Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Michelle Valent
Docket No. A-15-104
November 30, 2015

RECOMMENDED DECISION

The Social Security Administration Office of Inspector General (SSA I.G.) appeals a July 31, 2015 decision by an Administrative Law Judge on remand from the Board holding that there was no basis to impose a civil money penalty (CMP) or an assessment in lieu of damages (assessment) against Michelle Valent (Respondent) under section 1129(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-8(a)(1)). *Michelle Valent*, DAB CR4089 (2015) (ALJ Decision). The SSA I.G. proposed the CMP and assessment on the ground that Respondent failed to disclose to SSA that she engaged in work activity while receiving Social Security Disability Insurance Benefits (DIB) and knew or should have known that the undisclosed information was material and that not disclosing it was misleading.

The ALJ Decision followed the Board's reversal and remand of the ALJ's earlier decision holding that there was no basis to impose the CMP and assessment against Respondent. *Michelle Valent*, DAB CR3261 (2014) (First ALJ Decision), *rev'd and remanded*, *Michelle Valent*, DAB No. 2604 (2014) (Board Decision). The First ALJ Decision found that Respondent had failed to disclose to SSA that she worked while receiving DIB but concluded that, under a provision of the Act applicable to persons who have received DIB for 24 months, SSA could not terminate Respondent's DIB based on her work activity, and that information about her work activity was thus not a material fact and she could not be penalized for failing to disclose it. The Board concluded that the ALJ'S conclusion that SSA could not terminate Respondent's DIB based on her work activity was error and, therefore, that information about her work activity was a material fact. The Board reversed the First ALJ Decision and remanded the case for the ALJ to further consider whether the SSA I.G. had a basis to impose the CMP and assessment and, if so, to address issues relating to the amount of the CMP and the assessment.

On remand, the ALJ again found that Respondent engaged in work activity while receiving DIB and did not disclose her work activity to SSA but nonetheless concluded that the SSA I.G. had no basis to impose the CMP and assessment. The ALJ Decision reiterates the conclusion from the First ALJ Decision that Respondent's work activity was not a material fact for purposes of the disclosure requirement and also advances a

new legal ground for that conclusion. The ALJ Decision also concludes that even if the SSA I.G. had a basis to seek to impose a CMP and assessment, no amount of CMP or assessment was warranted under the regulations stating the factors that the SSA I.G. considers in determining CMP and assessment amounts.

For the reasons discussed below, we reverse the ALJ Decision's conclusions that Respondent did not know and could not have known that the facts about her work activities that she withheld from SSA were material and that withholding them was misleading; that the SSA I.G. had no basis to impose a CMP and assessment; and that no amount of CMP or assessment could be imposed under the factors in the Act and regulations. We uphold the ALJ's conclusion that SSA showed that Respondent withheld the information about her work activity for 41 months and recommend that the SSA Commissioner impose a CMP of $75,000 and an assessment of $51,410.

Case background[1]

Respondent had worked previously as a receptionist or administrative assistant but began receiving DIB in 2003 based on disabling medical conditions including depression. First ALJ Decision at 8, SSA I.G. Br. at 3 n.1. The DIB program, as relevant here, pays monetary benefits to covered, disabled individuals who are unable to engage in any "substantial gainful activity" due to medically determinable physical or mental impairments that are expected to last at least one year and prevent them from doing their previous work or any other kind of substantial gainful work that exists in the national economy. Act § 223(d)(1), (2); 20 C.F.R. Part 404.[2] SSA determines DIB eligibility in part by considering whether an individual has engaged in substantial gainful activity, and will find an individual with an impairment not eligible for DIB if the individual performs services or has earnings from services that exceed the criteria for substantial gainful activity SSA has prescribed in regulations. Act § 223(d)(4)(A); 20 C.F.R. § 404.1574(b)(2).

In June 2013 the SSA I.G. proposed a CMP and assessment for Respondent's failure to disclose that she had worked while receiving DIB, for 41 months from September 2009 through January 2013. First ALJ Decision at 1, 7. Based on an investigation, the SSA I.G. determined that during that time Respondent had been paid $400 per week for answering phones and doing other tasks for the War Era Veterans Alliance, an

[1] The information in the background section and in our analysis is from the two ALJ Decisions and the record before him.

[2] "Substantial gainful activity" is work that "(a) Involves doing significant and productive physical or mental duties;" and "(b) Is done (or intended) for pay or profit." 20 C.F.R. § 404.1510; *see also* § 404.1572 (describing some activities that are not considered substantial gainful activity, such as hobbies, self-care, household tasks, therapy and school attendance).

organization founded and operated by Respondent's brother and his wife.[3] SSA Exs. 1, at 15-17; 3, at 6, 12; 4; 5; 12, at 8; 16, at 3-4. The SSA I.G. proposed the penalty and assessment under section 1129(a)(1) of the Act (42 U.S.C. § 1320a-8) which authorizes CMPs and assessments for any person who fails to disclose to SSA "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" if the person "knows, or should know . . . that the withholding of such disclosure is misleading[.]" Act § 1129(a)(1)(C). A "material fact" is a fact SSA "may consider in evaluating whether an applicant is entitled to benefits under title II" of the Act (DIB). Act § 1129(a)(2); 20 C.F.R. § 498.101.

The Act and regulations authorize CMPs of up to $5,000 for each month an individual withholds material information while receiving DIB, and an assessment of up to "twice the amount of benefits or payments paid as a result of . . . such a withholding of disclosure." Act § 1129(a)(1); *see* 20 C.F.R. §§ 498.103(a), 498.104. The SSA I.G. proposed a CMP of $100,000 (reduced from $205,000) based on Respondent's failure to disclose her work for 41 months and an assessment of $68,547, the amount of benefits the SSA I.G. determined Respondent was overpaid during the 41 months for herself and on behalf of her daughter. *Id*.; SSA Exs. 3, at 6-7, 12; 4.

Respondent requested an ALJ hearing, which the ALJ convened by video teleconference on January 14, and 15, 2014.

The First ALJ Decision

The First ALJ Decision found that Respondent "did engage in some work activity" that she failed to report to SSA, finding her argument to the contrary "not persuasive" based on a review of the evidence. First ALJ Decision at 7, 14. The First ALJ Decision rejected Respondent's argument that she neither knew nor had been told that she had to report her work activity to SSA because "the broad reading of the regulation [20 C.F.R. § 404.1588(a)] to require reporting of all work is consistent with the purpose of the Act and the language of the regulation is sufficient notice to Respondent of what to report." *Id*. at 14. That regulation, the decision concluded, requires a beneficiary "such as Respondent . . . to promptly notify SSA when his or her condition improves; when he or

[3] Mark McCauley insisted at the hearing, and Marianne McCauley in her statement, that Marianne alone owned the organization. Tr. at 254-56, 261, 268; R. Ex. 1, at 1. The incorporation papers in the record identify Marianne McCauley as the registered agent but do not identify the owner. SSA Ex. 14, at 1; R. Ex. 3. In his testimony, Mark McCauley also denied he participated in the organization's operations. Tr. at 258, 261, 265-68, 287. However, investigative documents – employee statements and the organization's website – identified Mark McCauley as an owner or at least an operator of the organization. SSA Exs. 1, at 5-6, 10, 12, 16, 24; 16, at 2; 17, at 2; Tr. at 106-07, 139. Since the identity of the owners and operators of War Veterans Alliance is not material to our decision, we need not resolve this factual dispute.

she returns to work; when he or she increases the amount of work performed; or when earnings increase." *Id*. at 13, citing 20 C.F.R. § 404.1588(a).[4] The First ALJ Decision also cited another regulation, section 404.1571, as requiring beneficiaries to report "all work activity . . . – no matter how minimal, whether for pay or profit or not, whether legal or illegal, or whether in support of a charitable or volunteer organization – which is consistent with the SSA IG's position." *Id*. at 14, citing 20 C.F.R. § 404.1571. Section 404.1571, the First ALJ Decision concluded, "indicates that any work activity may impact the determination of whether or not one can perform substantial gainful activity and the determination of entitlement or continuing entitlement to Social Security benefits." *Id.*

The First ALJ Decision then stated that the ALJ "normally . . . would conclude that Respondent's failure to report that she engaged in work activity, no matter how minimal that work activity or how infrequent, was an omission or failure of Respondent to report a material fact subjecting her to a CMP and assessment under section 1129(a)(1)(C) of the Act." *Id*. at 15. However, the ALJ held that because Respondent had received DIB for more than two years, section 221(m) of the Act precluded SSA's considering her work as a basis to terminate her benefits, which meant that Respondent's work activity was not a material fact SSA could consider in evaluating whether Respondent continued to be entitled to benefits and which Respondent could be sanctioned for failing to disclose. *Id*. at 16. The ALJ relied on language in section 221(m) stating that if a beneficiary has received DIB for "at least 24 months— . . . no work activity engaged in by the individual may be used as evidence that the individual is no longer disabled[.]" Act § 221(m)(1)(B).[5] The ALJ concluded that Respondent's "failure to report her work activity . . . is not, as a matter of law, a failure to report a material fact for which a CMP or assessment is authorized under section 1129(a)(1)" and that there was no basis to impose a CMP or assessment. *Id*. at 16-17. The SSA I.G. appealed the First ALJ Decision to the Board.

---

[4] 20 C.F.R. § 404.1588(a), "Your responsibility to tell us of events that may change your disability status," states:

> (a) *Your responsibility to report changes to us.* If you are entitled to cash benefits or to a period of disability because you are disabled, you should promptly tell us if—
> (1) Your condition improves;
> (2) You return to work;
> (3) You increase the amount of your work; or
> (4) Your earnings increase.

[5] Act § 221(m)(1) also forbids SSA from using a 24-month DIB recipient's work activity as the sole basis to schedule a "continuing disability review" to assess whether the recipient is still disabled due to a medically determinable impairment. Act § 221(m)(1)(A).

The Board Decision

The Board Decision found legally erroneous the ALJ's conclusion that section 221(m)(1) of the Act precluded terminating Respondent's benefits based on her work activity, rendering that information not material. The ALJ's conclusion, the Board found, ignored other language in the Act and regulations permitting SSA to terminate benefits to a 24-month DIB recipient based on sufficient earnings derived from work. Specifically, regulations state that earnings may show that a DIB recipient has engaged in substantial gainful activity and specify the amount of monthly earnings that constitutes substantial gainful activity. Board Decision at 9-10, citing 20 C.F.R. § 404.1574(a)(1), (b)(2). Section 221(m) of the Act goes on to state that a 24-month DIB recipient "shall continue to be subject to . . . termination of benefits under this title in the event that the individual has earnings that exceed the level of earnings established by the Commissioner to represent substantial gainful activity," and the Board held that this language "clearly permits SSA to discontinue DIB payments to a 24-month DIB recipient who has earnings that, under the regulations, show that he or she has engaged in substantial gainful activity." *Id*. at 9, citing Act § 221(m)(2)(B). The Board also relied on language in the legislative history of section 221(m) and implementing regulations indicating that payments to 24-month DIB recipients may be suspended if earnings exceed the substantial gainful activity level. *Id*. at 11.

The Board concluded that SSA could thus consider information about Respondent's work activity to determine whether she had earnings from work that showed substantial gainful activity, authorizing SSA to discontinue her DIB payments, and that section 221(m) did not preclude SSA from considering Respondent's work activity for purposes of determining whether she had earnings from that work at the substantial gainful activity level. *Id*. at 11-12. The Board reversed the First ALJ Decision and remanded the case for the ALJ to consider 1) whether Respondent knew or should have known that the work activity information she withheld was material and that withholding that information was misleading; 2) whether the SSA I.G. has established the duration of the period for which CMPs and assessments may be imposed; and 3) whether the CMP amount is reasonable based on the factors specified in the regulations at 20 C.F.R. § 498.106(a).

The ALJ Decision on remand

The ALJ Decision determined that Respondent "did engage in work activity" for War Era Veterans Alliance and that she did not disclose that work activity to SSA for a period of 41 months. ALJ Decision at 23, 43. The ALJ Decision also concluded that the Act and regulations gave Respondent "constructive notice of her obligation to report her work activity to SSA" and "constructive knowledge that a material fact is a fact [SSA] may consider in evaluating whether an applicant is entitled to benefits." *Id*. at 23-24; *see also* at 15 ("Respondent engaged in reportable work activity in September 2009 that she failed to report for 41 months").

Nonetheless, the ALJ Decision again concluded that Respondent's work activity was not material information and that she was thus not subject to CMPs or assessments for her failure to disclose her work activity to SSA. First, the ALJ Decision asserts that the Board Decision erred in reversing the First ALJ Decision's reading of section 221(m) of the Act and asks the Board to reconsider its holding. Second, the ALJ Decision held that the definition of "material fact" in the Act and regulations does not include information SSA uses to determine a current DIB recipient's continuing eligibility and thus did not provide constructive notice that information about Respondent's work activity was material and that failing to disclose that information to SSA was misleading. The ALJ Decision also concluded that Respondent did not know and should not have known that failing to disclose that information to SSA was misleading because the regulations create confusion over what constitutes work activity that must be reported.

Finally, the ALJ Decision held that even if the SSA I.G. had a legal basis to propose a CMP and assessment, no amount of CMP or assessment was justified under the factors that 20 C.F.R. § 498.106(a) instructs the SSA I.G. to consider in determining CMP and assessment amounts.

Present appeal

The SSA I.G. timely appealed the ALJ Decision arguing that the ALJ made errors of law on remand in refusing to accept the conclusions of the Board Decision. SSA I.G. Br. in support of its Appeal, dated August 31, 2015. Specifically, the SSA I.G. argued that the ALJ erroneously failed to recognize that work is a material fact which SSA may consider in evaluating Respondent's continued entitlement and that Respondent knew or should have known that the information she withheld about her work activity was material and misleading. *Id*. at 2-6. Further, the ALJ's alternative conclusion that no CMP or assessment should be imposed based on the regulatory factors was not supported by substantial evidence, according to the SSA I.G. *Id*. at 7-8.

Respondent submitted a reply which focused largely on requesting reinstatement of benefits based on continued disability. Respondent's Reply Br., dated October 1, 2015. She asserts without elaboration that the SSA I.G. failed to prove by a preponderance of the evidence that she knew or should have known that her work was a material fact that she failed to report, that it rose to the level of substantial gainful activity, or that it was for pay or profit. *Id*. at 2. She also attaches ten additional exhibits, most of which either pertain to her medical disability (which is not at issue before us) or to her delinquent mortgage (which we also need not address). She includes two exhibits (marked as R. Exs. 8 and 9 attached to her reply) which purport to be statements from two individuals

(Aimee Konal and Bridget Sheriff, respectively) whose prior statements were at issue before the ALJ. She does not explain as to any of these exhibits why they were not or could not have been produced before the ALJ.[6]

Standard of review

The Board's review of an ALJ decision on the SSA I.G.'s proposal to impose a CMP or assessment is set by regulation. The Board "will limit its review to whether the ALJ's initial decision is supported by substantial evidence on the whole record or contained error of law." 20 C.F.R. § 498.221(i).

Analysis

I. The ALJ Decision's conclusion that the SSA I.G. had no basis to propose a CMP or assessment is legal error.

The ALJ found that "despite Respondent's protestations to the contrary, she did work for War Era Veterans Alliance" citing Respondent's and her brother's "testimony that Respondent answered the phone for War Era Veterans Alliance and she did some scheduling, at least occasionally." ALJ Decision at 22, 23 ("the evidence shows that Respondent did engage in work activity for War Era Veterans Alliance"). The ALJ also found that there "is no dispute that Respondent did not disclose her work activity for War Era Veterans Alliance to SSA." *Id*. at 23, citing First ALJ Decision at 7 ("Respondent failed to report work activity in violation of the regulation"), 14, 16; 31. The ALJ also concluded that, from the Act and regulations, Respondent "had at least constructive knowledge of her obligation to report her work activity to SSA" and "constructive knowledge that a material fact is a fact [SSA] may consider in evaluating whether an applicant is entitled to benefits." *Id*. at 23-24 (citations omitted), *see id*. at 24-25 ("public has at least constructive, if not actual knowledge of the requirements of the regulations," based on "publication of legislative rules adopted by federal agencies").

[6] The two statements are dated in September 2015, after the SSA I.G.'s appeal. They are unsworn and unaccompanied by any authenticating information or attempt to show relevance or materiality. In addition, Respondent does not explain why she could not have obtained sworn statements from these individuals during the ALJ proceeding so that their statements would have been subject to the usual evidentiary challenges and ALJ credibility determinations in that proceeding. Generally, the Board's review is limited to review of the record developed before the ALJ. *See* 20 C.F.R. § 498.221(f) (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"); *Guidelines -- Appellate Review of Decisions of Administrative Law Judges in Social Security Administration Cases to Which Procedures in 20 C.F.R. Part 498 Apply*, Completion of the Review Process (a) (citing 20 C.F.R. § 498.221(f)); (b) (stating that the Board will remand to an ALJ for consideration of evidence not presented to the ALJ only "[i]f a party demonstrates to the satisfaction of the Board that [the] evidence . . . is relevant and material and that there were reasonable grounds for the failure to present the evidence to the ALJ . . . ."). In any event, as we explain later, our decision here does not depend on evaluating the substance of the new statements submitted by Respondent.

Notwithstanding those findings, the ALJ Decision concludes "there is no basis for the imposition of a CMP or assessment in this case." *Id*. at 46. The ALJ reiterates his conclusion from the First ALJ Decision that section 221(m) of the Act barred SSA from considering Respondent's work activity and asks the Board to reconsider its reversal of that conclusion. The ALJ also concludes that Respondent's work activity was not material under the definition of "material fact;" and that Respondent "could not have known" that her work activity "was a material fact and that failure to report [her work activity to SSA] was misleading." *Id*. at 15. As we explain below, those conclusions are erroneous. First, however, we discuss why we find no basis to reconsider our conclusion that section 221(m) did not preclude consideration of Respondent's work activity.

A. We find no basis for reconsidering the Board's conclusion that section 221(m) does not bar SSA from considering a 24-month DIB recipient's work activity.

The ALJ Decision attributes the Board's rejection of the First ALJ Decision's analysis of section 221(m) as prohibiting SSA from considering a 24-month DIB recipient's work activity "to a lack of clarity in [the] prior analysis," offers "clarification" and asks the Board "to reconsider its legal ruling." ALJ Decision at 7.

The ALJ Decision essentially concluded that the Board erred by reading section 221(m)(2)(B) as permitting SSA to terminate a 24-month DIB recipient's benefits based on the recipient's work activity because, the ALJ says, that paragraph permits SSA to terminate benefits based on "earnings" and does not use the term "work activity," unlike paragraph (1)(B), on which the First ALJ Decision relied. ALJ Decision at 12 ("221(m)(2)(B) provides that a 24-month DIB beneficiary is subject to termination of benefits when he or she has **earnings** that exceed the level of **substantial gainful activity**" and "does not state that [SSA] can consider work activity of the 24-month DIB beneficiary") (emphasis in original); *see also id*. at 14 ("earnings and substantial gainful activity are material facts while 'work activity' is not as a matter of law").

The ALJ Decision also asserts that the Board ignored distinctions among the terms "work," "earnings," and "substantial gainful activity," as well as the legislative history to section 221(m) which, the ALJ Decision concluded, "does not indicate that Congress intended that [SSA] is permitted to consider the 24-month DIB beneficiar[y's] work activity" but is "intended to encourage long-term DIB beneficiaries to attempt to return to work without fear that the work activity would cause a suspension of their benefits or termination of their entitlement." *Id*. at 9-10, 12-13. The decision notes that the SSA I.G. charged Respondent with failing to report work activity, and not with failing to report that she had earnings or had engaged in substantial gainful activity. *Id*. at 9, citing SSA Ex. 4, Tr. at 361-63.

We decline to reconsider the Board's legal conclusion that Act section 221(m) does not render information about a 24-month DIB recipient's work activity immaterial for the following reasons.

The ALJ Decision's reliance on the use of the term "earnings" and not "work activity" in section 221(m)(2)(B), and on distinctions among the various terms used in the Act and regulations, is misplaced and ignores the connections among work activity, earnings and substantial gainful activity underlying the Board Decision's reversal of the legal conclusions in the First ALJ Decision.

The Board Decision noted the following: (1) the Act and regulations permit SSA to terminate DIB payments to recipients who engage in substantial gainful activity; (2) the regulations state that earnings may show that a DIB recipient has engaged in substantial gainful activity and specify the amount of monthly earnings that constitutes substantial gainful activity; and, (3) the regulations further specify that earnings must **derive from work activity** in order to show that the recipient has engaged in substantial gainful activity. Board Decision at 10, citing Act §§ 221(m)(2)(B), 223(e); 20 C.F.R. §§ 404.1592a(a); 404.1590(i)(4); 404.1574(a)(1), (b)(2). As the Board explained, SSA may thus terminate benefits to a DIB recipient who has earnings derived from work that exceed the levels set in the regulations as indicating substantial gainful activity, without having to find that the DIB recipient no longer has a medically determinable impairment. *Id*. at 10-11. As section 221(m) permits SSA to terminate a 24-month DIB recipient's benefits based on earnings, SSA could thus consider Respondent's work activity for purposes of determining whether she had earnings from that work activity at the substantial gainful activity level, making information about her work material for purposes of section 1129(a)(1). *Id*. at 11-12 (SSA "could consider information about Respondent's work to determine whether Respondent had earnings from work that showed substantial gainful activity, authorizing SSA to discontinue her DIB payments").

We also find no basis for the ALJ Decision's conclusion that the legislative history of section 221(m) "shows that Congress specifically intended to prohibit the Commissioner from considering a 24-month DIB beneficiary's work activity as a basis for conducting a CDR [continuing disability review] and terminating benefits." ALJ Decision at 13. The ALJ Decision quotes the history's statements as follows:

> Explanation of provision
>
> The Committee bill establishes the standard that CDRs for long-term SSDI [DIB] beneficiaries (i.e., those receiving disability benefits for at least 24 months) would be limited to periodic CDRs. SSA would continue to evaluate work activity to determine whether eligibility for cash benefits continued, but a return to work would not trigger a review of the beneficiary's impairment to determine whether it continued to be disabling.

> Reason for change
>
> > The provision is intended to encourage long-term SSDI [DIB] beneficiaries to return to work by ensuring that work activity would not trigger an unscheduled medical review of their eligibility. However, like all beneficiaries, long-term beneficiaries would have benefits suspended if earnings exceeded the substantial gainful activity level, and would be subject to periodic continuing disability reviews.

Id., quoting H.R. Rep. 106-393(I), at 45 (1999) (brackets in ALJ Decision).

The ALJ Decision asserts that this language "actually supports my interpretation of the provision, rather than the Board's." *Id*. at 12. We disagree. We read the second sentence of the "Explanation" as saying that the purpose of section 221(m) is to preclude SSA from reconsidering the physical or mental impairments of a 24-month DIB recipient solely on the basis of work activity while still permitting SSA to discontinue benefits based on work activity. This is consistent with the statement in the "Reason for change" confirming that SSA may consider a 24-month beneficiary's work activity as a basis for discontinuing benefits, but not as a basis for reviewing whether the beneficiary still has a medically determinable impairment, as prohibited by Act § 221(m)(1)(B). The ALJ's conclusion that Congress "specifically prohibited consideration of work activity" is contrary to these clear statements in the legislative history of section 221(m). *Id*. at 14.

The ALJ Decision accordingly provides no basis to reconsider the Board Decision's conclusion that section 221(m)(1) of the Act did not bar SSA from considering Respondent's work activity, or from concluding that information about Respondent's work history was "material."

B. The ALJ erred in his conclusion that Respondent "did not know and could not have known that her failure to report work activity to SSA was a material fact and that failure to report was misleading."

The ALJ Decision summarizes this issue on remand as "[w]hether Respondent knew that failure to report work activity was failure to report a material fact and that failure to report was misleading." ALJ Decision at 22. This statement focusing on actual knowledge is not consistent with the statute, which is not limited to what a beneficiary knows but also applies when the beneficiary "should know" that a withheld fact "is material to the determination of any initial or continuing right to or the amount" of benefits and "should know" that "the withholding of such disclosure is misleading." Act § 1129(a)(1)(C). The ALJ did later acknowledge, however, that the SSA I.G. must only prove that Respondent knew **or should have known** both that facts she withheld from SSA "were material to the determination of any initial or continuing right to or the

amount" of her monthly benefits, and that "the withholding of such disclosure was misleading." ALJ Decision at 23. We find that the ALJ's mistaken focus on whether the Respondent had actual notice of materiality (along with his misunderstanding of section 221(m) and his mischaracterizations of the regulatory language about the meaning of "work") distorted his analysis of this issue.

The ALJ's ultimate conclusion that Respondent "could not have known" that her work activity "was a material fact and that failure to report was misleading," ALJ Decision at 15, is based on additional legal error. The ALJ framed his discussion around the erroneous view that "material fact" is limited to information that SSA uses to review an DIB applicant's **initial** eligibility for benefits, and does not include information relating to a current DIB recipient's **continuing** eligibility. The ALJ cited the Act and regulations, which state that a "material fact" is one SSA "may consider in evaluating whether an applicant is entitled to benefits." Act § 1129(a)(2); 20 C.F.R. § 498.101. The ALJ held that "neither the definition in the Act or the regulation states that a material fact is a fact the Commissioner may consider in evaluating whether a beneficiary continues to be entitled to benefits." ALJ Decision at 24. The ALJ Decision thus concludes that "there is no regulation in 20 C.F.R. pts. 404 or 498 that states that work activity is material" to a determination of continuing entitlement and that Respondent, therefore, did not have "constructive knowledge that a material fact would be a fact that may be considered related to her continuing eligibility for DIB benefits." *Id*. at 24, 25.

We disagree. Section 1129(a)(1)(C) of the Act, the statute under which the SSA I.G. proceeded against Respondent, subjects to CMPs and assessments any person who fails to disclose a fact that the person "knows or should know is material to the determination of any initial **or continuing right to** or the amount of monthly . . . benefits" (emphasis added). The statute thus gave notice, and constructive knowledge, that Respondent's work activity was material to her right to continue to receive benefits. This unambiguous language of the Act imposing liability for failure to report information material to the continuing right or amount of benefits also undermines the significance the ALJ Decision attaches to the reference to "applicant" in the definition of material fact.

The ALJ's holding that information related to continuing eligibility is not material is, moreover, inconsistent with the First ALJ Decision's conclusion that "the fact that a beneficiary is engaging in work is material because the Commissioner may consider that fact in evaluating whether the beneficiary is entitled initially **and to continuing disability payments or the amount of those payments**." First ALJ Decision at 15 (emphasis added). Finally, the ALJ's reading of the definition of "material fact" as excluding information SSA uses to evaluate a current beneficiary's continuing eligibility would effectively bar the SSA I.G. from taking action against any current beneficiaries who make false statements or omissions to SSA. The ALJ Decision cites nothing to support that incongruous result, and we find no support for it.

Constructive notice that information about a DIB recipient's work activity is material to SSA's determination of the recipient's eligibility for benefits effectively creates in the recipient of that notice constructive knowledge that failure to disclose work information is misleading to SSA, which needs information about a recipient's work activity to render that determination accurately. Indeed, the ALJ's conclusion that Respondent "could not have known" that her work activity "was a material fact and that failure to report was misleading," ALJ Decision at 15, is entirely inconsistent with his conclusions elsewhere in his decision that the Act and regulations gave Respondent "constructive knowledge that a material fact is a fact [SSA] may consider in evaluating whether an applicant is entitled to benefits," *id*. at 24, and that "the public has at least constructive" knowledge of the requirements of the regulations, *id*. at 24-25. Since information about work activity is material to SSA's ability to determine entitlement to benefits, it necessarily follows that constructive knowledge of that materiality is also constructive knowledge that withholding that information is misleading. We accordingly reverse the ALJ's conclusion that Respondent did not have constructive notice that her work activity was a material fact and that failure to report was misleading.

The ALJ's erroneous analysis that the regulations do not provide constructive notice that failure to report material information about work activity is misleading appears to have been influenced by his conclusion that there is a "lack of clarity in the regulations[.]" ALJ Decision at 35. The ALJ Decision states that 20 C.F.R. § 404.1571 "creates some confusion as to whether all work activity needs to be reported" and that section 404.1572 "provides that not all work activity need be reported, even if it could be characterized as substantial and gainful." *Id*. at 34.

These conclusions are legally erroneous. First, the ALJ's view that the regulations raise confusion over what must be reported to SSA is undercut by his rejection, in the First ALJ Decision, of Respondent's argument that "it was not explained to her what was considered work that had to be reported and, therefore, she did not intentionally or unintentionally omit to report a material fact." First ALJ Decision at 14, citing P. Br. at 2-4. The ALJ rejected that argument because, he concluded, "the broad reading of [20 C.F.R. § 404.1588(a)] to require reporting of all work is consistent with the purpose of the Act **and the language of the regulation is sufficient notice to Respondent of what to report**." *Id*. (emphasis added).

Second, neither of the two regulations the ALJ cites as creating confusion about what work activity to report addresses reporting requirements or otherwise states what work activities individuals must or need not report to SSA. They instead describe how SSA evaluates whether an individual can engage in substantial gainful activity for the purpose of determining disability. In addition, the listing in section 404.1572(c) of activities that are "generally" not considered to be substantial gainful activity (e.g., household tasks, hobbies, therapy), cited by the ALJ as an example of the alleged confusion, does not carve out exceptions to what is "substantial gainful activity" but merely contrasts

activities that are not substantial gainful activity. Thus, even assuming the regulation can be read as addressing what work activity must be reported, it does not create any doubt that, as the ALJ concluded in his first decision, virtually all work activity must be reported. *See* First ALJ Decision at 14, citing 20 C.F.R. § 404.1571.

We thus reverse the ALJ Decision's conclusion that Respondent did not know and could not have known that her failure to report work activity to SSA was a material fact and that failure to report was misleading, and hold that the SSA I.G. established a basis for the imposition of a CMP or assessment.

II. The ALJ erred in concluding that there was no basis for a CMP or assessment and that no CMP or assessment is reasonable; we conclude that a CMP of $75,000 and an assessment of $51,410 are reasonable.

A. Since Respondent's liability is established, the SSA I.G. had a basis for imposing a CMP and assessment in some amount consistent with the regulatory factors.

Social Security benefits are paid monthly. *See, e.g.*, Act § 1129(a)(1) (referring to "monthly insurance benefits under title II" of the Act); 20 C.F.R. §§ 404.201(a) (addressing determination of "the monthly benefit amount payable to you and your family"), 404.304 (describing determination of "the highest monthly benefit amount you ordinarily could qualify for under each type of benefit"); 404.317 (addressing calculation of "[y]our monthly benefit"); 404.333 (spouse's "monthly benefit is equal to one-half the insured person's primary insurance amount"). When a beneficiary is determined to have omitted or withheld disclosure of a material fact under section 1129(a)(1) of the Act, the SSA I.G. is authorized to impose a CMP of up to "$5,000 for each false statement or representation, omission, or receipt of payment or benefit while withholding disclosure of a material fact." 20 C.F.R. § 498.103(a); *see* Act § 1129(a)(1). The SSA I.G. may impose a CMP for each month in which material information is withheld and DIB benefits are received. The SSA I.G. also may impose an "assessment in lieu of damages" of up to "twice the amount of benefits or payments paid as a result of such a statement or representation or such a withholding of disclosure." Act § 1129(a)(1); *see* 20 C.F.R. § 498.104. In determining the amount of a CMP and assessment, the SSA I.G. must consider the factors in 20 C.F.R. § 498.106(a) which we discuss below. Here, the SSA I.G. imposed a CMP of $100,000 and an assessment in lieu of damages of $68,547 after considering the regulatory factors and based on Respondent's failure to disclose her work for a period of 41 months during which she received benefits in the amount of $68,547.[7] SSA Exs. 1, at 22; 4.

[7] The ALJ did not identify any dispute about the actual amount of the overpayment, and Respondent does not raise any such dispute on appeal.

In its Remand Decision, the Board stated that, if the ALJ found on remand that Respondent knew or should have known that the information she withheld about her work was material to SSA's determination of her right to receive benefits or to the amount of benefits and that her withholding was misleading, the ALJ should make findings as to the duration of the period during which Respondent withheld information about her work and should address the issues related to determining whether the amounts of the CMP and assessment were reasonable. Board Decision at 13-14. As discussed above, the ALJ found, erroneously, that Respondent did not know and should not have known that information about her work activity was material and that withholding that information was misleading and thus was not liable for a CMP or assessment. Nonetheless, the ALJ went on to "address the additional two issues directed by the Board in its remand decision"– the "duration of the period for which CMPs and assessments may be imposed" and "[w]hether the SSA IG has shown that the CMP [and assessment] amount is reasonable based on the factors in the regulations." ALJ Decision at 35, 43.

After discussing at length the SSA I.G.'s allegations and the evidence regarding the nature of Respondent's work activity, the ALJ found "convincing evidence that she did some work for War Era Veterans Alliance as early as September 8, 2009 and again in September 22, 2010." ALJ Decision at 42. The ALJ then stated, "There is no evidence that Respondent reported to SSA the work activity in which she engaged on September 8, 2009 and September 22, 2010." *Id*. at 42-43. The ALJ then concluded "that the SSA IG did establish that Respondent engaged in work activity as early as September 8, 2009 and Respondent failed to report that work activity during the 41 months from September 2009 through January 2013."[8] *Id*. at 43. Respondent did not appeal that conclusion, and we affirm it without discussion.

While we uphold his determination on the duration of Respondent's withholding information, we have reversed the ALJ's conclusion on remand that Respondent did not know and should not have known that in withholding information about her work activity she was withholding material facts and misleading SSA. Accordingly, we have concluded that under a correct application of the law, the SSA I.G. had a basis for imposing a CMP and assessment in some amount for Respondent's withholding of material information during the period September 2009 through January 2013. We thus find further error in the ALJ conclusion "that there is no basis for the imposition of a CMP or assessment in this case" and "that no CMP or assessment should be imposed against Respondent on the facts of this case." ALJ Decision at 46.

[8] The ALJ noted that because SSA imposed the CMP and assessment based on failure to report work activity, not on failure to report earnings or substantial gainful activity, he did not need to find that Respondent worked full time, had earnings from her work or that any earnings constituted substantial gainful activity.

The ALJ's reasoning as to lack of basis is not clear (and is difficult to distinguish from his erroneous decision on liability). However, it seems the ALJ might have read the word "deny" in 20 C.F.R. §498.220(b) – which provides that an ALJ "may affirm, deny, increase, or reduce the penalties or assessments proposed by the Inspector General" – as meaning that even though the SSA I.G. has established a beneficiary's liability for a CMP and assessment, an ALJ can foreclose SSA's imposition of a CMP or assessment in any amount. *See* ALJ Decision at 43 n.11, citing 20 C.F.R. §498.220(b). We see no basis for this reading in the statute or regulations, and it flies in the face of the regulatory scheme. Clearly, the regulations authorize an ALJ to deny imposition of a CMP or an assessment where the ALJ finds no liability for same. They also allow an ALJ to modify the amount of a CMP or assessment proposed by the SSA I.G. based on the ALJ's de novo review of the factors in 20 C.F.R. § 498.106(a) where the ALJ finds liability. However, it makes no sense to read the word "deny" as allowing an ALJ to decline to find a CMP or assessment in **any** amount reasonable once liability has been established, especially since the regulations provide that an ALJ may not "[r]eview the exercise of discretion by the Office of the Inspector General to seek to impose a civil monetary penalty or assessment under §§ 498.100 through 498.132." 20 C.F.R. § 498.204(c)(5). The SSA I.G.'s unreviewable discretion to impose a CMP and assessment would effectively be nullified if the ALJ's reading were correct. Accordingly, we conclude that the ALJ erred in concluding the SSA I.G. had no basis to impose a CMP and assessment once it had established Respondent's liability for same.

B. A CMP of $75,000 and an assessment of $51,410 are reasonable under the factors SSA, the ALJ and the Board must consider.

Having concluded that the SSA I.G. had a basis to impose a CMP and assessment in some amount, we are left with the issue of whether the CMP and assessment amounts determined by the SSA I.G. are reasonable or should be increased or reduced when the regulatory factors are assessed based on the facts of record in this case. The ALJ Decision contains some discussion of the factors. *See* ALJ Decision at 5, 43-46. However, because of the erroneous premise he brought to that discussion – that there is no basis for a CMP or assessment in any amount – we find it impossible to determine the extent to which the ALJ's discussion of the factors is consistent with our remand instructions and reflects a review of the factors unaffected by his legal errors. In addition, as discussed below, we conclude that the ALJ's findings regarding Respondent's culpability are not supported by substantial evidence in the record.

We may either remand for the ALJ to make a new determination as to reasonable CMP and assessment amounts, consistent with our conclusions that there is a basis for a CMP and assessment, that an ALJ may not refuse to recognize the SSA I.G.'s discretion to impose a CMP or assessment in some amount once the basis for same is established and our upholding of the ALJ's determination of the period for which CMPs and assessments

may be imposed (41 months). Alternatively, the Board may determine what constitutes a reasonable amount of CMP and assessment to recommend to SSA. *See* 20 C.F.R. § 498.221(h) ("The DAB may remand a case to an ALJ for further proceedings, or may issue a recommended decision to . . . affirm, increase, reduce or reverse any penalty or assessment determined by the ALJ.") We have concluded that the fairest and most efficient use of our authority and Board resources is to resolve the remaining issue ourselves and to issue a recommended decision on all issues to the Commissioner. Our decision in this regard is influenced by the facts that we have already reversed and remanded this case once based on finding legal error, that we have found additional legal error in this appeal of the remand decision and that the issues remaining to be resolved (the amounts of the CMP and assessment) can be resolved on the existing record.

The regulations require consideration of the following factors in determining an amount of a CMP and assessment that is reasonable: (1) the nature of the statements, representations, or actions and the circumstances under which they occurred; (2) the degree of culpability of the person committing the offense; (3) the history of prior offenses of the person committing the offense; (4) the person's financial condition; and (5) such other matters as justice may require. 20 C.F.R. § 498.106(a); *see also* Act § 1129(c) (presenting as one numbered factor regulatory factors 2, 3 and 4). As stated earlier, the SSA I.G. considered these factors and determined to impose a CMP of $100,000, which represents approximately $2439 a month for each of the 41 months Respondent received benefits while withholding material information, and an assessment of $68,547, the amount of the overpayment of benefits she received. SSA Ex. 4, at 1-2.

We note at the outset the ALJ's statement in response to the Board's directions on remand that the regulations do not expressly direct ALJs to determine that the CMP or assessment amount is <u>reasonable</u>. ALJ Decision at 43 n.11. While that is true, the preamble to the final rule providing for CMPs and assessments against persons who withhold disclosure of material facts states that the SSA I.G. "will continue to impose <u>reasonable</u> civil monetary penalties and assessments, as applicable, on a case-by-case basis by applying the five enumerated factors . . . as set out at 20 C.F.R. § 498.106(a)." 71 Fed. Reg. 28,574, 576 (May 17, 2006) (emphasis added). Accordingly, we conclude that the intent of the regulations is to use a reasonableness standard in applying the factors in order to arrive at reasonable CMP and assessment amounts. S*ee also Latoshia Walker-Mays*, Docket No. A-11-13, Recommended Decision (2011) (finding legally correct and supported by substantial evidence the ALJ's conclusion that $61,000 CMP imposed by the SSA I.G. under section 1129(a)(1) of the Act was reasonable under the factors in 20 C.F.R. § 498.106(a)). We have reviewed the record de novo as the ALJ would have done on remand, and we conclude that the amounts of the CMP and assessment imposed by the SSA I.G. here are reasonable based on substantial evidence in the record relating to the regulatory factors.

The SSA I.G. considered all of the regulatory factors and based the determination of the CMP and assessment amounts on 1) the nature and "aggravating" circumstances of the withholding of information – citing Respondent's negative answers on two SSA forms to the question of whether she worked and the statement of an employee of the War Era Veterans Alliance that Respondent "work[ed] there every day from open to close" and was known as "Ms. Dependable at work;" 2) Respondent's not having submitted a financial disclosure form for SSA to consider in determining her financial condition; 3) Respondent's having no history of prior "offenses" in connection with Social Security; and 4) what SSA determined was a "substantial" degree of culpability on the part of Respondent. SSA Ex. 4, at 1-2. Based on these considerations, the SSA I.G. imposed a CMP of $100,000 and an assessment of $68,547, noting that the CMP was less than the maximum amount ($205,000) it could have imposed and that the assessment equaled the amount of her overpayment rather than twice that amount as the statute and regulations would have allowed. *Id*.

We find, as did the ALJ, that there is "no evidence of any prior offenses" and "no evidence that Respondent is unable to pay a CMP and assessment in the amount proposed by the SSA IG." ALJ Decision at 45. We also recognize that the $100,000 CMP imposed by the SSA I.G. imposed was half the CMP (actually slightly less than half) it could have imposed and that the assessment, which the SSA I.G. limited to the actual amount of the overpayment, also was half of the maximum assessment it could have imposed. *Id*. at 44, citing SSA Ex. 4, at 1, 2.

The ALJ based his determination that no CMP or assessment was supported by the facts of this case largely on his findings on the culpability factor. In addressing what it found was Respondent's "substantial" culpability, the SSA I.G. stated as follows:

> I find that your actions were calculated to defraud SSA of benefits . . . which you were clearly not entitled to receive. You and you alone are responsible for your actions. On June 8, 2012, a Special Agent of the OIG interviewed you. During the interview, you denied working at War Era Veterans Alliance. You made this false statement even though you knew that you have worked at War Era Veterans Alliance since September 2009. Interviews with employees of the company confirm that you were an employee between September 2009 and January 2013. Mark McCauley, the owner, paid you $400 per week.

SSA Ex. 4, at 2. The ALJ stated that the SSA I.G. employee making this statement cited no evidence that would support a conclusion of intent to defraud SSA and that the "mere allegations of the investigators are insufficient to support a finding of fraudulent intent." ALJ Decision at 45. The ALJ also stated that "[t]he simple definition for culpability is blameworthiness," and concluded that although Respondent had failed to report work, he

did "not find Respondent's failure to report to be blameworthy." *Id*. at 45-46, citing *Black's Law Dictionary* 406 (18th ed. 2004). As a reason for his conclusion, the ALJ stated, "The SSA regulations are not clear enough for a person of reasonable intelligence to know what activity is reportable as work activity."[9] ALJ Decision at 46. As we have previously noted, this statement about the regulations is wholly inconsistent with the ALJ's conclusion in his first decision that "the broad reading of [20 C.F.R. § 404.1588(a)] to require reporting of all work is consistent with the purpose of the Act and the language of the regulation is sufficient notice to Respondent of what to report." First ALJ Decision at 14. It is also a conclusion that, if adopted, would allow beneficiaries to withhold material work information with impunity, undercutting the whole Social Security disability system. We find no merit in this reasoning.

We need not determine whether the SSA I.G. has established intent to defraud SSA in order to determine whether Respondent's culpability was "substantial." We also find that it not necessary to determine whether the work activity constituted substantial gainful activity or was for pay or profit (both of which Respondent denied in her reply). Respondent Reply Br. at 2.

There are degrees of culpability. Even if SSA did not show intent to defraud (and we make no finding on this issue), Respondent's undisputed denials that she had worked for the War Era Veterans Alliance when she knew she had worked for that organization are sufficient to show some degree of "blameworthiness" and culpability. The SSA I.G. cited Respondent's denial to investigators that she had worked for the War Era Veteran Alliance when there is ample evidence that she did, even under the ALJ's findings. SSA Exs. 1, at 13-14, 24; 4, at 2; ALJ Decision at 42 (citing as "convincing evidence" emails showing she worked for War Era Veterans Alliance; the emails appear in SSA Ex. 15, at 7-9). In addition, in discussing the circumstances surrounding Respondent's withholding of material information, the SSA I.G. cited Respondent's statements on two SSA forms inquiring about her work activity which the record has shown to be false. *See* SSA Ex. 9, at 1 (Work Activity Report –Employee); SSA Ex. 10, at 2 (Continuing Disability Review Report). The SSA I.G. also relied in setting the CMP and assessment on the fact that

[9] The ALJ also cited Respondent's testimony that her medical impairments and medication side effects limited her ability to work and said that testimony was "unrebutted by any qualified medical evidence." ALJ Decision at 46. Respondent's medical impairments go to the issue of whether she qualifies for benefits on the ground that they prevent her from performing substantial gainful activity, not to the issue of whether she is liable for a CMP and assessment based on withholding material information about her work activity. The ALJ did not explain how her mental impairments might have so limited her understanding as to significantly diminish her responsibility for her false statements and withholding of material information. This is especially questionable in light of statements the ALJ made earlier in the decision: "The impact of medications was not readily apparent at hearing. Further, I have no medical evidence and no expert medical opinion on which to base a finding that her mental impairments and medication either did or did not affect her ability to understand." *Id*.at 33. We therefore do not consider Respondent's medical condition as relevant to her culpability on this record.

Respondent withheld information about her work activity for a period of 41 months while receiving benefits which the ALJ found supported on the record. ALJ Decision at 43. Furthermore, the ALJ agreed with the SSA I.G. that Respondent had at least constructive notice of her duty to report that work activity. *Id*. at 45.

We find no merit in the ALJ's suggestion, *id*., that Respondent's constructive knowledge of what work activity she had to report was not enough to support any CMP and assessment and that absence of evidence of actual knowledge would be a basis to reduce (or in the ALJ's view eliminate) the CMP and assessment. The Act and regulations do not require actual knowledge to support liability and permit the SSA I.G. to impose CMPs and assessments based on a "should have known" standard. While actual knowledge might support a finding of enhanced capability, it is not required to show culpability. Cf. *Paul D. Goldenheim, M.D., et al.*, DAB No. 2268, at 17 (2009) (individuals excluded by the HHS I.G. upon whom law placed responsibility for company's conduct were culpable for that conduct notwithstanding uncontested claims that they had no personal knowledge of that conduct), *aff'd*, *Friedman v. Sebelius*, 755 F. Supp. 2d 98 (D.D.C. 2010), *rev'd on other grounds and remanded*, 686 F.3d 813 (D.C. Cir. 2012).

We also note that, although Respondent has challenged her liability for any CMP and assessment (on the basis of her claim that she did not work for War Era Veterans Alliance), she has not challenged the amounts of the CMP and assessment.

Nevertheless, our de novo review reflects that the ALJ made findings as to the nature and circumstances of Respondent's work activity that do not fully support the factual premises on which the SSA I.G. determined the amounts of the CMP and assessment. We therefore address the ALJ's evidentiary assessment of facts relevant to the regulatory factors to determine what change may be appropriate to ensure the amounts continue to be reasonable in light of the record as a whole. The SSA I.G. apparently believed, based on various interviews, that Respondent worked full work weeks beginning September 1, 2008 and was paid $400 per week. *See, e.g.*, SSA Ex. 12, at 8. The ALJ made no findings as to how much work Respondent actually did,[10] but discounted some of the evidence on which the SSA I.G. relied in reaching this assessment. The Board will generally defer to an ALJ's findings on the weight and credibility of testimony, absent a compelling reason to do otherwise. *See, e.g., Brenham Nursing & Rehab. Ctr.*, DAB No. 2619, at 13 (2015), *citing Woodland Oaks Healthcare Facility*, DAB No. 2355, at 7

[10] The ALJ's numbered finding 7 stated only that Respondent "engaged in reportable work activity in September 2009 that she failed to report for 41 months as alleged by the SSA IG." ALJ Decision at 15. Later, the ALJ states that Respondent did not rebut evidence that she "did some work" as early as September 8, 2009 "and again in September 22, 2010," based on emails that she sent on those dates, and that she "failed to report that work activity during the 41 months from September 2009 through January 2013." *Id*. at 42-43.

(2010); *Gateway Nursing Ctr.*, DAB No. 2283, at 7 (2009); *Koester Pavilion*, DAB No. 1750, at 15, 21 (2000). As we discuss below, we find compelling reasons to disagree with the ALJ's complete rejection of the organizational website as some evidence of Respondent's employment. We defer to the ALJ's findings on credibility as to witnesses' statements and testimony to the extent they affect determination of a reasonable amount for the CMP and assessment. We explain that the remaining evidence, while not sufficient to establish by the preponderance of the evidence that Respondent was paid $400 a week for daily work throughout the 41-month period at issue, is sufficient to establish that she did do significant work activities over a significant period of time. We reduce the amount of the CMP and assessment to take into account the resulting differences in the circumstances and degree of culpability shown on the record.

The ALJ noted that Respondent clearly engaged in work activity on behalf of the War Era Veterans Alliance on the two dates on which she sent emails for the organization. ALJ Decision at 42. The ALJ also described admissions by Respondent about additional work activity:

> She testified she only trained Adrianne Watt on how to use the telephones. She admitted she did send some emails to agents such as Alan Watt regarding meetings but she stated that was only when she was with the president of the company a couple days per week. She testified that two or three days per week, a couple hours each day, 10:00 a.m. to 1:00 p.m., she would be in the Michigan office. She admitted she answered the War Era Veterans Alliance telephone but only when instructed to do so by the president and then only certain callers. She also admitted to writing down stories related by veterans and posting some to the War Era Veterans Alliance website. Tr. 206-11, 230-31.

ALJ Decision at 41. The ALJ also recounted that Mark McCauley "agreed that the telephone he gave Respondent was a telephone that could receive calls intended for War Era Veterans Alliance." *Id*. The ALJ also found credible statements made by Jacquie Scalet that Respondent used to work in the organization's office answering phones and had been doing so when Ms. Scalet began working there in 2010, but that "for the past year, starting in spring 2011, Respondent worked from home." ALJ Decision at 39-40, citing Tr. at 52-54, 106-07.

The website for War Era Veterans Alliance, as printed by SSA I.G. on June 7, 2012, identified Respondent as an employee who had "been taking calls and managing all War Era Veterans Alliance calendars for over four years." SSA Ex. 13, at 58. At the hearing, Respondent denied that the biography on the website was accurate (Tr. at 222) and the ALJ gave no weight to the website information because the author was not known and "almost anything can be posted on a website." ALJ Decision at 37. In giving no weight at all to the statement on the website identifying Respondent as an employee, the ALJ

failed to consider Respondent's admission that she posted material to that website and thus had access to it. She admitted that she was aware that she was in a group photo of employees on the website but continued to deny that she was aware of the "bio." Tr. at 215. We find that the evidence of the website as a whole is compelling that Respondent did have an ongoing employment relationship which the organization held out to the public and of which she was aware.

The individual who reported Respondent's work activity to the SSA I.G., Alan Watt, also testified at the hearing. SSA Ex. 15; Tr. at 158-59. He testified that he had contact with Respondent at War Era Veterans Alliance in fall 2009, that he stopped working there on April 13, 2011, and reported that Respondent "was customer service. She would answer all incoming calls from the 800 number and book appointments and forward any messages from clients." Tr. at 158-59. The ALJ found that Mr. Watt acknowledged under questioning that he spent limited time in the Michigan office, and saw Respondent in the office "only 50 to 75 percent of the time he was in office," which the ALJ calculated "is roughly four to six hours a month on the high-side." ALJ Decision at 41. Mr. Watt also testified that "until August 2010 Respondent answered about 75 percent of his calls and after August 2010, she answered about 30 percent of the time." *Id.*, citing Tr. at 187-95.[11]

The ALJ concluded that, overall, the SSA I.G.'s evidence supported "a finding that Respondent engaged in some other activity at War Era Veterans Alliance [besides sending the work-related emails already mentioned] during the period September 2009 through January 2013, which she also failed to report." ALJ Decision at 43. He found it impossible to determine, however, on the record before him, "when exactly the work activity occurred, over what period, and for how many hours work activity was performed." *Id.* Nor do we attempt to make such a precise determination on this record.

[11] Mr. Watt gave further information about his beliefs that Respondent answered all calls to the toll-free line, worked full-time, and earned about $10 per hour, basing some of his beliefs on information provided to him by his wife who worked in the Michigan office (and whom Respondent admitted having trained). ALJ Decision at 40. The ALJ gave no weight to these statements, finding them not credible because Mr. Watt and his wife could not have actually witnessed as much of Respondent's work as they speculated had occurred given the amount of contact with Respondent. ALJ Decision at 43. The ALJ also declined to credit or gave little weight to statements by informants who gave the SSA I.G. investigator additional corroborating statements about the scope of Respondent's work activity because neither party called them as witnesses and he found their statements to be unreliable hearsay. *Id*. at 37-39, 43. We might well view much of this evidence differently. (We also note the ALJ credited two of the emails that Respondent sent to Mr. Watt and Mr. Watt gave to SSA as "appear[ing] on their face to be related to business activity of War Era Veterans Alliance and Mr. Watt." ALJ Decision at 40, citing SSA Ex. 15, at 7-9.) However, as noted, we will not overturn an ALJ's findings on the weight and credibility to be given particular evidence absent a compelling reason. The SSA I.G. has not identified a compelling reason for us to do so as to this particular evidence and we do not find such a reason. Because we do not rely on this particular evidence, we conclude it is not necessary to evaluate the substance of the belated statements submitted by Respondent that purport to be from two of these witnesses and purport to retract or modify aspects of their prior statements. We note, however, that neither of the new statements affirmatively disavows the content of prior statements, which were made during the SSA I.G.'s investigation.

In summary, while we might not share the ALJ's constricted view of the evidence presented about the extent of work that Respondent performed, even under that view it is clear she did far more than send two emails a year apart. On the other hand, the ALJ clearly did not view the evidence presented by the SSA I.G. as sufficient to prove that she engaged in the full-time, fully compensated employment on which the SSA I.G. appears to have based its determination of the appropriate amount of CMP and assessment. In order to reasonably reflect the difference between the circumstances as the SSA I.G. appears to have understood them in making the original determination of amount and the circumstances as supported by the record (deferring as appropriate to the ALJ's findings), as well as the relation of those different circumstances on the degree of culpability, we consider a reduction in the amounts to be proper based on our de novo review. As explained earlier, the determination of the amounts to be imposed is an exercise in reasonableness, rather than an application of formula. We have determined that a reduction of 25% from the amounts originally imposed by the SSA I.G. reasonably reflects the differences in the evidentiary basis as developed before the ALJ.

Conclusion

For the reasons stated above, we reverse the ALJ Decision's conclusions that Respondent did not know and could not have known that the facts (her work activities) she withheld from SSA were material and that withholding them was misleading; that the SSA I.G. had no basis to impose a CMP and assessment; and that no amount of CMP or assessment could be imposed under the factors in the Act and regulations. We uphold the ALJ's conclusion that the SSA I.G. showed that Respondent withheld the information about her work activity for 41 months and recommend that the Commissioner of Social Security impose a CMP of $75,000 and an assessment of $51,410.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member