

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

Carolyn Cole
Docket No. A-14-62
June 12, 2014

RECOMMENDED DECISION

The Social Security Administration Office of Inspector General (SSA I.G.) appeals a March 12, 2014 decision by an Administrative Law Judge (ALJ). *Carolyn Cole*, DAB CR3150 (2014) (ALJ Decision). The SSA I.G. had proposed to impose a civil monetary penalty (CMP) and assessment in lieu of damages on Carolyn Cole (Respondent) under section 1129(a)(1)(C) of the Social Security Act (Act) on the ground that Respondent withheld disclosure of a fact that she knew or should have known was material to her right to receive Social Security Widow's Insurance Benefits (WIB) by failing to disclose to SSA her common law marriage. The ALJ denied the SSA I.G.'s proposal, concluding that Respondent was not common law married by February 1, 2005, the date she turned 60 years old, so she did not withhold disclosure of a fact material to her receipt of WIB.

As explained more fully below, we recommend that the Commissioner of SSA affirm the ALJ Decision because it is supported by substantial evidence and consistent with applicable legal authorities.

Legal Background

Under Title II of the Act, in certain circumstances the widow of a worker eligible for benefits through Social Security's Old-Age and Survivors Insurance Trust Fund may receive WIB based on her deceased spouse's Social Security record. *See* Act § 202(e)(1), 42 U.S.C. § 402(e)(1).¹ In general, a widow is eligible to begin receiving WIB once she has attained age 60, provided she has not remarried prior to turning 60. *See* Act § 202(e)(1)(B)(i); 20 C.F.R. § 404.335(e)(1).

¹ The current version of the Act can be found at http://www.ssa.gov/OP_Home/ssact/ssact.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

Section 1129(a)(1)(C) of the Act authorizes the imposition of a CMP and an assessment in lieu of damages against any person who –

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 . . . 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)(C); *see also* 20 C.F.R. § 498.102(a) (implementing regulation). A “material fact” is one which the Commissioner of SSA “may consider in evaluating whether an applicant is entitled to benefits under title II” 42 U.S.C. § 1320a-8(a)(2). Section 1129 authorizes a CMP “of not more than \$5,000 for each such statement or representation or each receipt of such benefits or payments while withholding disclosure of such fact” and an assessment in lieu of damages “of not more than twice the amount of benefits or payments paid as a result of such a statement or representation or such a withholding of disclosure.” 42 U.S.C. § 1320a-8(a)(1); *see also* 20 C.F.R. §§ 498.103(a), 498.104.

An individual against whom the SSA I.G. proposes to impose a CMP or assessment may request a hearing before an ALJ to challenge the proposal. 20 C.F.R. § 498.109(b). The ALJ may then affirm, deny, increase, or reduce the SSA I.G.’s proposed penalty and assessment. *Id.* § 498.220(b). If the ALJ’s decision is appealed to the Board, the Board may remand the case to the ALJ for further proceedings or may issue a recommended decision to decline review or to affirm, increase, reduce, or reverse any penalty or assessment determined by the ALJ. *Id.* § 498.221(h).

Factual and Procedural Background

Respondent was married to James Cole from 1964 until his death in 1999. SSA Exs. 1-2; SSA Ex. 3, at 20. In December 2004, Respondent filed an application for WIB based on Mr. Cole’s Social Security record. SSA Ex. 3, at 19-21. In her application, Respondent indicated that she was last married to Mr. Cole and agreed to notify SSA if she remarried. *Id.* at 20. SSA approved Respondent’s application, and she began receiving benefits as of February 1, 2005, when she turned 60 years old. *See id.* at 19; Act § 202(e)(1)(B)(i).

Six years later, on March 17, 2011, Respondent filed a second application for WIB based on her common law marriage to Alex Moore, who had passed away in February 2011. SSA Ex. 3, at 16-18. In the application, Respondent indicated that the marriage commenced on July 10, 2003 – prior to her sixtieth birthday and prior to the date that she had initially applied for WIB based on her marriage to Mr. Cole. *Id.* at 17. SSA approved Respondent’s application and began paying her benefits based on Mr. Moore’s

Social Security record rather than Mr. Cole's. (Mr. Moore's record entitled Respondent to a higher benefit payment.) SSA Ex. 3, at 64-66. However, SSA subsequently began investigating whether Respondent had provided false information about her marital status to SSA in order to receive benefits based on Mr. Cole's Social Security record. *See id.* at 1-2, 5, 67-68; SSA Ex. 12, at 6.

By letter dated July 19, 2012, the SSA I.G. notified Respondent that it was proposing to impose on her a CMP of \$51,000 and an assessment in lieu of damages of \$96,482 based on a determination that she had withheld material information from SSA. SSA Ex. 8. Specifically, the letter alleged:

On December 17, 2004, when you applied for [WIB] on the record of your deceased common law [sic] husband, James Cole, you falsely stated that you were not married to Alex Moore. Then, on March 17, 2011, you applied for WIB on the record of your deceased common law husband Alex Moore and stated that you married Mr. Moore on July 10, 2003. Between December 17, 2004 and February 2011, you failed to notify SSA that you were married to and living with Mr. Moore. Because of your failure to report this material information, you received \$91,967 in WIB payments to which you were not entitled.

Id. at 1.

Respondent, through counsel, requested a hearing before an ALJ to challenge the SSA I.G.'s determination and proposed CMP and assessment. The parties submitted briefs, written direct testimony, and other evidence in support of their positions. The ALJ also convened a one-day hearing at which Respondent and her daughter testified. Respondent testified that she made an "honest mistake" by stating in her second WIB application that she had been common law married to Mr. Moore since July 10, 2003. *Tr.* at 30. Instead, Respondent testified, she met and began dating Mr. Moore on that date. *Id.* at 30, 64-65, 80. Respondent further testified that she never considered herself married to Mr. Moore until after his death when she called SSA to explain that the agency was mistakenly attempting to pay her a spousal death benefit for Mr. Moore and the SSA employee to whom she spoke suggested that their relationship might constitute a common law marriage under state law. *Id.* at 15, 20-25, 56-57, 68, 77-78, 88, 102.

In its July 2012 determination letter, the SSA I.G. had alleged that when Respondent was initially applying for WIB in 2004 based on Mr. Cole's Social Security record, SSA "specifically asked if you were married to Mr. Moore and you said you were not." SSA Ex. 8, at 2. In its opening brief before the ALJ, the SSA I.G. similarly contended that during the 2004 application process, Respondent "advised SSA that her common law husband [Mr. Moore] informed her that she was eligible for benefits based on her deceased husband's record," but then "denied the common law marriage when she learned that the marriage would make her ineligible for benefits." SSA Br. in Support of

the I.G.'s Decision to Propose a CMP at 8; *see also id.* at 5. The SSA I.G. considered this alleged "false statement" as an aggravating factor when determining (and then justifying) the amount of its proposed CMP and assessment. *Id.* at 12; SSA Ex. 8, at 2. However, at the hearing, the SSA I.G. stipulated that it had been mistaken and that Respondent did not mention Mr. Moore and refer to him as her common law husband until 2011, when she was applying for WIB based on his Social Security record. Tr. at 9-10.

The ALJ found Respondent's hearing testimony credible and determined that Respondent was not common law married to Mr. Moore before Respondent turned 60 years old on February 1, 2005. Accordingly, the ALJ concluded, Respondent did not withhold a material fact related to the determination of her continued entitlement to WIB based on Mr. Cole's Social Security record, so there was no basis for the SSA I.G.'s proposed CMP and assessment.

The SSA I.G. timely appealed the ALJ Decision to the Board.

Standard of Review

The regulations governing section 1129 appeals provide that the Board "will limit its review to whether the ALJ's initial decision is supported by substantial evidence on the whole record or contained [an] error of law." 20 C.F.R. § 498.221(i).

Analysis

On appeal to the Board, the SSA I.G. does not dispute that the ALJ correctly framed the basis for liability in this case. As the ALJ explained, because marriages after 60 years of age do not affect entitlement to WIB, Respondent is liable for withholding a material fact related to her continued entitlement to WIB on Mr. Cole's account only if she was common law married to Mr. Moore before she turned 60 years old on February 1, 2005. ALJ Decision at 4. If, on the contrary, Respondent either was never common law married to Mr. Moore or was only common law married to him 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." *Id.*, citing 20 C.F.R. § 404.335(e)(1). Thus, the key issue is whether Respondent was common law married to Mr. Moore by February 1, 2005.

The SSA I.G. also does not dispute that the ALJ correctly identified the burden of proof and the governing law regarding this issue. As the ALJ noted, in order to sustain the SSA I.G.'s proposed CMP and assessment, the SSA I.G. needed to prove the existence of a common law marriage between Respondent and Mr. Moore by February 1, 2005 by a preponderance of the evidence. ALJ Decision at 4, citing 20 C.F.R. § 498.215(b);

Driscoll v. Driscoll, 552 P.2d 629, 632 (Kan. 1976); SSR 87-5c. And, as the ALJ explained, because Mr. Moore was domiciled in Kansas at the time of his death, the ALJ needed to determine whether the preponderance of the evidence established that Respondent and Mr. Moore were common law married by February 1, 2005 under Kansas law. *Id.*, citing 42 U.S.C. § 416(h)(1)(A)(i)²; *Keen v. Keen*, 201 U.S. 319, 321 (1906); SSR 88-14.

As the SSA I.G. concedes, the ALJ correctly recognized that under Kansas law there are three essential elements to establish a common law marriage: (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. ALJ Decision at 5, citing *Sullivan v. Sullivan*, 413 P.2d 988, 992 (Kan. 1966). The ALJ determined that Respondent and Mr. Moore were not common law married under Kansas law by February 1, 2005 because prior to that date they had the capacity to marry but did not have a present marriage agreement or hold themselves out to the public as husband and wife. *Id.* at 5-12. We conclude that the ALJ's determination is supported by substantial evidence and free of legal error.

1. Substantial evidence supports the ALJ's conclusion that prior to February 1, 2005 Respondent and Mr. Moore did not have a present marriage agreement or hold themselves out to the public as husband and wife.

The SSA I.G. contends that, contrary to the ALJ's findings, the record is "replete with . . . substantial evidence" that Respondent and Mr. Moore had a present marriage agreement and held themselves out to the public as husband and wife prior to February 1, 2005. SSA Br. at 5-6. As noted above, our standard of review is whether the ALJ's decision is "supported by substantial evidence on the whole record or contained [an] error of law," so the SSA I.G.'s argument reflects a misunderstanding of the governing standard. 20 C.F.R. § 498.221(i) (emphasis added). Substantial evidence "does not mean a large or considerable amount of evidence, but 'rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Pierce v. Underwood*, 487 U.S. 552, 565 (1988), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). In an adequately developed factual record, substantial evidence may be "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966). Thus, under the substantial evidence standard, the Board does not re-weigh the evidence or overturn an ALJ's "choice between two fairly conflicting views" of the

² Section 416(h)(1)(A)(i) of the Act provides in relevant part that an applicant for federal old-age, survivors, and disability insurance benefits is the widow of an insured individual for benefits qualification purposes if the courts of the state in which the insured individual was domiciled at the time of his death would find that the applicant and the insured individual were validly married at that time.

evidence; instead, the Board determines whether the contested finding could have been made by a reasonable factfinder “tak[ing] into account whatever in the record fairly detracts from the weight of the evidence” upon which the ALJ relied. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); see also *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 377 (1998); *Golden Living Ctr. - Frankfort*, DAB No. 2296, at 9-10 (2009), *aff’d*, *Golden Living Ctr.- Frankfort v. Sec’y of Health & Human Servs.*, 656 F.3d 421 (6th Cir. 2011).

Substantial evidence supports the ALJ’s determination that Respondent and Mr. Moore did not have a present agreement to marry prior to February 1, 2005. Under Kansas law, an agreement to be married in the future is insufficient to establish a common law marriage. *In re Freeman’s Estate*, 231 P.2d 261, 263 (Kan. 1951). In addition, the “general reputation of the parties with respect to being married or single does not prove or disprove the marriage agreement itself.” *Id.* However, no particular form of present agreement is required, so the agreement “may be evidenced by the acts and conduct of the parties.” *Dixon v. CertainTeed Corp.*, 915 F. Supp. 1158, 1160 (D. Kan. 1996). In concluding that Respondent and Mr. Moore did not have a present agreement to marry by February 1, 2005, the ALJ primarily relied on Respondent’s testimony that she did not consider herself married to Mr. Moore until after he died, when she spoke to an SSA representative who suggested that they might have been common law married. ALJ Decision at 6, citing Tr. at 15. The ALJ also relied on Respondent’s testimony, corroborated by her daughter, that she planned to marry Mr. Moore when he recovered from his illness, but that never happened. *Id.*, citing Tr. at 115-16; SSA Ex. 3, at 10, 41. The ALJ also found that the undisputed evidence showed that Respondent never used Mr. Moore’s surname, filed income taxes individually, maintained her own residence (albeit one at which Mr. Moore frequently spent the night) until 2007, and did not open a joint bank account with Mr. Moore until 2008. *Id.* at 6-7. This evidence is sufficient to support the ALJ’s determination.

Substantial evidence also supports the ALJ’s determination that Respondent and Mr. Moore did not hold themselves out to the public as husband and wife prior to February 1, 2005. As the ALJ observed, the record is clear that Mr. Moore referred to Respondent as his “wife” during a dinner party that they held at their house in 2009 – stating that he and his wife thanked their guests for coming – but it appears that this was the first time either Mr. Moore or Respondent ever publicly stated that they were married. ALJ Decision at 11. In addition to Respondent’s testimony that this was the case, Respondent submitted an affidavit from one of the guests at the party stating that at no time prior to the party had she heard Respondent and Mr. Moore hold themselves out as married. R. Ex. 3, at 1. Respondent also submitted an affidavit from her sister stating that, although she was not present at the party, she remembered Respondent telling her afterwards that Mr. Moore had introduced Respondent as his wife for the first time at the party, and that the first time she heard Mr. Moore refer to Respondent as his wife was in October 2010 when the couple came to visit her. R. Ex. 5, at 1. The Kansas Supreme Court has noted that its

decisions “take it for granted that some measure of publicity is a distinguishing feature, if not an essential attribute of, a common-law marriage.” *Butler v. Butler*, 285 P. 627, 629 (Kan. 1930). Thus, this testimony constitutes substantial evidence in support of the ALJ’s determination that prior to February 1, 2005 Respondent and Mr. Moore did not hold themselves out to the public as husband and wife, and so were not common law married as of that date.

In challenging the ALJ’s conclusions, the SSA I.G. mainly asserts that the ALJ gave inadequate weight to the supporting statements from friends and family that Respondent submitted with her second application for WIB. According to the SSA I.G., these statements describe “activities and conduct that would lead to the presumption” that Respondent and Mr. Moore had a present marriage agreement before February 1, 2005 and also constitute “compelling evidence” that Respondent and Mr. Moore held themselves out to the public as husband and wife prior to that date. SSA Br. at 4-6. Most notably, in three “Statement Regarding Marriage” forms, the individuals completing the forms indicated that Mr. Moore and Respondent had lived together as husband and wife from 2003 to 2011 and explained, in various ways, why they considered Mr. Moore and Respondent to be husband and wife (i.e., they had joint title to their home, they lived together, etc.). SSA Ex. 3, at 28-34.

Although the supporting statements provide some support for the conclusion that Respondent and Mr. Moore had a present marriage agreement and held themselves out to the public as husband and wife prior to February 1, 2005, the statements are not so persuasive that the ALJ’s contrary conclusion is unreasonable. The ALJ thoroughly discussed each statement and explained why it provided only limited support for the conclusion that Respondent and Mr. Moore were common law married prior to February 1, 2005. ALJ Decision at 7-10. As the ALJ explained, most of the statements supported only the conclusion that Respondent and Mr. Moore cohabitated under Kansas law prior to February 1, 2005. *Id.* at 10. The ALJ also pointed out that some of the statements could be read as detracting from a conclusion that Respondent and Mr. Moore were married and that some statements lack exactness with regard to time. *Id.* at 8-10. The SSA I.G. essentially wants us to re-weigh the significance of the statements but, as discussed above, the substantial evidence standard of review does not permit us to do so.

The SSA also challenges the ALJ’s conclusions by attacking the ALJ’s finding that Respondent was a credible witness. SSA Br. at 8-9. Because an ALJ has the opportunity to observe witness demeanor at the hearing, the Board defers to an ALJ’s credibility findings “absent a compelling reason to do otherwise” (*see, e.g., Woodland Oaks Healthcare Facility*, DAB No. 2355, at 7 (2010)), and the SSA I.G. has provided no such reason here.

The SSA I.G. emphasizes that during the process of applying for WIB through Mr. Moore, Respondent never indicated that she only believed she and Mr. Moore were common law married because of a conversation she had with an SSA representative. *Id.* at 8.³ Although Respondent did not mention her conversation with the SSA representative in her WIB application paperwork, Respondent's daughter did so in a May 26, 2011 letter to the SSA employee who was helping Respondent apply for WIB. In the letter, Respondent's daughter stated that her mother "lost her significant other, Alex J. Moore in February and was told by someone in your office that she would qualify for his SS benefits as they were common law married." SSA Ex. 3, at 41. Thus, documentary evidence contemporaneous with Respondent's application corroborates her testimony that she did not consider herself married to Mr. Moore until after he died, and that she only reached this conclusion based on the suggestion of an SSA employee.

The SSA I.G. also argues that the record is "replete with contradictions" by Respondent that "are more likely lies than mistakes," pointing mainly to discrepancies between Respondent's testimony at the hearing and statements she made in her second WIB application related to when she and Mr. Moore became common law married. SSA Br. at 8-9. In concluding that Respondent testified credibly, the ALJ acknowledged that Respondent's testimony was somewhat inconsistent with her WIB application, but reasoned that the record made clear that "a combination of events have resulted in tremendous confusion about Respondent's relationship to Mr. Moore." ALJ Decision at 12. As discussed above, an SSA employee suggested to Respondent that she and Mr. Moore were common law married – and it was this suggestion that led Respondent to apply for WIB based on Mr. Moore's Social Security record. *See* Tr. at 56-57.⁴ Unlike a marriage established through a traditional marriage ceremony, a common law marriage does not generally commence on a particular date with a particular event. Instead – as Kansas's standard for establishing a common law marriage demonstrates – the existence of a common law marriage calls for a legal determination based on a variety of factors. Thus, as the ALJ noted, because Respondent "is not an attorney and does not understand the law related to common law marriage" (ALJ Decision at 15), it is not surprising that Respondent's statements about the timing of a common law marriage between herself and

³ The SSA I.G. also asserts that it is "curious" that Respondent did not name the SSA representative with whom she spoke until the day of the hearing and did not call the representative as a witness or obtain an affidavit from her. SSA Br. at 8. The SSA I.G. does not argue that it was prejudiced by the timing of the disclosure or by the absence of an affidavit or live testimony, however. Nor could the SSA I.G. make such an argument, as it could have attempted to uncover the identity of the representative prior to the hearing or moved to adjourn the hearing in order to track her down if it believed her testimony was necessary.

⁴ In addition, as the ALJ pointed out, at the time Respondent applied for WIB through Mr. Moore, she had recently suffered the loss of her mother, as well as Mr. Moore, and so was under "significant emotional strain." ALJ Decision at 15.

Mr. Moore were not completely consistent.⁵ Accordingly, such inconsistencies do not provide a compelling reason to conclude that the ALJ erred in finding Respondent's testimony credible and relying on that testimony.

For these reasons, we conclude that substantial evidence supports the ALJ's determination that Respondent and Mr. Moore did not have a present marriage agreement or hold themselves out to the public as husband and wife prior to February 1, 2005.

2. The SSA I.G.'s other challenges to the ALJ Decision lack merit.

In challenging the ALJ Decision, the SSA I.G. further asserts that the ALJ erroneously refused to consider relevant evidence by determining that Respondent's two WIB applications could not be used to uphold the proposed CMP and assessment. SSA Br. at 1-2. The SSA I.G.'s argument mischaracterizes the ALJ's ruling. The ALJ observed that any purportedly false statements in Respondent's first WIB application could not be the basis for the I.G.'s proposed CMP or assessment because of the six-year statute of limitations. ALJ Decision at 5, citing 42 U.S.C. § 1320a-8(b)(1). The ALJ did not state that he would consider the first WIB application to be irrelevant, even if he determined that Respondent was married to Mr. Moore at the time of the application.

The ALJ also stated that any question as to the truthfulness of the information in Respondent's second WIB application could not serve to uphold the CMP and assessment because the SSA I.G. did not base the CMP and assessment on that application. ALJ Decision at 5. However, the ALJ never refused to consider the contents of the applications in determining whether Respondent was common law married to Mr. Moore prior to February 1, 2005 and thus withheld a material fact related to the determination of her continued entitlement to WIB. To the contrary, as noted above, in his analysis the ALJ acknowledged the discrepancies between Respondent's testimony about her relationship with Mr. Moore and the statements in her second WIB application and also discussed in detail the supporting statements that Respondent submitted with that application. *See* ALJ Decision at 7-10, 12-15.

The SSA I.G. also challenges several of the ALJ's factual findings on peripheral issues. We have considered all of the SSA I.G.'s arguments, but conclude that they are meritless or would not provide a basis for overturning the ALJ Decision.

⁵ As noted above, in order to violate section 1129(a)(1)(C), a person must withhold 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 . . ." (emphasis added). Given this knowledge requirement, the complex, legal evaluation necessary to determine the existence of a common law marriage and Respondent's understandable confusion on the subject further support the ALJ's conclusion that the prerequisites for a CMP under section 1129(a)(1)(C) were not met here.

Conclusion

For the reasons explained above, we recommend that the Commissioner affirm the ALJ Decision denying the SSA I.G.'s proposed CMP and assessment.

_____/s/
Leslie A. Sussan

_____/s/
Constance B. Tobias

_____/s/
Judith A. Ballard
Presiding Board Member