Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Cassandra Ballew
Docket No. A-14-98
October 22, 2014

RECOMMENDED DECISION

The Social Security Administration (SSA) Office of the Inspector General (I.G.) appeals in part the June 27, 2014 decision by an Administrative Law Judge (ALJ). *Cassandra Ballew*, DAB CR3275 (2014) (ALJ Decision). The ALJ upheld the I.G.'s determination that Cassandra Ballew (Respondent) violated section 1129(a)(3) of the Social Security Act (Act) by converting Social Security Disability and Supplemental Security Income payments made to her as a representative payee to uses that she should have known were other than for the use and benefit of the beneficiary.[1] Based on the factors in section 1129(c) of the Act, however, the ALJ reduced the $90,000 civil monetary penalty (CMP) proposed by the I.G. to $45,000. The ALJ also reduced the proposed $81,478 assessment to $40,739, based on his conclusion that section 1129(a)(3) limits an assessment to the amount of actual damages incurred and proven by the government.

As explained below, we conclude that the ALJ's determination of the assessment amount contains an error of law. We explain that the plain language of section 1129(a)(3) and the implementing regulations does not limit the amount of an assessment to actual damages incurred by the government or require the I.G. to prove the existence of actual damages. We also explain that the history of the statute and regulations, federal court precedent, and prior Board decisions support this conclusion. We further describe why we recommend that the Commissioner of Social Security impose an assessment of $40,739 based on the ALJ's evaluation of the factors in section 1129(c) in this case, which neither party challenged in this appeal.

[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.

Because the I.G. appealed only the ALJ's determination of the assessment amount, and because Respondent did not file any response or appeal, we summarily affirm the ALJ's conclusions that Respondent violated section 1129(a)(3) of the Act and that a CMP in the amount of $45,000 should be imposed.

I. Legal Background

The Social Security Disability Insurance Program (Title II of the Act) pays benefits to insured individuals who are aged, blind, or disabled. The Supplemental Security Income Program (Title XVI of the Act) helps aged, blind, and disabled people who have little or no income by providing cash to meet basic food, shelter, and clothing needs. If SSA determines that a beneficiary cannot manage her benefits because she is legally incompetent or mentally or physically incapable, it will pay the benefits to a representative payee. 20 C.F.R. § 404.2010.

A representative payee must use the payments solely for the beneficiary's use and benefit in a manner he or she determines to be in the beneficiary's best interests, consistent with SSA regulations. *Id.* § 404.2035(a). The representative payee must keep any benefits received for the beneficiary separate from his or her own funds and show the beneficiary's ownership of benefits, unless the representative payee is the beneficiary's spouse, or natural or adoptive parent or stepparent, and lives in the same household with the beneficiary. *Id.* § 404.2035(b).

Section 1129(a)(3) of the Act provides that any person --

> who, having received, while acting in the capacity of a representative payee . . . , a payment under title II, VIII, or XVI for the use and benefit of another individual, converts such payment, or any part thereof, to a use that such person knows or should know is other than for the use and benefit of such other individual shall be subject to . . . a civil money penalty of not more than $5,000 for each such conversion. Such person shall also be subject to an assessment, in lieu of damages sustained by the United States resulting from the conversion, of not more than twice the amount of any payments so converted.

Section 1129(c) provides that in determining the scope of any penalty or assessment, the Commissioner of Social Security must take into account the nature of the actions and circumstances under which the conversion occurred; the degree of culpability, history of prior offenses, and financial condition of the person committing the offense; and other matters as justice may require.

The regulations at 20 C.F.R. Part 498 implement section 1129 and, as discussed in detail below, were modeled on regulations implementing similar provisions in section 1128A of the Act. 60 Fed. Reg. 58,305-58,306 (Nov. 27, 1995). Section 498.102(b) states that the I.G. may impose a penalty and assessment against a representative payee who receives a payment under titles II, VIII, or XVI for the use and benefit of another individual and who converts any part of such payment to a use that the representative payee knew or should have known was other than for the use and benefit of the other individual.

Section 498.104 provides that a representative payee who so converts payments may be subject "to an assessment of not more than twice the amount of benefits or payments received by the representative payee . . . converted to a use other than for the use and benefit of such other individual." Section 498.104 explains that an "assessment is in lieu of damages sustained by the United States because of such statement, representation, omission, withheld disclosure of a material fact, or conversion . . . ." Section 498.106 provides that to determine the amount of "any penalty and assessment," the I.G. will take into account the nature of the actions and the circumstances under which they occurred; the offender's culpability, history of prior offenses, and financial condition; and "[s]uch other matters as justice may require."

An individual against whom the I.G. proposes to impose a CMP and assessment may request a hearing before an ALJ to challenge the proposal. 20 C.F.R. §§ 498.109(b), 498.202. The ALJ will issue an "initial decision" and may affirm, deny, increase, or reduce the I.G.'s proposed penalty and assessment. *Id.* § 498.220(a), (b). Unless a party timely appeals the initial decision to the Board, "the initial decision of the ALJ becomes final and binding . . . ." *Id.* § 498.220(d).

If the ALJ's decision is appealed to the Board, the Board "will not consider any issue not raised in the parties' briefs, nor any issue in the briefs that could have been, but was not, raised before the ALJ." *Id.* § 498.221(f). 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).

II. Factual Background[2]

Respondent and B.G. were cousins.[3] SSA Ex. 1, at 1. B.G. moved into Respondent's house after B.G.'s mother died in May 2009. Tr. at 83, 157. B.G. shared a bedroom with

[2] The factual information in this section is drawn from the ALJ Decision and undisputed facts in the record and is presented to provide a context for the discussion of the issues raised on appeal. Nothing in this section is intended to replace, modify, or supplement the ALJ's findings of fact.

[3] B.G. died in February 2013. R. Ex. 7.

one of Respondent's children. *Id.* Respondent allowed B.G. to live in Respondent's home at that time without paying rent. Tr. at 23.

SSA thereafter determined that B.G. qualified for Social Security Disability and Supplemental Security Income and that B.G. required a representative payee to receive and manage the payments on her behalf. SSA Exs. 1, 2. In February 2010, Respondent applied to be B.G.'s representative payee; Respondent represented at that time that B.G. "does not owe me any money and I do not expect her to in the future." SSA Ex. 1, at 1. In April 2010, SSA appointed Respondent to serve as B.G.'s representative payee. SSA Ex. 2. Although Respondent deposited B.G.'s benefits into an account she established for B.G., Respondent made the decisions on how B.G.'s benefits were spent and saved. Tr. at 42-43; SSA Ex. 16.

Between April 7, 2010 and June 3, 2011, Respondent received 18 payments totaling $52,806.64 in benefits for BG's current needs or to save for B.G.'s future needs. SSA Exs. 2, 4; 20 C.F.R. § 416.635.

B.G. moved into an apartment after SSA determined that B.G. was eligible for Social Security Disability and Supplemental Security Income. Tr. at 158. B.G. was jailed for several weeks in April and May 2010, however, and upon release, she moved back to Respondent's residence. Tr. at 19-20, 61, 83-84, 160. This time, a camper was purchased with B.G.'s benefit payments and moved to Respondent's backyard for B.G. to use as a bedroom. *Id.* at 38-39, 90-91; SSA Ex. 6, at 5; R. Ex. 1. The camper did not have running water or a bathroom, and it was heated with a space heater; Respondent did not title the camper in B.G.'s name. *Id.* Respondent moved B.G.'s possessions from the apartment into a storage unit. Tr. at 20-21, 61; SSA Ex. 11, at 2.

In August 2010, B.G. began to pay Respondent $450 per month in rent and $100 per month for meals provided by Respondent. Tr. at 21-22. B.G. also gave Respondent $25 a month in food stamps and later paid $20 a month to share Internet access with Respondent's household. Tr. at 24-25. Even though B.G. was sleeping in the camper that was purchased with her benefit payments, the rent she paid Respondent was approximately the same amount as the rent that B.G. had paid for the apartment. ALJ Decision at 8, citing Tr. at 24.

In addition, Respondent used B.G.'s benefit payments to buy a washing machine, dryer, soft water system, hot water heater, and dishwasher. Tr. at 44-46, 57- 58; SSA Ex. 9, at 10; SSA Ex. 11, at 19-22. These appliances were installed in Respondent's house, to which B.G. had access. Tr. at 46-47, 66. Respondent asserted that B.G was present at the time of the purchases and requested them so that she could better do her laundry. Tr. at 44-47. B.G. did not take the appliances with her when she later moved from Respondent's house and did not request payment for them. Tr. at 46.

Respondent used B.G.'s benefit payments for numerous other items for Respondent's family. Respondent allowed B.G to purchase a laptop computer as a gift for Respondent's daughter. Tr. at 48-49; SSA Ex. 9, at 6. Respondent used B.G.'s money to buy tickets for B.G. and Respondent's daughter to go to a Selena Gomez concert. Tr. at 58; SSA Ex. 9, at 11. Respondent permitted B.G. to pay for a trip for Respondent's family to an amusement park. *See* Tr. at 73-74; 147-49, 171-72; R. Ex. 2; SSA Ex. 6, at 7. Respondent also used B.G.'s money to pay for repairs to Respondent's truck, which Respondent used to transport B.G. to various appointments and places. Tr. at 50, 55-56; SSA Ex. 9, at 12. Respondent also admitted using B.G.'s benefit payments to take her family out to dinner multiple times a week. Tr. at 53-55; SSA Ex. 9, at 2-13.

In April 2011, Respondent used B.G.'s benefit payments to pay for repairs to her garage roof so that B.G. could move her possessions from storage to the garage. Tr. at 43; SSA Ex. 11, at 1. This would allow B.G. to have access to those possessions and would provide for the possibility that Respondent could convert the garage into a place where B.G. could live. Tr. at 43. However, B.G. alleged that she sold these possessions before the garage was repaired. Tr. at 252; SSA Ex. 8, at 10.

In mid-June 2011, SSA appointed a different representative payee and notified Respondent that she must return any saved funds or future payments she received on behalf of B.G. SSA Ex. 7. Respondent testified that when B.G. told her that B.G.'s father would be her new representative payee, instead of returning the balance of any benefits remaining in the representative payee account to SSA, Respondent took B.G. shopping to spend down the balance. Tr. at 67. The debit records from the payee bank account show sporadic purchases through July 1, 2011. SSA Ex. 9, at 13-14. B.G. moved out of Respondent's residence at the end of October 2011. SSA Ex. 5, at 2.

B.G. filed a complaint with the I.G., alleging that Respondent used B.G.'s benefit payments to pay for home repairs and appliances. Tr. at 121-22; SSA Ex. 6, at 2. The I.G. conducted an investigation into B.G.'s complaint, which included interviewing B.G. and Respondent and obtaining relevant financial records. Tr. at 122-24; SSA Exs. 6, at 5-8; 8; 9.

III. The I.G. Decision

In a November 20, 2012 letter, the I.G. notified Respondent that as a result of its investigation, the I.G. had determined that between April 2010 and June 2011, Respondent converted $40,739 of the benefit payments received by Respondent for B.G.'s use and benefit for purposes other than B.G.'s use and benefit. SSA Ex. 15. The I.G. found that Respondent had used the funds to repair Respondent's garage, take

Respondent's family on vacation, repair Respondent's vehicle, buy household appliances for Respondent's house, and dine out multiple times with Respondent's husband and children, among other things. The letter stated that the I.G. was proposing to impose on Respondent the maximum penalties: a CMP of $90,000 ($5,000 for each of the 18 monthly payments that Respondent received); and an assessment in lieu of damages of $81,478 (twice the amount of the converted funds) based on section 1129 of the Act, as implemented by 20 C.F.R. § 498.100-224.

Respondent timely requested an ALJ hearing to contest the proposed penalties. Both parties submitted briefs and exhibits, and the ALJ held an in-person hearing on January 14-15, 2014, at which he heard from 12 witnesses.

IV. The ALJ Decision

The ALJ sustained the I.G.'s determination that Respondent violated section 1129(a)(3) by converting $40,739 of the 18 benefit payments made to her for B.G.'s use and benefit to purposes that were other than for B.G.'s use and benefit. The ALJ also concluded that "Respondent should have known that she should not have allowed [B.G.'s] benefit payments to be used for high rent, the purchase of permanent appliances in Respondent's house, repairs to the garage roof or Respondent's car." ALJ Decision at 11. Consequently, the ALJ determined, Respondent was subject to a CMP and assessment in lieu of damages. *Id.* at 6.

The ALJ, however, reduced the proposed $90,000 CMP based on factors in section 1129(c) of the Act. In particular, the ALJ found Respondent not as culpable as the I.G. had found; while the I.G. appeared to "completely believe" B.G.'s version of the events as reflected in her written statement and the notes of her interview with an I.G. special agent, the ALJ questioned B.G.'s veracity because "Respondent established that [B.G.] was a felon, significant drug abuser, and reputed liar." ALJ Decision at 13 (citations omitted). In addition, the ALJ "believe[d] that Respondent wanted to help her cousin . . . ." *Id.* at 13-14. The ALJ also disagreed with the I.G. about Respondent's financial condition. Based on November 2012 bankruptcy documentation and Respondent's testimony that she did not work due to health issues and taking care of her disabled child, the ALJ concluded that Respondent did not have the financial ability to pay the penalty proposed by the I.G. Accordingly, the ALJ concluded that a CMP of $45,000 ($2,500 for each of the 18 benefit payments converted), half of the amount proposed by the I.G, was reasonable.

The ALJ reduced the proposed $81,478 assessment to $40,739, based on his interpretation of section 1129(a)(3) of the Act, which states that the assessment is "in lieu of damages sustained by the United States resulting from the conversion, of not more than twice the amount of any payments so converted." The ALJ read this language to

mean that the "assessment is to be made in place of damages sustained by the United States resulting from a representative payee's conversion of benefit payments intended for a beneficiary." ALJ Decision at 16. "However," the ALJ added, "Congress capped the potential liability for damages at double the amount of benefit payments converted." *Id.* "While an assessment may be as much as double the amount of the converted payments," the ALJ stated, "in order for such an assessment to be made, the I.G. must prove that damages exist to support such an assessment." *Id.* Here, the I.G. had "not asserted the existence of damages in excess of the amount of money that the I.G. alleged was converted by Respondent." *Id.* Hence, there was "no basis for imposing an assessment that is more than the actual amount of benefit payments that were converted." *Id.* The ALJ added that he did not believe that the factors he considered from section 1129(c) required "a further adjustment to the assessment in this matter." *Id.* Accordingly, the ALJ reduced the assessment to $40,739.

V. 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).

VI. Analysis

A. Section 1129(a)(3) of the Act does not limit an assessment amount to the sum of actual damages incurred and proven by the government.

The I.G. argues that the "ALJ's reliance on actual damages to reduce the assessment, and placement of the burden to assert the existence of actual damages" on the I.G. was an error of law. I.G. Br. at 1. The I.G. asserts that section 1129 of the Act "is not strictly based on, or limited by, actual damages, and there is no requirement for the Government to prove or allege any damages beyond verification of a subject's overpayment or fraud loss in a [CMP] case." *Id.* According to the I.G., the language of section 1129 "directs that the focus of the statute is not on the actual loss sustained by the government." *Id.* at 2. The I.G. further argues that legislative history, regulatory history, and prior federal court and Board decisions support this reading.

We agree with the I.G. that the ALJ's interpretation of section 1129(a)(3) as limiting an assessment amount to the sum of actual damages incurred and proven by the government is inconsistent with the plain meaning of the statutory language. As quoted in full above, the language of section 1129(a)(3) describes the assessment to be "in lieu of" the damages sustained by the government as a result of the conversion, not limited by the

government's proof of actual damages. The phrase "in lieu of" is defined as "in the place of" or "instead of." *See, e.g.*, http://www.merriam-webster.com/dictionary/lieu. Thus, the wording of the statute provides for the assessment to serve as a *substitute* for a showing of actual damages. There is no language in section 1129(a)(3) or the implementing regulations that ties the assessment amount to actual damages or places any burden on the government to prove its damages. Moreover, the only limitation for the assessment amount specified in the statute and regulations – "not more than twice the amount of any payments so converted" – plainly contemplates that assessments may well exceed the amount of payments that a representative payee has wrongly converted.

Furthermore, even if one found the statutory language ambiguous, the legislative history of section 1129 and the regulatory history of the implementing and related regulations indicate that Congress crafted the wording of the assessment provision to relieve the government from the burden of proving actual damages where such damages are often difficult to ascertain. According to the legislative history of section 1129, the provision was modeled on section 1128A of the Act, the civil monetary penalties law (CMPL), which provides for CMPs and assessments to be imposed on persons who make false claims or engage in other prohibited actions in the Medicare and Medicaid programs. H.R. Rep. No. 103-670, at 125-126 (1994)(Conf. Rep.) (explaining that section 1129 would give SSA the "same authority to impose civil penalties as the Secretary of [Health and Human Services] now has under section[] 1128A of the Social Security Act involving false claims in the Medicare and Medicaid programs. . . ."). Section 1128A(a) indeed contains the same relevant language as that used in section 1129(a)(3), providing that a person who engages in specified prohibited activities "shall be subject to an assessment of not more than 3 times the amount claimed for each such item or service **in lieu of damages sustained by the United States** or a State agency because of such claim . . . ." Emphasis added. The preamble to the final rule implementing section 1129 of the Act likewise stated that the regulations at 20 C.F.R. Part 498 were modeled on the regulations implementing section 1128A, originally codified at 45 C.F.R. §§ 101.100–101.133 and subsequently redesignated at 42 C.F.R. Part 1003. 60 Fed. Reg. 58,305-58,306 (Nov. 27, 1995); 51 Fed. Reg. 34,764 (Sept. 30, 1986).

Notably, the Secretary of Health and Human Services stated in the 1983 preamble to the CMPL regulations that the assessment provision in section 1128A differs from the penalties imposed under the False Claims Act (FCA), which are based in part on "the amount of damages which the Government sustains because of the act of [the responsible] person." 48 Fed. Reg. 38,827, 38,829-830 (Aug. 26, 1983); 31 U.S.C. § 3729(a)(1). Section 1128A, the Secretary observed, instead subjected the responsible person to an assessment "in lieu of damages sustained," stating as follows:

> The amount of actual damages sustained as a result of fraud has often been difficult to prove. In enacting [section 1128A], Congress clearly intended to obviate the need for the government to prove the amount of damages in order to make an assessment. Because the costs of investigating the false claim and of pursuing administrative sanctions are not separately recoverable, it is reasonable for Congress to have concluded that twice the amount claimed for such items or services would fully compensate the government for all losses incurred as a result of the claim.
>
> However, . . . the Secretary exercises discretion in fixing the amount of the assessment, taking into account the factors listed in section 1128A(c). Hence, in instances where the actual damages to the government may be readily calculated, perhaps as a result of evidence supplied by respondents in mitigation of a proposed penalty, the amount of actual damages suffered by the government will be a factor that justice requires be taken into account in arriving at a proper assessment.

48 Fed. Reg. at 38,829-830.

Multiple federal court decisions support the Secretary's interpretation of the CMPL. The Tenth Circuit Court of Appeals has held that assessments under the CMPL need not be calculated by or limited to the actual damages incurred by the government, even in cases in which such damages are ascertainable. *Chapman v. U.S., Dep't of Health & Human Servs.*, 821 F.2d 523 (10th Cir. 1987). In reaching this conclusion, the court stated:

> Though the legislative history does not explain Congress's intentions regarding this aspect of the CMPL, it can be fairly reasoned that the difference in phrasing between the False Claims Act and the CMPL is indicative of congressional purpose. By authorizing assessments of twice "the amount claimed" rather than twice "the amount of damages," Congress seems to have deliberately shifted the focus away from the actual loss sustained and onto the amount claimed as a basis for assessments.

Id. at 528. The court added that it "is not unusual for statutes to provide for a heavy civil penalty, as an alternative to criminal punishment, to discourage objectionable activity and to insure adequate compensation." *Id.* Moreover, the *Chapman* court noted, the Eleventh Circuit Court of Appeals had concluded that "[j]ust as punitive damages in tort law or treble damages in anti-trust law encompass a civil remedy in excess of the tangible damages sustained by the plaintiff, here the government has made a determination that

activities in violation of the [CMPL] result in damages in excess of the actual amount disbursed by the government to the fraudulent claimant." *Id.* citing *Mayers v. U.S. Dept of Health & Human Servs.*, 806 F.2d 995, 999 (11th Cir. 1986). "Thus," the *Chapman* court "[found] entirely reasonable the Secretary's opinion that by providing for an assessment in lieu of damages, Congress intended to obviate the need for the government to tie assessments to proven actual damages." *Id.* at 528.

Citing the *Chapman* decision, the Eighth Circuit Court of Appeals in *Horras v. Leavitt*, 495 F.3d 894, 903 (8th Cir. 2007) reiterated that, "[u]nlike the FCA, the CMPL focuses on the amount falsely or fraudulently 'claimed.'" Responding to the appellant's argument that the Secretary had not shown that all of appellant's allegedly false or fraudulent claims impacted how much money the government lost, the *Horras* court added, "Proof of loss by the United States is not an element of the CMPL." *Id.* Prior Board decisions also support the I.G.'s reading of the assessment provisions in section 1129(a)(3) and the CMPL. Most recently, in *Nancy Whitehead*, Docket No. A-13-53, at 9 (2013)(not reversed or modified by the SSA Commissioner), the Board sustained an assessment imposed under section 1129(a)(3) of nearly twice the amount of converted funds even though the amount that the I.G. documented related only to the amount converted. In *Cary Frounfelter*, the Board held that penalty assessments under section 1128A are not limited by the amount of actual payments for false claims and may recognize other "inchoate" or "indirect" damages such as the "inchoate cost to the reputation of the Medicare program caused by Respondents' perpetration of their fraud." DAB No. 2211, at 30-31 (2008), quoting DAB CR1808, at 18 (2008). The Board further noted in *Frounfelter* that an ALJ may reasonably infer that investigation and litigation costs are substantial where a record shows there were a lengthy investigation, extensive pre-hearing proceedings, and in-person hearing. In sum, the Board explained in *Frounfelter*, "a showing that the actual damages were in fact less than the amount assessed is not conclusive but is merely a factor to be considered where the actual damages to the government may be readily calculated." DAB No. 2211, at 31.

In light of the language of the Act, legislative and regulatory history, and federal court and Board decisions discussed above, we conclude that the ALJ erred in interpreting section 1129(a)(3) as limiting an assessment to documented damages and requiring the I.G. to prove the amount of damages resulting from a wrongful conversion of funds.

B. The Board recommends that the Commissioner of Social Security impose an assessment of $40,739.

As summarized above, section 1129(c) of the Act and the implementing regulations at 20 C.F.R. §§ 498.104-106 provide that in determining the amount of any CMP or assessment under section 1129(a)(3), I.G. must consider: the nature of the actions and circumstances under which the conversion occurred; the degree of culpability, history of

prior offenses, and financial condition of the representative payee; and other matters as justice may require. As further summarized above, the ALJ assessed these factors in determining the amount of the CMP. Based on his "evaluation of the factors . . . involving Respondent's culpability and financial condition," the ALJ determined that a fifty percent reduction in the penalty amount was warranted. ALJ Decision at 15. Accordingly, the ALJ reduced the total CMP to $45,000. Neither party has challenged the ALJ's evaluation of the factors in section 1129(c) and the implementing regulations as a basis for reducing the proposed CMP by fifty percent.

With respect to the proposed assessment of $81,478, the ALJ stated that he "considered the factors from [section 1129(c)] already addressed" in his evaluation of the CMP. ALJ Decision at 15. After concluding that section 1129(a)(3) limits the assessment amount to the "actual amount of benefit payments that were converted," however, the ALJ determined that his evaluation of the factors in section 1129(c) and the implementing regulations did not "require a further adjustment of the assessment" below the sum of converted funds, $40,739. *Id.* at 16.

In light of our determination that the Act does not limit the assessment amount to actual damages proven by the government but only to "not more than twice the amount of" converted payments, the maximum assessment amount of $81,478 proposed by the I.G. must be reconsidered taking into account the factors in section 1129(c). Based on the ALJ's detailed analysis of those factors in the context of determining the CMP amount; the ALJ's conclusion that some of those factors necessitated a reduction of the proposed CMP by fifty percent; and in the absence of any argument by either party challenging the ALJ's evaluation and application of the factors, we advise the Commissioner of Social Security similarly to reduce the proposed assessment by fifty percent, to $40,739. We thus recommend that the Commissioner of Social Security sustain the amount of the assessment determined by the ALJ based on our legal analysis rather than the ALJ's rationale.

VII. Conclusion

For the reasons discussed above, the Board recommends that the Commissioner of Social Security:

1. Determine that Respondent is liable under section 1129(a)(3) of the Act to pay a CMP and assessment;

2. Impose a CMP of $45,000 on Respondent;

3. Determine that section 1129(a)(3) of the Act does not limit an assessment amount to the sum of actual damages incurred and proven by the government; and

4. Impose an assessment of $40,739 on Respondent based on the factors in section 1129(c) of the Act.

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan

/s/
Judith A. Ballard
Presiding Board Member