been accused or convicted of a felony.

SSA Ex. 24 at 1-2.

As found above, Respondent had been arrested for a felony five times by 2009 and convicted of felonies three times by 2008, and denied those arrests and convictions on his SSI applications and the Review Statement Summary for SSI. For the reasons stated below, I conclude that information concerning felony arrests and convictions is material to an SSI application and that Respondent knew or should have known his statements were false.

A material fact for CMP purposes is one that SSA may consider in evaluating whether an applicant is entitled to SSI benefits. 42 U.S.C. § 1320a-8(a)(2). In the present matter, the question as to whether an individual applying for SSI is accused or convicted of a criminal offense is a fact that SSA must consider before paying benefits.

The title of the section on the SSI applications and the Review Statement Summary for SSI that included the question as to whether Respondent was accused or convicted of a felony is: “Fugitive Felony and Parole or Probation Violation Information.” SSA Ex. 1 at 1; SSA Ex. 3 at 8; SSA Ex. 8 at 1. This title is used because individuals are ineligible for SSI benefits for any time that the individual is fleeing to avoid prosecution or to avoid confinement after being convicted of a felony. 20 C.F.R. § 416.1339(a). Further, individuals who are residents of public institutions, which often include individuals incarcerated in jails and prisons, are ineligible for SSI payments. 20 C.F.R. § 416.1325;

SSA Program Operations Manual System § SI00520.009. It is significant that SSA paid Respondent SSI benefits while he was incarcerated and that SSA later had to recover that overpayment. SSA Ex. 22 at 2. Therefore, I conclude that Respondent's answers regarding his history of felony arrests and convictions involved material facts.

I also conclude that Respondent knew or should have known that his statements were false or misleading. Because Respondent was three times convicted of felony offenses, there is no possible way that Respondent was not aware his answers on the SSI applications and the Review Statement Summary for SSI were false. Further, each of those documents provided a warning that Respondent was declaring under penalty of perjury that all of the statements he made in the applications and the Review Statement Summary for SSI were true and correct to the best of his knowledge, and that false or misleading statements of material fact may result in penalties. SSA Ex. 1 at 2; SSA Ex. 3 at 9; SSA Ex. 8 at 3. Therefore, I conclude that Respondent is liable for a CMP based on three violations of 42 U.S.C. § 1320a-8(a)(1)(A)-(B).

Respondent disputes the violations, asserting that SSA knew of Respondent's criminal record and accounted for this when determining his benefits, as can be seen in the July 26, 2010 Notice of Award for DIB. R. Ex. 3 at 1 ("We cannot pay you because you are imprisoned for the conviction of a crime."). Respondent asserts that SSA's knowledge of his incarceration at the time SSA granted benefits means that he could not have violated 42 U.S.C. § 1320a-8. R. Br. at 3, 5. This argument is not correct because CMP liability under 42 U.S.C. § 1320a-8(a)(1) does not include as an element of the offense that the SSA IG must prove that SSA believed a respondent's false statement or that SSA did not know a respondent's false statement was false. Therefore, the fact that SSA determined correctly for DIB that Respondent was in prison despite Respondent's false statement only means that SSA exercised due diligence before paying Respondent benefits. It does not exculpate Respondent. Finally, while SSA correctly withheld DIB from Respondent while he was incarcerated (R. Ex. 3 at 1), SSA failed to withhold SSI benefits and later had to recover the funds overpaid Respondent while he was in prison. SSA Ex. 9; SSA Ex. 33 at 2. SSA's confusion may have risen in part from Respondent's false statements on his SSI applications and the Review Statement Summary for SSI.

Respondent also asserts that he has borderline intellectual functioning and thus could not have made knowing false statements. R. Br. at 2, 8; R. Ex. 2. Respondent has not met his burden of proving this affirmative defense. The document Respondent submitted to support this contention is primarily directed at a finding of depression. Other than indicating the diagnosis of borderline intellectual functioning, there is no other discussion of this or how this was specifically determined. Further, the diagnosis was made by a social worker, and not a higher level medical professional. R. Ex. 2 at 3. Finally, there is no other evidence in the record that would support Respondent's inability to understand the importance of truthfully reporting information to SSA. Although Respondent indicates that his diagnosis of borderline intellectual functioning is significant, it does not

appear to have been mentioned as a severe impairment in the 2010 SSA ALJ decision finding Respondent disabled, or in the 2013 decision of a hearing officer finding Respondent not disabled. SSA Ex. 7 at 7; R. Ex. 9. Perhaps the diagnosis has only been made subsequent to these decisions. If so, then there is nothing to support it except one statement on the social worker's report that Respondent submitted.

C. Respondent engaged in work activities related to an ice cream truck business commencing no later than August 2011.

On March 5, 2007, Respondent purchased a 1986 white Chevrolet van with a vehicle identification number (VIN) of 2GCEG25H0G4137190. When purchasing this vehicle, Respondent gave his address as 1443 N Fairmount, Wichita, KS. R. Ex. 1.

On April 2, 2007, Sharron Griffin, Respondent's former wife, filed an application for a Food Safety License with the Kansas Department of Agriculture for a business named Ice Cream and More. SSA Ex. 37 at 1. Ms. Griffin indicated that the address of the business was 1443 N. Fairmount, Wichita, KS, the same address Respondent used when buying the white van one month earlier. SSA Ex. 37 at 1. Ms. Griffin indicated that the license was for an ice cream truck. SSA Ex. 37 at 2. Ms. Griffin filed renewal applications for Ice Cream and More in 2008, 2011, 2012, and 2013, indicating on each application that the address of the business was 1443 N. Fairmount, Wichita, KS. SSA Exs. 19, 37. In April 2012, Ms. Griffin obtained an Employer Identification Number from the Internal Revenue Service for "Ice Cream Truck and More" located at 1443 Fairmount St., Wichita, KS. R. Ex. 4.

From August 2011 through July 2012, the SSA IG CDI unit investigated Respondent's work activity while receiving benefits. SSA Ex. 28 at 2. During that investigation, Ms. Tarango from the Kansas City Police Department determined that Respondent was the primary owner of the white van with the VIN of 2GCEG25H0G4137190, but that Ms. Griffin was a secondary owner of it. SSA Ex. 17 at 3-4; *see also* SSA Ex. 38 at 2. The registration for the van indicated an address of 1443 N. Fairmont Avenue Wichita, KS. SSA Ex. 17 at 4. During this investigation, a local police officer took a picture of the van's license plate (Kansas 346APJ); visible in the picture are markings indicating that it is an ice cream truck. SSA Ex. 17 at 4; SSA Ex. 28 at 6. Following the completion of the investigation, Ms. Griffin purchased Respondent's van on March 13, 2013, and retitled it in her name with an address of 1443 Fairmount St., Wichita, KS. R. Ex. 5. Ms. Griffin also obtained insurance for the vehicle. R. Ex. 6.

On December 6, 2011, during the investigation, Respondent signed a statement in which he said that he did not own a business and he has not worked since November 2007. R. Ex. 7. Respondent asserted that:

A friend of mine, Shar[r]on Gri[ff]in, owns an ice cream business. She owns the truck and drives around and sells ice cream. . . . I occasionally ride with her, maybe twice a month, for maybe 1 hr. I do not have any involvement in the business. On occasion I have put gas in the truck and checked the oil. A couple of times I took some orders and wrote them down.

R. Ex. 7 at 1. On this statement, Respondent gave 1443 N. Fairmount, Wichita, KS as his address.

Consistent with this statement, Respondent disputes that he engaged in any work activity for times relevant to the charges in this case. Respondent asserts that there is no evidence that when Respondent purchased the van in 2007 it was an ice cream truck, thus making the vehicle a personal vehicle and not a resource reportable on his SSI application. R. Br. at 2, 6. Respondent states that he bought a truck and Ms. Griffin owned a business. R. Br. at 6. Although the SSA IG provided evidence that Ms. Griffin works at another job, Respondent argues that this does not foreclose her from owning her own business as well. R. Br. at 7. Respondent also asserts that all of the SSA IG's evidence of alleged work activity related to August 2011 and later, which is after Respondent was approved for benefits. R. Br. at 3. Respondent also avers that to the extent there was any work activity, it was covered by a trial work period allowed under the Social Security Act. R. Br. at 4. Finally, Respondent asserts that he has borderline intellectual functioning and did not have sufficient understanding of any reporting requirements to knowingly make false statements. R. Br. at 7-8; R. Ex. 2.

The SSA IG supports its charges that Respondent was operating an ice cream truck business with an August 12, 2011 article, located on the internet from "nakedcity," which is a site apparently located at wichita.com. SSA Ex. 18. The article, entitled "scrumptiously secret steals" is about a business called Ice Cream Truck & More, and specifically identifies Respondent by name and describes the ice cream truck in question. Significantly, it does not include Ms. Griffin's name.

The ever-mobile Ice Cream Truck & More is painted a neopolitan black, pink, and white, and laced with a shiny set of chrome Polo 20" rims. Andre Watley, or "Ice Cream Dre" to his friends, sells arguably the cheapest frozen treats in town and even better, can bring it directly to your block party, family reunion, or church function with a single phone call.

....

The truck is specially equipped to cook snacks like Hot Wings (\$4) and Texas Hot Links (\$3.75). I love a good food truck, and Ice Cream & More is truly legit. The giant hot wings are spicy and fresh, served 4-5 to an order with a side of ranch dressing, and were the clear winner at a house party I recently attended.

....

And after most ice cream men hang their hats for the winter, Dre will be cranking out Chili, Stew, Cocoa, and Coffee for the cold weary. Give him a call; you will not regret his tasty, entertaining and friendly visit.

SSA Ex. 18 at 2. The SSA IG has provided testimony that it obtained the article on the internet. SSA Ex. 28 at 6-7; SSA Ex. 38 at 2.

I give weight to this article as evidence that Respondent was actively engaged in working with Ice Cream Truck & More. The article has a photograph of Respondent sitting in the ice cream truck. SSA Ex. 18 at 1. This photograph looks like Respondent. SSA Ex. 17 at 1. Further, the ice cream truck in the picture looks like Respondent's ice cream truck. SSA Ex. 17 at 2. In addition, the article not only accurately describes the appearance of the ice cream truck, but also accurately describes information appearing on the side of the truck, i.e., Ice Cream Truck & More can be reserved for "Reunions, Church Functions" and that in addition to ice cream, "Hot Wings" are served. SSA Ex. 17 at 2.

I also find it significant that Ice Cream Truck & More provides hot food. The only job that Respondent stated that he held in the 15 years preceding his 2007 SSI and DIB applications was as a cook at BG Bolders from August 2005 through December 2006. SSA Ex. 2 at 1-2; SSA Ex. 6. This work experience is consistent with the article in describing Respondent's ability to cook and serve hot food from the truck.

Further, I consider the uncontested testimony of several Wichita police officers to significantly support the SSA IG's charge related to Respondent's alleged work activity involving the ice cream truck. Officer Donald Moore testified that on August 26, 2011, he was dispatched to a disturbance and, after arriving at the scene, observed Respondent standing outside an ice cream truck with the license plate 346APJ. SSA Ex. 31 at 1. Although the officer did not see Respondent sell food from the truck, he noticed chips and candy in the ice cream truck and the officer "saw customers outside [the ice cream truck] consuming and holding chips and candy that appeared to have been purchased from the truck." SSA Ex. 31 at 1-2; *see also* SSA Ex. 20 at 1-2.

Officer Ryan Tyrrell testified that on September 10, 2011, the concession manager at Grove Park reported that an ice cream truck was operating in the park's parking lot. Officer Tyrrell responded and observed Respondent "selling ice cream and other treats from a white and maroon conversion style van with Kansas tag number 346APJ." SSA Ex. 32 at 1. Officer Tyrrell asked Respondent to leave the area and Respondent drove the ice cream truck away. SSA Ex. 32 at 1. Officer Tyrrell's contemporaneous report of the incident is consistent with his testimony; however, the report makes it clear that Respondent "was observed selling ice cream and other treats to customers by himself . . . and drove the . . . vehicle away; again alone in the vehicle." SSA Ex. 20 at 4.

Officer Donielle Watson testified that in June 2013, he saw Respondent driving the ice cream truck in a parade and handing out water bottles. SSA Ex. 30.

Therefore, based on the evidence of record, I find that Respondent engaged in work activity related to the ice cream truck business commencing no later than August 2011.

D. Respondent made or caused to be made five statements or representations of material fact related to his work activity, for use in determining a continuing right to or amount of DIB benefits that Respondent knew or should have known were false or misleading in violation of 42 U.S.C. § 1320a-8(a)(1).

The SSA IG alleged that Respondent made several false or misleading statements of fact material to his continued receipt of DIB benefits related to his involvement with the Ice Cream and More business. SSA Ex. 24 at 2. Specifically, the relevant statements that the SSA IG alleged as being false, located in the twentieth through twenty-fourth bullets in the CMP notice, are:

- On a Statement of Claimant or Other Person (SSA Form 795) that [Respondent] signed on December 6, 2011, [Respondent] falsely stated that [Respondent] did not own a business.
- On this statement, [Respondent] falsely stated that [Respondent] had not worked since November 2007. [Respondent] stated that [Respondent's] friend Sharron Griffin owned an ice cream business.
- [Respondent] falsely stated that [Ms. Griffin] owned the ice cream truck for this business.

- [Respondent] falsely stated the [Respondent] drive[s] around in the ice cream truck with [Ms. Griffin] only about twice per month, for an hour.
- [Respondent] falsely stated that [Respondent] had no involvement in this business.

SSA Ex. 24 at 2.

Based on the evidence of record, as summarized above, I conclude that the SSA IG has proven the twentieth through twenty-fourth bulleted allegations in the CMP notice, and that Respondent made five false or misleading statements of material fact. The record reveals that Respondent does not occasionally ride in the ice cream truck with Ms. Griffin, but rather has operated the Ice Cream and More truck on his own. SSA Exs. 18, 20, 30-32. In fact, Respondent has operated this truck enough times to have earned a special name, “Ice Cream Dre” and to have an article written about him, with his photograph, posted in a local online publication on August 12, 2011. SSA Ex. 18. In 2011, Respondent was the principal owner of the ice cream truck for the Ice Cream and More business; Ms. Griffin only acquiring complete ownership in 2013. SSA Ex. 17 at 4; R. Ex. 5.

A material fact is a fact that SSA may consider in evaluating whether an individual is entitled to DIB benefits. 42 U.S.C. § 1320a-8(a)(2). Under this definition, Respondent’s statements on December 6, 2011, are material because they involve the issue as to whether Respondent engaged in work activities, an issue that SSA will always consider when evaluating the entitlement to disability benefits.

To be found “disabled,” a claimant must not be able to engage in substantial gainful activity (SGA) as that term is defined in SSA’s regulations. 42 U.S.C. § 423(d)(1)(A), (d)(4)(A); 20 C.F.R. § 404.1505. Under the regulations, SGA “means work that . . . [i]nvolves doing significant and productive physical or mental duties . . . and . . . is done (or intended) for pay or profit. 20 C.F.R. § 404.1510. However, work activity may be considered gainful “whether or not a profit is realized,” and work activity may be substantial “even if it is done on a part-time basis or if you do less, get paid less, or have less responsibility than when you worked before.” 20 C.F.R. § 404.1572(a)-(b). This is why, “[e]ven if the work you have done was not [SGA], it may show that you are able to do more work than you actually did. [SSA] will consider all of the medical and vocational evidence . . . to decide whether or not you have the ability to engage in [SGA].” 20 C.F.R. § 404.1571 (emphasis added).

I also conclude that Respondent knew or should have known that his statements were false or misleading. Respondent made this statement on an SSA form that provides the following directly above his signature:

I declare under penalty of perjury that I have examined all the information on this form . . . and it is true and correct to the best of my knowledge. I understand that anyone who knowingly gives a false or misleading statement about a material fact in this information, or causes someone else to do so, commits a crime and may be sent to prison, or may face other penalties, or both.

SSA Ex. 13 at 2; R. Ex. 7 at 2.

Respondent has asserted that he has borderline intellectual functioning and thus could not have made knowing false statements. R. Br. at 2, 8; R. Ex. 2. As addressed previously, this argument is not sufficiently supported to prove this affirmative defense.

Respondent also argues that any work activity he might have engaged in would not subject him to sanction because he is eligible for a trial work period. R. Br. at 4. “The trial work period is a period during which you may test your ability to work and still be considered disabled.” 20 C.F.R. § 404.1592. However, regardless as to whether Respondent’s work activity, as detailed above, could be considered part of a trial work period, 42 U.S.C. § 1320a-8(a)(1) still prohibited him from falsely stating to SSA that he did not engage in work activity when he did. Interestingly, Respondent submitted a February 27, 2012 notice from SSA regarding the results of his continuing disability review in which SSA states: “The evidence shows that you have not worked in any trial work months.” R. Ex. 8 at 1. This notice describes what a trial work period is. R. Ex. 8 at 3-4. However, the notice also states that Respondent must promptly report any changes that may affect his benefits, specifically stating: “Let us know if: [y]ou returned to work since your last report or you return to work in the future (no matter how little you earn).” R. Ex. 8 at 1. Respondent not only did not report his work activity, he actively denied it existed. Therefore, for the reasons stated above, I conclude that Respondent violated 42 U.S.C. § 1320a-8(a)(1) five times based on the contents of his December 6, 2011 statement to SSA regarding his work activity.

E. Respondent stated to SSA in his December 17, 2007 SSI application, June 12, 2009 SSI Application, and July 20, 2010 Review Statement Summary for SSI that he did not have any resources; however, from March 2007 until March 2013 Respondent owned a 1986 Chevrolet van.

On December 17, 2007, Respondent filed applications for DIB and SSI. SSA Ex. 1. Respondent indicated on the SSI application that: “I do not own any type of resource.” SSA Ex. 1 at 2.

On June 12, 2009, Respondent filed new applications for DIB and SSI. SSA Ex. 3 at 1. Respondent again asserted on the SSI application that: "I do not own any type of resource." SSA Ex. 3 at 9.

On a July 20, 2010 Review Statement Summary for SSI, Respondent again stated that: "I do not own any type of resource." SSA Ex. 8 at 3.

On March 5, 2007, Respondent purchased a 1986 Chevrolet van with the VIN of 2GCEG25H0G4137190 for \$800. R. Ex. 1. A title for this vehicle was issued on April 26, 2007. SSA Ex. 17 at 3-4. State records show that Respondent was the primary owner of the vehicle and Ms. Griffin was the secondary owner. SSA Ex. 17 at 4; *see also* SSA Ex. 38. On March 13, 2013, Ms. Griffin purchased the van and applied to have the van retitled in her name. R. Ex. 5.

F. Respondent made or caused to make three statements or representations of material fact related to the resources he possessed, for use in determining an initial right to or amount of SSI benefits, that Respondent knew or should have known was false or misleading in violation of 42 U.S.C. § 1320a-8(a)(1).

The SSA IG alleged that Respondent made three false or misleading statements of fact material to his initial application for SSI related to the resources he possessed. Specifically, the relevant statements that the SSA IG alleged as being false, located in the first, fifth, and twelfth bullets in the CMP notice, are:

- In an application for [SSI] payments that [Respondent] completed and attested to on December 17, 2007, [Respondent] falsely stated that [Respondent] had no resources even though [Respondent was] the primary owner of a truck that [Respondent] used for [Respondent's] ice cream business.
- On this application, [Respondent] falsely stated that [Respondent] owned no resources when [Respondent] in fact owned a truck purchased in 2007 that [Respondent] used for [Respondent's] ice cream business.
- On [the July 20, 2010] Review Summary [for SSI], [Respondent] falsely stated that [Respondent] owned no resources.

SSA Ex. 24 at 1-2.

As found above, Respondent purchased a van in March of 2007, several months before he filed the December 17, 2007 SSI application. Further, he possessed that vehicle until well after the July 20, 2010 Review Statement Summary for SSI.

A material fact for CMP purposes is one that SSA may consider in evaluating whether an applicant is entitled to SSI benefits. 42 U.S.C. § 1320a-8(a)(2). In the present matter, the question as to whether an applicant for SSI has any resources is an important matter that SSA must consider before paying benefits. 20 C.F.R. § 416.202(c) (in order to be eligible for SSA, an individual must “not have more resources than permitted.”). For purposes of SSI, “resources means cash or other liquid assets or any real or personal property that an individual . . . owns and could convert to cash to be used for his or her support and maintenance.” 20 C.F.R. § 416.1201(a).

There is no doubt that Respondent’s van, which he purchased for \$800 in 2007, could have been sold for cash. Therefore, the van was a resource.

Respondent argues that Respondent did not need to inform SSA of his van because the van was not a significant resource, was his personal vehicle, and SSI recipients may own a vehicle. R. Br. at 2. Although it is true that SSI recipients may generally own one vehicle for transportation purposes and that this will not be counted as a resource (20 C.F.R. § 416.1218), Respondent still needed to disclose the ownership of the vehicle so that SSA, and not Respondent, could determine whether the vehicle qualified for the regulatory exclusion from being a resource. 20 C.F.R. § 416.1210 (indicating that SSA determines resources for an SSI applicant and providing a list of items that SSA excludes from being counted as resources). In the present case, Respondent’s van was used for business purposes by at least 2011, and, as discussed in the next paragraph, quite possibly before that time. Respondent’s false statement that he did not have any resources foreclosed SSA from inquiring as to the purpose for the van. Therefore, I conclude that Respondent falsely stated three times that he did not have resources and that these false statements were material facts.

I also conclude that Respondent knew or should have known that his statements were false or misleading. Respondent purchased the van less than a year before he filed his December 2007 SSI application. This van appears to be Respondent’s primary asset. At some point, it became Respondent’s source of employment. It is possible that the van was purchased in order to provide Respondent with employment, because Ms. Griffin applied for an ice cream truck license from the state within a month of Respondent’s purchase of the van. *Compare* R. Ex. 1 *with* SSA Ex. 37 at 1. When asked whether he had any resources, it is not reasonable to conclude that Respondent did not believe that his primary asset was not a potential resource. Thus, Respondent knew or should have known his statement was false. Therefore, I conclude that Respondent is liable for a CMP based on three violations of 42 U.S.C. § 1320a-8(a)(1).

G. I conclude that the SSA IG has not proven 13 of the 24 allegations of false or misleading statements in the CMP notice.

The SSA IG has the burden of proving its allegations by a preponderance of the evidence. In addition to the 11 allegations of false statements discussed above, the SSA IG alleged 13 other false statements.

1. The SSA IG did not prove by a preponderance of the evidence that Respondent engaged in work activities before 2011.

The SSA IG alleged false statements regarding Respondent's work activities and income before 2011 from both the ice cream truck business and as a drug dealer. SSA Ex. 24 at 1-2 (third, fourth, seventh, eleventh, seventeenth, eighteenth, and nineteenth bullets). As found above, the SSA IG's direct evidence regarding Respondent's work activities is limited to the 2011 article concerning the Ice Cream and More business and observations made in 2011 and 2013 by local police officers. Although the SSA IG has shown that Ms. Griffin (an individual whom Respondent had been married to and has lived with during times relevant to this case) applied for a business license for Ice Cream and More shortly after Respondent purchased the van that would become Ice Cream and More's ice cream truck, this evidence, while suggestive, is insufficient to prove that Respondent actually engaged in work activity from 2007 through 2011. This is especially so given the lack of license renewals for Ice Cream and More in 2009 and 2010 and Respondent's incarceration in 2009 and 2010.² R. Br. at 3; R. Ex. 3 at 1; *see also* SSA Ex. 36 at 2; SSA Ex. 37.

I am also unable to find that a preponderance of the evidence supports the conclusion that Respondent engaged in work activity as a seller of illegal drugs. No doubt Respondent has been convicted previously for possession of illegal drugs (SSA Exs. 17, 36); however, I cannot find that possession violations prove work activity. Further, while Respondent was arrested on a charge of selling drugs, this charge was dropped. SSA Ex. 36 at 2. Therefore, this charge is not proof that Respondent sold illegal drugs.

² The SSA IG indicates that Respondent failed to properly provide documents about his work activity in response to a discovery request. SSA Ex. 26. The SSA IG asserts that "had Respondent submitted requested evidence, such as information about the truck route and times travelled, as he was legally required to do (*see* 20 CFR § 498.203(a)(3) granting both parties the right to conduct discovery) [the SSA IG] would have been able to establish exact dates and times of Respondent's work activity." SSA Reply Br. at 4. However, the SSA IG did not file a motion for sanctions against Respondent. *See* 20 C.F.R. § 498.214(b)(1) (providing certain sanction for a refusal to permit or provide discovery).

2. *The SSA IG did not prove by a preponderance of the evidence that Respondent's functional capabilities before 2011 were greater than he asserted to SSA.*

The SSA IG alleged false statements concerning Respondent's functional abilities from before 2011. SSA Ex. 24 at 2 (eighth, ninth, and tenth bullets). I cannot find that a preponderance of the evidence supports a finding that proves Respondent's functional capabilities were greater than he alleged in documents submitted before 2011 or in statements he made to an SSA ALJ before 2011. There is simply no evidence in the record, medical or otherwise, that proves Respondent was lying about his functional capabilities before 2011. Indeed, an SSA ALJ concluded the following after holding a hearing in Respondent's SSI and DIB case in 2010: "I find [Respondent's] allegations [of his physical capabilities] to be credible and consistent with the record as a whole." SSA Ex. 7 at 7. Even the May 31, 2013 determination by a hearing officer to uphold SSA's decision to cease Respondent's DIB acknowledged Respondent's impairments and indicated that he could have periods of time where he is better and worse.

An evaluation of the medical evidence establishes [Respondent] has a physical impairment that would limit him vocationally. This impairment, Lupus, is well-documented with a longitudinal history. Lupus is also an impairment that has periods of exacerbations. [Respondent] has also been diagnosed with Lupus nephritis, hypertension, and obesity. However, at this time, the severity of the impairments including exacerbations and the alleged functional limitations are not fully supported by the medical evidence. . . . It is medically reasonable that the impairment of Lupus would limit [Respondent's] ability to stand and walk and lift and carry. However, his impairment has been stable for sometime . . . and he appears much more active tha[n] he reports.

R. Ex. 9 at 4.

Respondent's proven health condition makes it impossible, with the record before me, to conclude that Respondent's functional limitations before 2011 were falsely reported by him.

3. *The SSA IG did not prove by a preponderance of the evidence that Respondent made false statements on a Continuing Disability Report allegedly completed on December 7, 2011.*

The SSA IG alleged the following false statements by Respondent:

- On a Continuing Disability Review Report (SSA Form 454-BK) that you completed and attested to on December 7, 2011, [Respondent] falsely stated that [Respondent] had not worked since November 1, 2007.
- On this Report, [Respondent] stated that a typical day consisted of only watching television and sitting outside. [Respondent] stated that [Respondent] sometimes needed a walker.
- On this form, [Respondent] indicated that [Respondent] had difficulty dressing, bathing, walking, standing, lifting objects, driving and using [Respondent's] arms.

SSA Ex. 24 at 2 (fourteenth through sixteenth bullets).

I cannot find that Respondent made false statements related to a Continuing Disability Report that Respondent allegedly completed and attested to on December 7, 2011. The only document in the record that appears to relate to the SSA IG's allegations is SSA Ex. 12. However, there is no date or signature on this document. There is no attestation by Respondent as alleged. I cannot be certain that SSA Ex. 12 is the document the SSA IG references in the CMP notice. Further, although Agent Guilford's testimony and investigation report reflect concerns over false statements made by Respondent on the December 6, 2011 Statement of Claimant or Other Person (Form SSA-795), which has been discussed above, he does not mention a December 7, 2011 Continuing Disability Report. SSA Ex. 21 at 4, 11; SSA Ex. 28 at 3. Because there is no other evidence in the record, to explain this ambiguous document or support the allegations quoted above, I cannot conclude that the SSA IG has proven these allegations.

H. The I.G.'s proposed CMP of \$5,000 per false statement is permissible and reasonable.

The SSA IG proposed the imposition of a \$5,000 CMP for each of the 24 alleged false statements enumerated in the CMP notice.³ SSA Ex. 24 at 4. Because I have sustained 11 of the alleged false statements in the CMP notice, I must now consider the reasonableness of the proposed penalty amount based on applicable statutory requirements.

³ The SSA IG only proposes in its CMP notice a \$120,000 penalty and does seek an assessment in lieu of damages. SSA Ex. 24; *see also* SSA Br. at 20 n.33; November 19 Order at 2.

As a general parameter, a CMP may not be more than \$5,000 for each false statement or misrepresentation of a material fact. 42 U.S.C. § 1320a-8(a)(1). Therefore, Respondent is potentially subject to a maximum CMP amount of \$55,000 for the 11 false or misleading statements proven above.

In addition to establishing the maximum CMP amount that may be imposed, the statute requires that the following factors be taken into account when determining the actual amount of the CMP:

- (1) the nature of the statements, representations, or actions referred to in [42 U.S.C. § 1320a-8(a)] and the circumstances under which they occurred;
- (2) the degree of culpability, history of prior offenses, and financial condition of the person committing the offense; and
- (3) such other matters as justice may require.

42 U.S.C. § 1320a-8(c); *see also* 20 C.F.R. § 498.106(a).

1. The nature and circumstances of Respondent's misconduct.

In regard to the first factor, the SSA IG has stated the following:

[Respondent] has made a deliberate effort to mislead SSA. He made false statements on SSI applications in 2007 and 2009 about his resource (the ice cream truck) and felony history He received about \$36,000.00 in DIB and SSI as a result of his false statements and misrepresentations.

SSA Br. at 21. Respondent does not appear to provide an argument regarding this factor except to state that Respondent "is a person with a severe medical condition." R. Br. at 8.

Although the record reflects that Respondent suffers from several severe medical conditions, Respondent's medical condition does not mitigate his misconduct. SSA Ex. 7; R. Ex. 10. From the beginning of his interaction with SSA, i.e., Respondent's SSI application in 2007, Respondent lied to SSA. He affirmatively stated he was not accused or convicted of a felony and that he did not own any resources. SSA Ex. 1 at 2. He repeated these lies in his 2009 SSI application and on the Review Statement Summary for SSI in 2010. SSA Ex. 3 at 9; SSA Ex. 8 at 1, 3. Although SSA learned of Respondent's incarceration and did not pay him DIB, it still accidentally paid him SSI benefits while he was in prison; benefits that SSA later had to recover. SSA Ex. 33 at 2; R. Ex. 3 at 3; see

also SSA Ex. 9. However, it is clear that Respondent did not and would not have informed SSA of his incarceration on his own.

Respondent's lies related to his ownership of a van might have a connection to his later lies about his work activity. As found above, Respondent has engaged in work activity related to an ice cream truck business since at least 2011. Although there was insufficient evidence proving that work activity occurred before 2011, there are certainly indications that this business may have been started in conjunction with Ms. Griffin as early as 2007, the year Respondent first applied for DIB and SSI. *See* SSA Ex. 37; R. Ex. 1. Respondent has asserted in this proceeding that there is no proof that Respondent purchased an ice cream truck or proof of when it was converted to an ice cream truck. That is certainly true, but based on the significant evidence of work activity in 2011 related to his van (which had been converted to an ice cream truck by that time), his lies concerning a lack of resources seem likely to have been an attempt to hide the ice cream truck business from as early as 2007.

Such a conclusion is not unwarranted. The record is clear that, in 2011, Respondent was engaged in providing food services from an ice cream truck equipped to cook some hot food dishes. SSA Exs. 18, 31, 32. Serving as a cook was Respondent's past vocation and one that he could do again. SSA Ex. 2 at 1-2; SSA Ex. 6 at 1-2. However, despite this evidence of significant work activity while SSA was conducting a continuing disability review of Respondent, Respondent provided a statement under penalty of perjury where almost every one of his assertions denied involvement in the ice cream truck business. SSA Ex. 13 at 1.

Respondent has an arrest record 41 pages long and is a felon multiple times over. His defense in this case to most of the alleged false statements has simply been that the SSA IG has not met its burden of proof. As discussed earlier, this is true for many allegations and I have only upheld the allegations that a preponderance of the evidence in the record supports. However, the SSA IG's lack of proof is in some measure likely attributable to Respondent's efforts to mislead SSA.

2. Respondent's level of culpability, prior offenses, and financial condition.

The second factor includes three parts. The SSA IG considered each of these in its CMP notice.

i. Respondent's level of culpability

The SSA IG stated the following regarding culpability:

I have considered the degree of your culpability in this offense and conclude that it is substantial. You have made numerous false statements to SSA during your application process, appeals process and post-eligibility review. You have lied not only about your work activity, but also about other factors affecting your eligibility as noted above. There is no indication you would ever have reported your work activity and income to SSA unless and until you were caught. Your degree of culpability is substantial.

SSA Ex. 24 at 3-4.

Respondent's argument related to culpability appears to be that he has been diagnosed with borderline intellectual functioning. R. Br. at 8. However, as already indicated above, there is insufficient evidence in the record to support a finding that such a limitation on his intellectual functioning is severe enough to preclude responsibility for his actions.

I agree with the SSA IG that Respondent's culpability is substantial. Respondent not only worked at the ice cream truck business while receiving disability benefits, but was interviewed for an article in order to promote the business. SSA Ex. 18. While the record in this case is limited regarding matters before 2011, it is sufficient for me to surmise that Respondent worked in tandem with Ms. Griffin concerning this business, perhaps in an effort to avoid SSA learning of his work activity. He clearly lied on the statement he made to SSA in December 2011 related to his involvement in the ice cream truck business. Further, Respondent overtly lied to SSA multiple times about his extensive criminal record. There is no possible way that Respondent did not do this knowingly with the intent to mislead SSA.

ii. Respondent's prior Social Security offenses

I agree with the SSA IG that there is no evidence in the record that Respondent committed a previous offense related to SSA programs. SSA Ex. 24 at 4.

iii. Respondent's financial condition

The SSA IG addressed the issue of Respondent's financial condition as follows:

SSA-OIG considered [Respondent's] financial condition. It is important to note that [Respondent] bears the burden of proving by a preponderance of the evidence that his financial condition would prevent him from being able to pay the penalty imposed against him

[Respondent] failed to submit a financial disclosure form to SSA-OIG to consider. Because SSA-OIG was unable to serve an initial CMP letter to [Respondent] which would have allowed him to submit financial information for consideration prior to issuing a proposed penalty, in this case, SSA-OIG's notice still offered [Respondent] an opportunity to submit financial information so that it could consider and revise the proposed penalty, if appropriate. To date, [Respondent] failed to provide any financial information. Even after making a request for discovery and requesting financial information, [Respondent] indicated he had no debts, no expenses, and no bank accounts. Perhaps he has no expenses, but on July 28, 2010, [Respondent] requested that SSA directly deposit his DIB benefits into a bank account, thus leading OIG to presume he does, despite his assertion to the contrary (SSA Ex. 26, p. 3) in fact have a bank account, at least as of July 2010. Without financial information to consider, SSA-OIG proposes the maximum penalty. . .

SSA Br at 22-23. In response, Respondent only asserts that he has provided financial information with his discovery response and baldly states that "fining him at the maximum penalty would have severe financial consequences." R. Br. at 8.

I agree with the SSA IG's argument that Respondent has failed to meet his burden of proving that his financial condition should serve as a mitigating factor regarding the amount of the penalty to be imposed. Respondent provided no evidence concerning his financial condition. Respondent did not even submit a declaration related to that issue. Finally, due to the reduced number of false statements proven in this case, the potential maximum total penalty has been reduced from \$120,000 to \$55,000. To the extent that a \$120,000 penalty would have caused "severe financial consequences," there is no reason to believe that a greatly reduced amount would as well.

3. Other matters as justice may require.

In the CMP notice, the SSA IG "considered the fact that [Respondent] ha[s] a lengthy criminal history. I am not aware of additional factors." SSA Ex. 24 at 4. Respondent has not raised any other factors.

I agree with the SSA IG that Respondent has been a criminal throughout his adult life. He is still only in his early 40's and may come in contact with SSA or other government programs for years to come. A high penalty must be imposed to deter future fraudulent acts.

4. A CMP of \$55,000 is reasonable.

The SSA IG proposed to penalize Respondent at the maximum rate of \$5,000 per false statement. Based on the analysis above, I conclude that the SSA IG's proposal is reasonable and supported by the statutory factors that must be considered when determining such a penalty. Therefore, a total penalty of \$55,000 is appropriate.

Order

Based on the evidence of record, and consistent with my findings of fact and conclusions of law, I hereby order the following:

1. Respondent is **LIABLE** to pay a CMP under 42 U.S.C. § 1320a-8(a)(1) for knowingly making 11 false statements of material fact to SSA;
2. The I.G.'s proposed CMP of \$5,000 per false statement is **AFFIRMED**; and
3. Respondent is directed to pay a total of \$55,000 in the manner specified by the SSA IG in his CMP notice (SSA Ex. 24 at 4) or in any other manner prescribed by the SSA IG following the issuance of this decision.

/s/

Scott Anderson
Administrative Law Judge