APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 19a0048p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-2109

[Filed March 20, 2019]

MICHELLE VALENT, *Petitioner*,	)
v.	)
COMMISSIONER OF SOCIAL SECURITY, *Respondent*.	)

Petition for Review of a Civil Money Penalty of the Social Security Administration.
C-13-984—Social Security Administration;
A-15-104—Departmental Appeals Board.

Argued: October 3, 2018

Decided and Filed: March 20, 2019

Before: GILMAN, KETHLEDGE, and BUSH, Circuit Judges.

COUNSEL

ARGUED: Christopher P. Desmond, JOHNSON LAW, PLC, Detroit, Michigan, for Petitioner. Patricia Gaedeke, UNITED STATES ATTORNEY'S OFFICE, Detroit, Michigan, for Respondent. **ON BRIEF:** Paul F. Doherty, JOHNSON LAW, PLC, Detroit, Michigan, for Petitioner. Laura Anne Sagolla, Patricia Gaedeke, UNITED STATES ATTORNEY'S OFFICE, Detroit, Michigan, for Respondent.

GILMAN, J., delivered the opinion of the court in which BUSH, J., joined. KETHLEDGE, J. (pp. 13–19), delivered a separate dissenting opinion.

OPINION

RONALD LEE GILMAN, Circuit Judge. The Commissioner of Social Security imposed an assessment of $51,410 and a civil monetary penalty of $75,000 on petitioner Michelle Valent after the Social Security Administration found that Valent failed to disclose that she had engaged in paid work activity while receiving Social Security disability benefits. Valent argues that 42 U.S.C. § 421(m)(1)(B) prohibits the Administration from considering her work activity in determining whether she continues to be eligible as a disability-benefits recipient.

She therefore contends that her failure to disclose her paid work activity was not a material omission, such an omission being a prerequisite for the Administration to impose an assessment and a penalty under 42 U.S.C. § 1320a-8(a). Finally, she asserts that even if her failure to disclose her paid work activity was a material omission, she did not have actual or constructive knowledge that her omission was material. For the reasons set forth below, we **DENY** Valent's petition for review and **AFFIRM** the judgment of the Departmental Appeals Board.

I. BACKGROUND

A. Statutory framework

The Social Security Act provides for the payment of benefits to individuals with a "disability," which, as relevant here, is defined as a "medically determinable physical or mental impairment" that prevents a person from doing "any substantial gainful activity" for at least 12 months. 42 U.S.C. § 423(d)(1)(A). To receive disability benefits under the Act, an individual must apply to the Commissioner, who determines whether the applicant satisfies the statutory criteria. 42 U.S.C. § 423(a)–(b).

Once an individual qualifies for benefits, the Commissioner must periodically verify that the beneficiary continues to be eligible for the program, a process called a "continuing disability review." 42 U.S.C. §421(i), (m). Congress amended the Act in 1999 "to help individuals with disabilities return to work." Pub. L. No. 106-170, § (2)(a)(11), 113 Stat. 1860. The amended Act provides that, for the purpose of

determining whether an individual who has received benefits for at least 24 months remains entitled to receive them, "no work activity engaged in by the individual may be used as evidence that the individual is no longer disabled."42 U.S.C. § 421(m)(1)(B). But the Act also states that the Commissioner may terminate benefits if the beneficiary "has earnings that exceed the level of earnings established by the Commissioner to represent substantial gainful activity."42 U.S.C. § 421(m)(2)(B).

B. Factual background

Valent applied for Social Security disability benefits in October 2003. The Administration found that she was disabled since March 2003, based primarily on various psychological problems, including depression. The Commissioner conducted a continuing-disability review in 2010 and found that Valent remained disabled.

But in January 2012, the Administration's Office of Inspector General (IG) received a tip that Valent had been working since 2009 at the War Era Veterans Alliance, an organization founded and owned by her brother and sister-in-law. A month later, the IG began an investigation into whether Valent had indeed worked at the Alliance. Valent signed forms during that investigation affirming that she had not earned income since 2003 or worked since 2004.

The IG, to the contrary, concluded that Valent had been working at the Alliance since 2009 and that her failure to report her paid work activity was an omission of a "material fact." *See* 42 U.S.C. § 1320a-8(a). Based

on that omission, the IG recommended that Valent be assessed $68,547 (the amount of benefits paid to her since she had returned to work) and that she pay a civil penalty of $100,000 for her failure to report her paid work activity to the Administration. Section 1320a-8(a)(1)(C) authorizes the Administration to impose a penalty of up to $5,000 for each statement or representation in which an individual receiving Social Security disability benefits withheld material information. The IG determined that Valent made 41 material omissions—one for each month during which she received benefits without disclosing her work activity that generated earnings. He then decided to impose a penalty of $100,000 instead of the maximum penalty of $205,000.

C. Procedural background

Valent requested a hearing before an administrative law judge (ALJ), who heard testimony from the tipster and from Valent's brother, among others. Her brother testified that he had assigned Valent simple tasks and paid her about $400 per week, essentially as an act of charity. In a June 2014 decision, the ALJ agreed with the IG's finding that Valent had indeed worked for and been paid by the Alliance, her brother's motivation notwithstanding. But the ALJ disagreed with the IG that Valent's unreported work activity was an omission of a "material fact" because, according to the ALJ, 42 U.S.C. §421(m)(1)(B) prevents the Commissioner from considering work activity "in evaluating whether [Valent] continued to be entitled to benefits or payments under the Act." The ALJ therefore held that

the IG had no basis for either the assessment or the penalty.

The Departmental Appeals Board (the Board) reversed the ALJ's ruling in November 2014, concluding that the ALJ's interpretation of 42 U.S.C. §421(m)(1)(B) was incorrect. Specifically, the Board held that "[s]ince work is relevant in determining whether amounts paid to a recipient are earnings from work, work is a fact [that the Administration] may consider in determining whether a 24-month recipient is entitled to benefits." The Board remanded the case to the ALJ to make factual findings as to whether Valent knew or should have known that the omission of her work activity that generated earnings was material and would mislead the Administration.

On remand, the ALJ reiterated his opinion that § 421(m)(1)(B) barred the Administration from considering Valent's work activity. He therefore concluded that Valent had no reason to know that her failure to disclose her work activity was an omission of a material fact. Ultimately, the ALJ held that the Social Security Act and the Administration's regulations "are not clear enough for a person of reasonable intelligence to know what activity is reportable as work activity." The ALJ accordingly again declined to impose either an assessment or a penalty.

Once more, the Board reversed the ALJ's decision. It noted that constructive knowledge that an omission of fact is material is sufficient under 42 U.S.C. § 1320a-8(a). Furthermore, the Board disagreed with the ALJ's conclusion that the regulatory scheme is so confusing that a reasonable person would not know that

withholding the report of gainful work activity constitutes the omission of a material fact. So although the Board deferred to the ALJ's findings of fact, it imposed a special assessment of $51,210 and a penalty of $75,000, both of which were less than the amounts originally levied by the IG. This petition for review followed.

II. ANALYSIS

A. Standard of review

We review the Administration's interpretation of law under the framework established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). That framework requires us to engage in a two-step inquiry. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–3. We engage in step two "if the statute is silent or ambiguous with respect to the specific issue." *Id.* at 843. Then, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

For agency determinations that are not interpreting a statute, we will set them aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Steeltech, Ltd. v. EPA*, 273 F.3d 652, 655 (6th Cir. 2001) (quoting 5 U.S.C. § 706(2)(A)) (applying this standard to the EPA's imposition of a civil penalty). And we will accept

the Administration's findings of fact if they are "supported by substantial evidence on the record considered as a whole."42 U.S.C. §1320a-8(d)(2).

B. Section 421(m) of the Social Security Act is ambiguous, and the Administration's interpretation of that section is based on a permissible construction of the statute.

The key interpretive question before us is whether the failure of an individual who receives Social Security disability benefits to report work activity that generates earnings constitutes the omission of a "material fact" under 42 U.S.C. §1320a-8(a). That statute authorizes the Commissioner to impose an assessment and a penalty when a recipient of Social Security disability benefits "omits from a statement or representation . . . or otherwise withholds disclosure of, a fact which the person knows or should know is material to the determination of any initial or continuing right to or the amount of monthly insurance benefits." 42 U.S.C. § 1320a-8(a)(1)(C).

Under step one of the *Chevron* framework, Congress has not "directly spoken to the precise question at issue." *See Chevron*, 467 U.S. at 842. Specifically, the Social Security Act is ambiguous with respect to the question at issue because 42 U.S.C. § 421(m)(1)(B) and m(2)(B) appear to conflict with one another. Section 421(m)(1)(B) states that when an individual has received Social Security disability benefits 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." But § 421(m)(2)(B) states that such an individual shall be subject to "termination of

benefits under this subchapter in the event that the individual has earnings that exceed the level of earnings established by the Commissioner to represent substantial gainful activity." These two provisions create an ambiguity as to whether the Commissioner may consider an individual's work activity that generates earnings. Section 421(m)(1)(B) appears to proscribe taking such activity into account, yet the Commissioner would need to do so in order to determine whether the individual has earnings that amount to "substantial gainful activity."

The Second Circuit in *Cappetta v. Commissioner of Social Security Administration*, 904 F.3d 158 (2d Cir. 2018), addressed this very question and held that "although §421(m)(1) makes 'work activity' irrelevant as both a reason to conduct a continuing disability review, and as evidence in such a review, the statute just as clearly permits the [Administration] to consider substantial gainful activity to terminate benefits." *Id.* at 168. In *Cappetta*, the court resolved the issue at step one of the *Chevron* framework, holding that "the Commissioner may properly consider a failure to report work activity that generates profit or pay 'material' for purposes of § 1320a-8, and that the plain text of the statute authorizes the Commissioner to do so." *Id.* (The term "profit or pay" comes from the Administration's definition of "substantial gainful activity." *See* 20 C.F.R. § 404.1572.)

Although we disagree with the Second Circuit's holding that the statute *unambiguously* authorizes the Commissioner to "consider a failure to report work activity that generates profit or pay 'material' for

purposes of §1320-8," *Cappetta*, 904 F.3d at 168, we acknowledge that another circuit's differing interpretation of the very statute at issue is evidence of ambiguity in the statutory scheme. *See Salazar v. Butterball, LLC*, 644 F.3d 1130, 1137 (10th Cir. 2011) (holding that a circuit split over whether donning and doffing personal protective equipment is considered "changing clothes" under 29 U.S.C. §203(o) shows that the term "changing clothes" is ambiguous). We therefore conclude that the statute is ambiguous as to whether a failure to report work activity that generates profit or pay is a material omission under 42 U.S.C. § 1320a-8.

Having determined that the statutory scheme is ambiguous, we now move on to the second step of the *Chevron* framework: "whether the agency's answer is based on a permissible construction of the statute."*See Chevron*, 467 U.S. at 843. The Board concluded that the Administration can consider a beneficiary'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 [42 U.S.C] section [1320a-8](a)(1)." In support of this position, the Commissioner argues that the Administration can consider work activity for the "vocational" element of disability, a term that she defines as synonymous with the recipient "engaging in substantial gainful activity." The Commissioner in essence acknowledges that the Administration *cannot* take work activity into account to conclude that a beneficiary like Valent is no longer suffering from a medical disability. But, the Commissioner argues, the Administration *can* take

work activity into account in determining whether a beneficiary is engaging in substantial gainful activity. According to the Administration, a failure to report work activity that generates profit or pay is a material omission under 42 U.S.C. § 1320a-8 because such activity is relevant to the beneficiary's "continuing right to . . . benefits." *See* 42 U.S.C. § 1320a-8(a)(1)(C). This argument rings true because work activity that generates earnings can amount to substantial gainful activity, which is a proper ground for terminating benefits under 42 U.S.C. § 421(m)(2)(B).

We conclude that the Administration's interpretation is a permissible construction of the statute. Valent's position is that the Administration can consider "substantial gainful activity" but not "work" or "work activity." As the Commissioner argues, however, this construction of the statutory scheme "makes no sense" and "could be impossible to implement." The Administration would be unable to examine a beneficiary's substantial gainful activity without considering the beneficiary's work activity that generates profit or pay.

Nor does the Administration's interpretation read out or ignore 42 U.S.C. § 421(m)(1)(B). It instead interprets that section, which prohibits the Administration from considering "work activity . . . as evidence that the individual is no longer disabled," to bar it from considering work activity in determining whether a beneficiary is *medically* disabled. In other words, according to the Administration's permissible construction of the statute, if an individual claims Social Security disability benefits because of, say, a

back injury, and the Administration later determines that the individual was engaging in manual labor that belies his or her back injury, then it cannot use this work activity as evidence that the individual is no longer *medically* disabled. But if the work activity generates profit or pay, then the Administration can consider the work activity in determining whether the individual has "earnings that exceed the level of earnings established by the Commissioner to represent substantial gainful activity" under §421(m)(2)(B).

The Administration's interpretation of the statutory scheme is further supported by the legislative history of 42 U.S.C. § 421(m). Subsection (m) was added to the Social Security Act as part of the Ticket to Work and Work Incentives Improvement Act of 1999. Pub. L. No. 106–170, § 111(a), 113 Stat. 1860. The official committee report for that Act explains that the changes in § 421(m) are "intended to encourage long-term SSDI [Social Security Disability Insurance] beneficiaries to return to work by ensuring that work activity would not trigger an unscheduled *medical* review of their eligibility." H.R. Rep. No. 106-393, pt. 1, at 45 (1999) (emphasis added). It continues, however, by noting that, "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.*

As the Second Circuit held in *Cappetta*, "[t]hose observations support the Commissioner's reading of the statute, because they demonstrate Congress's clear intent to continue making substantial gainful activity—which the SSA assesses by looking primarily

at earnings derived *from work*—relevant and applicable to SSDI beneficiaries." *Cappetta*, 904 F.3d at 169 (emphasis in original). In sum, we defer to the Administration's permissible construction of 42 U.S.C. § 421(m)(1)(B) and (m)(2)(B) as allowing it to consider a beneficiary's work activity that generates profit or pay because such activity goes to the beneficiary's substantial gainful activity. We also defer to the Administration's permissible construction that a failure to report work activity generating profit or pay constitutes a material omission under 42 U.S.C. § 1320a-8.

C. The Administration's imposition of an assessment and a penalty in this case is consistent with its permissible construction of the Social Security Act.

This leaves the question of how to apply the above principles to the present case. Both the IG and the Board found that Valent made a material omission under 42 U.S.C. § 1320a-8 when she failed to disclose her work activity with the War Era Veterans Alliance, an activity that generated profit or pay. According to the dissent, Valent's assessment and penalty in this case were based solely on her failure to report work activity, not on her failure to disclose earnings. Dissenting Op. 15–16. The dissent further notes that the Commissioner's counsel agreed during oral argument that the Commissioner imposed an assessment and a penalty in the present case based on Valent's failure to disclose work activity. Dissenting Op. 16.

But the dissent overlooks the Administration's conclusion that work activity is a necessary component of substantial gainful activity, which is a proper ground for terminating benefits under 42 U.S.C. § 421(m)(2)(B). Under the Administration's permissible construction of the Social Security Act, it can consider a beneficiary's work activity as an element of substantial gainful activity. But it cannot take work activity into account (after the beneficiary has received benefits for at least 24 months) to conclude that the beneficiary is no longer suffering from a medical disability. Here, the Administration did not use Valent's work activity to make any conclusions regarding her medical disability, so its imposition of an assessment and a penalty in this case is consistent with the Administration's permissible construction of the statute.

The dissent also contends that "the Commissioner imposed the sanction based solely on Valent's failure to report 'work activity' *period*—without regard to whether she received any earnings from that activity." Dissenting Op. 15 (emphasis in original). We respectfully disagree. In the IG's June 3, 2013 letter to Valent, the IG states that Valent "failed to report to [the Administration] that [she] worked at the War Era Veterans Alliance"and that her brother, the coowner of the Alliance along with Valent's sister-in-law, "paid [her] $400 per week." Valent was thus being paid for her work, and the Administration took this fact into account when it imposed an assessment and a penalty. Whether the Administration can impose an assessment and a penalty on a beneficiary who fails to disclose *unpaid* work activity is not a question before us

because Valent engaged in and failed to disclose her *paid* work activity with the Alliance.

D. Valent had constructive notice that her failure to report her work activity that generated profit or pay was a material omission that misled the Administration.

As we concluded earlier (*see* Part II.B. above), we defer to the Administration's permissible determination that a failure to report work activity that generates profit or pay is a material omission under 42 U.S.C. § 1320a-8. We now turn to the two other elements of § 1320a-8: (1) whether Valent knew or should have known that her omission was material, and (2) whether she knew or should have known that her omission was misleading to the Administration. *See* 42 U.S.C. § 1320a-8(a)(1)(C). The Board, in its second decision in this case, concluded that Valent should have known that the failure to report her paid work activity with the Alliance was a material omission that misled the Administration.

We agree with the Board that the statutory scheme and the Administration's regulations put Valent on constructive notice that her failure to report was material. As the ALJ held on remand, "[t]he Administrative Procedure Act requires publication of legislative rules adopted by federal agencies and, based on that publication[,] the public has at least constructive, if not actual knowledge of the requirements of the regulations." Several regulations put Valent on notice of her need to report work activity that generated profit or pay, and that a failure to do so would mislead the Administration.

"Substantial gainful activity" is defined in 20 C.F.R. §404.1572 as "work activity that you do for pay or profit." And 20 C.F.R. § 404.1588(a) requires recipients of Social Security disability benefits to tell the Administration if they "return to work," if they "increase the amount of [their work,]" or if their "earnings increase." All of this is consistent with the statutory framework because, as the Second Circuit held in *Cappetta*, "calculating whether earnings amount to substantial gainful activity that prevent the continuing receipt of disability benefits is a complex undertaking that requires the [Administration] to have a complete picture of a SSDI recipient's earnings." *Cappetta*, 904 F.3d at 169 (citing 20 C.F.R. §§ 404.1574, 404.1592–404.1592a). Ultimately, the Board's conclusion that Valent had constructive notice that her failure to report her work activity with the Alliance was a material omission that misled the Administration is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *See Steeltech, Ltd. v. EPA*, 273 F.3d 652, 655 (6th Cir. 2001) (quoting 5 U.S.C. § 706(2)(A)).

The dissent, however, argues that the Administration's own regulation—specifically, 20 C.F.R. § 404.1594—refutes the position of the Commissioner and shows that Valent did not have constructive notice that her failure to disclose her work activity was a material omission. Dissenting Op. 19. We again respectfully disagree. The regulation reads as follows:

> If you are currently entitled to disability insurance benefits as a disabled worker . . . and

> at the time we are making a determination on your case you have received such benefits for at least 24 months, we will not consider *the activities you perform* in the work you are doing or have done during your current period of entitlement based on disability if they support a finding that your disability has ended.

20 C.F.R. § 404.1594(i)(2) (emphasis added).

The regulation is consistent with the position advanced by the Administration in this case. In particular, the regulation states that the Administration "will not consider the activities you perform in the work you are doing." *Id.* This means that the Administration cannot use the activities that a beneficiary performs during work to demonstrate that the beneficiary is no longer *medically* disabled. But it can use that work activity, if that activity generates profit or pay, as evidence that the beneficiary engaged in substantial gainful activity.

E. The issues raised in Valent's supplemental brief are not reviewable.

This brings us to one final matter to be decided, which is based on our request that the parties file supplemental briefs to address the Second Circuit's decision in *Cappetta*. In the course of doing so, Valent raised three new issues in her supplemental brief: (1) whether the Board can impose an assessment and penalty in the first instance, (2) whether the assessment and penalty are supported by substantial evidence, and (3) whether the Administration considered the fact that it suffered no actual loss. But

these new arguments are not properly before us because they were not raised in Valent's opening brief. *See Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appellants must raise any challenge to a district court or administrative decision in their opening brief."). In addition, Valent did not challenge the amount of the assessment and penalty before the Board, and our jurisdiction is limited to issues raised administratively. *See* 42 U.S.C. § 1320a-8(d)(1). We therefore conclude that the new arguments raised in Valent's supplemental brief are not reviewable.

III. CONCLUSION

For all of the reasons set forth above, we DENY Valent's petition for review and AFFIRM the judgment of the Board.

DISSENT

KETHLEDGE, Circuit Judge, dissenting. In every case where an Article III court defers to the Executive's interpretation of a statute under *Chevron*, our constitutional separation of powers is surely disordered. That disorder, the Supreme Court has said, is constitutionally permissible. But it is disorder nonetheless. For whenever a federal court declares a statute ambiguous and then hands over to an executive agency the power to say what the statute means, the Executive exercises a power that the Constitution has assigned to a different branch.

One can conceive of this transfer in two ways. As *Chevron* itself conceives of it, the executive branch resolves the ambiguity by exercising *legislative* power to define the statute's terms. 467 U.S. at 843-44. Under that view, *Chevron* allows an executive agency to impose binding obligations upon our citizenry—which is to say, to legislate—through a process vastly less difficult and subject to democratic scrutiny than the legislative process prescribed in the Constitution. *See* U.S. Const. art. I, § 7. For where the Constitution requires the concurrence of the House, the Senate, and the President (or an overwhelming consensus in the House and Senate)—the approval, in other words, of every component of the elected branches—*Chevron* requires only the approval of a single agency head. Alternatively, *Chevron* effects an abdication of "[t]he judicial power" vested in Article III courts—as the judicial branch cedes to the Executive the "emphatic[ ]

. . . province and duty of the judicial department to say what the law is." U.S. Const. art. III, § 1; *Marbury v. Madison*, 1 Cranch 137, 177 (1803). And under either conception of *Chevron*, the agency is free to expand or change the obligations upon our citizenry without any change in the statute's text. *See Nat's Cable & Telecomm. Assoc. v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005).

Under *Chevron* itself, courts should ensure that this disorder happens as rarely as it lawfully can. *Chevron* directs courts to exhaust all the "traditional tools of statutory construction"—and there are many of them—before surrendering to some putative ambiguity and thereby allowing the Executive to exercise power belonging to another branch. *See* 467 U.S. at 843 n.9. For just as the separation of powers "safeguard[s] individual liberty," *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 525 (2014), so too the consolidation of power in the Executive plainly threatens it. In short, an Article III court should not defer to an executive agency's pronouncement of "what the law is" unless the court has exhaustively demonstrated—and not just recited—that every judicial tool has failed.

But that is hardly what happens in reality. Instead, the federal courts have become habituated to defer to the interpretive views of executive agencies, not as a matter of last resort but first. In too many cases, courts do so almost reflexively, as if doing so were somehow a virtue, or an act of judicial restraint—as if our duty were to facilitate violations of the separation of powers rather than prevent them.

In this case, respectfully, the tools of statutory construction are hardly employed. Rather than analyze the interpretive issue, the majority merely frames it. And the agency's interpretation—now the law of our circuit—construes the words of the statute in a manner that no ordinary speaker of the English language would recognize. (Agencies are experts at policy, but not necessarily at statutory interpretation.) Meanwhile, the majority overlooks more case-specific grounds on which Valent is entitled to relief.

I.

The question presented by this case is whether the Social Security Act authorized the Commissioner to sanction Valent for her failure to report her "work activity." The Act allows the Commissioner to impose certain penalties and assessments for each instance in which a person "omits from a statement or representation . . . or otherwise withholds disclosure of, a fact which the person knows or should know is material to the determination of any initial or continuing right" to disability insurance benefits. 42 U.S.C. §1320a-8(a)(1)(C). To impose a penalty and assessment, the Commissioner bears the burden of proving three elements: first, that a person failed to disclose a "material fact" second, that the person had reason to know the fact was "material" and third, that the person had reason to know that failure to disclose the fact was "misleading"to the agency. *Id.*; 20 C.F.R. §498.215(b)(2). A fact is "material" if the Commissioner of Social Security "may consider" it when "evaluating whether an applicant is entitled to benefits[.]" 42 U.S.C. §1320a-8(a)(2).

The Commissioner imposed the assessment and penalty (hereinafter, "the sanction" against Valent based solely on her failure to disclose her "work activity" at the Alliance. R. 18 at 835; *see also* R. 18 at 119. Valent argues that her work activity could not be "material" because the Commissioner could not use it as evidence against her. Section § 421(m)(1)(B) provides in relevant part:

> (m) Work activity as basis for review
>
> (1) In any case where an individual entitled to disability insurance benefits . . . has received such benefits for at least 24 months—
> . . .
>
> (B) no *work activity* engaged in by the individual may be used as evidence that the individual is no longer disabled[.]

42 U.S.C. § 421(m)(1)(B) (emphasis added). The Commissioner may terminate benefits, however, if the beneficiary "has *earnings*" that exceed an amount "established by the Commissioner to represent substantial gainful activity." *Id.* § 421(m)(2)(B) (emphasis added). The question, then, is whether the Commissioner could "consider" Valent's work activity when determining whether she remained "entitled to benefits"—in which case her work activity would be "material[,]" *id.* § 1320a-8(a)(2)—even though her work activity may not "be used as evidence" that she was "no longer disabled." *Id.* § 421(m)(1)(B).

As an initial matter, the majority repeatedly misstates the basis on which the Commissioner

imposed the sanction at issue here. The Commissioner did not, as the majority recites throughout its opinion, impose the sanction based on Valent's failure to report "work activity *that generates earnings*" or "work activity *that generates profit or pay*[.]" Maj. Op. at 6, 8 (emphasis added). That characterization distorts the question presented by blending a fact that the agency may use as evidence against a beneficiary (*i.e.*, her earnings) with a fact the agency may not (*i.e.*, her work activity). Instead, the Commissioner imposed the sanction based solely on Valent's failure to report "work activity" *period*—without regard to whether she received any earnings from that activity. For example, the ALJ on remand noted: "It is important to recognize that the [Inspector General] did not charge [Valent] with failure to report earnings or failure to report substantial gainful activity, both of which are material facts. The [IG] cited failure to report *work activity* as the basis for the [sanction.]" R. 18 at 124 (emphasis added). The Board likewise wrote that the Inspector General had proposed the sanction for Valent's "failure to disclose that she had worked while receiving [benefits.]" R. 18 at 10. The Commissioner's brief to this court likewise recited that Valent had "withheld information that she was engaged in work activity while receiving disability benefits." Comm'r Br. at 21. True, as the majority points out, the IG's letter to Valent recited that she had received a stipend from her brother in exchange for her work activity. But the fact remains that the Commissioner's stated basis for imposing the sanction was solely her work activity. The Commissioner's counsel expressly conceded the point at oral argument:

> COURT: As I understand the record here, the Commissioner sought this penalty and repayment of benefits solely on the ground of her failure to disclose work activity, not substantial gainful or earnings.
>
> GOVERNMENT: That's correct.
>
> COURT: Why in the world did the Commissioner do that?
>
> GOVERNMENT: I don't know.

Oral Arg. at 28:02.

Working from this mistaken understanding of the basis for the Commissioner's action, the majority then says that the statute is ambiguous because §§ 421(m)(1)(B) and (2)(B) "appear to conflict with one another." Maj. Op. at 6. That two provisions appear to conflict, however, does not mean they are ambiguous. Instead that means we must use all the tools of statutory construction, if at all possible, to interpret the statute as "an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S 120, 133 (2000) (internal quotation marks omitted). That does not happen here: the majority instead goes on to say that it disagrees with the Second Circuit's reading of this statute, and that "another circuit's differing interpretation of the very statute at issue is evidence of ambiguity in the statutory scheme." Maj. Op. at 6. In *Chevron* cases especially, that assertion cannot be right: that two circuits disagree as to the interpretation of a statute does not mean the Executive gets to interpret it. Sometimes one of the circuit courts is

simply wrong. That is why we have a Supreme Court; and that Court, not the Executive, is the arbiter of circuit splits.

More to the point, on the basis of a conclusory statement about the two provisions at issue, and the mere fact of another court's conflicting decision, the majority moves past *Chevron*'s "step one" and allows the Executive to assume the judicial role. A court more vigilant about the constitutional separation of powers might instead observe that the verbs in the operative provisions here are different: section 421(m)(1)(B) says that a beneficiary's work activity may not be "*used as evidence* that [she] is no longer disabled," *id.* (emphasis added)—potentially a relatively narrow proscription—whereas § 1320a-8(a)(2) says that a fact is "material" if the Commissioner may "*consider*" it when "evaluating whether an applicant is entitled to benefits." *Id.* (emphasis added). Different words in statutes usually have different meanings. *See Henson v. Santander Consumer U.S.A., Inc.*, 137 S. Ct. 1718, 1723 (2017). And just as in civil cases a party is entitled to obtain evidence that might be excluded on any number of grounds from admission at trial, *see* Fed. R. Civ. P. 26(b)(1), Fed. R. Evid. 402, so too might the Commissioner be able to "consider" facts that "may not be used as evidence" in determining disability. Or—to take the majority's putative conflict between §§421(m)(1)(B) and (2)(B) head-on—perhaps the agency can terminate benefits based on the beneficiary's "earnings" (which is permitted under § 21(m)(2)(B)) without using her "work activity" as evidence against her (which is proscribed by § 421(m)(1)(B)). (That the agency has elsewhere defined "substantial gainful

activity" as used in §421(m)(2)(B) to include "work activity" does not mean that the two provisions conflict. For if a court can construe the two provisions as "an harmonious whole," then the agency's conflicting interpretation must yield. *Brown & Williamson Tobacco Corp*., 529 U.S at 133 (internal quotation marks omitted).) But the majority exhausts none of these possibilities before ceding the judicial role.

The interpretation to which the majority then defers is almost a test case for how far an agency can go in *Chevron*'s "step two." Specifically, the agency notes that §421(m)(1)(B) includes the phrase "no longer disabled[,]" and that, in the agency's paraphrase, disability as defined by 42 U.S.C. § 423(d)(1)(A) "has both a vocational and a medical component." Comm'r Br. at 24. The agency then asserts that "it is not clear whether section 421(m)(1)(B) precludes the Commissioner from using 'work activity' to determine whether a beneficiary" meets the "medical" component of disability, or the "vocational" component, "or both." Comm'r Br. at 25. From there the agency submits—as an interpretation to which the majority defers—that it can consider "work activity" for purposes of the "vocational" component of disability, but not the "medical" component. But of course the statute is "clear" on what it "precludes" section 421(m)(1)(B) says the Commissioner may not use a beneficiary's work activity as evidence that she is not "disabled" *simpliciter*, which means the agency cannot use a beneficiary's work activity as evidence for *any* part of a determination that she is not disabled. Nothing about that proscription is ambiguous. What the agency proposes here is not interpretation of a statute, but

amputation, by which the agency (and now our court) discards roughly half the protection that Congress unambiguously provided to beneficiaries in § 421(m)(1)(B). The agency has not carried its burden to show that Valent's work activity was material within the meaning of § 1320a-8(a)(2).

II.

Valent is also entitled to relief for a simpler reason: the agency has failed to show that she knew or had reason to know that her work activity was material. The majority finds this element of the sanction met for the same reason the Board did in its second decision: that (in their view) an agency regulation required her to report her work activity. *See* Maj. Op. at 10 (citing 20 C.F.R. 404.1588(a)). But the majority overlooks that the Board itself expressly rejected this very position in its first decision below, when the Board held that this same regulation was "relevant" but "not determinative" of the question whether Valent knew or had reason to know that her work activity was material. R. 18 at 240.

Under the Administrative Procedure Act, we set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under that rule, "[a]gencies are free to change their existing policies[,]" but an agency "must at least display awareness that it is changing position and show that there are good reasons" for the change. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (internal quotation marks omitted). An "unexplained inconsistency in agency policy[,]" in contrast, is reason to find it arbitrary and capricious. *Id.* (internal

quotation marks omitted). Here, neither the agency in its brief in this appeal, nor the Board in its second decision, has offered any explanation as to why the Board's position in its first decision was wrong. And yet—in conflict with that position—the Board has proceeded to impose a sanction exceeding 100,000. On this record, therefore, the agency's determination as to this element was arbitrary and capricious.

Finally, a more pertinent regulation—unmentioned by the Commissioner in her brief—seriously undermines the agency's position here. Specifically, in response to the enactment of § 421(m), the Commissioner promulgated a regulation, entitled "How we will determine whether your disability continues or ends." *See* 20 C.F.R. § 404.1594. This regulation assures beneficiaries as follows:

> If you are currently entitled to disability insurance benefits as a disabled worker . . . and at the time we are making a determination on your case you have received such benefits for at least 24 months, we will not *consider* the activities you perform in the work you are doing or have done during your current period of entitlement based on disability if they support a finding that your disability has ended.

20 C.F.R. § 404.1594(i)(2) (emphasis added). The reason for this regulation, as the agency explained it, was simple: "we [have] concluded that there is no other permissible interpretation of the language of section [4]21(m)(1)(B)." 71 Fed. Reg. 66,850 (Nov. 17, 2006). Thus, in this regulation—which by its terms ("you") speaks directly to the beneficiary—the agency

interprets the proscription against "use[]" of work activity in §421(m)(1)(B) to mean that the agency cannot "consider" that activity to "support a finding that your disability has ended." *See* 20 C.F.R. § 404.1594(i)(2). And that quite possibly amounts to an assurance to the beneficiary herself that her work activity was not material. *See* 42 U.S.C. § 1320a-8(a)(2).

I respectfully dissent.

APPENDIX B

Office of the Secretary

[SEAL] DEPARTMENT OF HEALTH & HUMAN SERVICES

Departmental Appeals Board
Appellate Division, MS-6127
Room G-644, Cohen Building
330 Independence Avenue, SW
Washington, D.C. 20201

March 15, 2016

BY DAB E-FILE

Marianne McCauley
[redacted]

Michelle Valent
[redacted]

and

Benjamin Alpert
Office of the Counsel to the
Inspector General
Social Security Administration
6401 Security Boulevard, 3-ME-1
Baltimore, Maryland 21235

Re: Michelle Valent
Docket No. A-15-104
SERVICE OF FINAL DECISION

Ms. Valent, Ms. McCauley and Mr. Alpert:

On December 2, 2015, the Departmental Appeals Board issued the attached recommended decision in the above-captioned case. A copy of the recommended decision was served on the parties and the Acting Commissioner of the Social Security Administration.

Pursuant to 20 C.F.R. § 498.222(a), if the Commissioner does not reverse or modify the Board's recommended decision within 60 days after it is served, the recommended decision becomes the final decision of the Commissioner.

The Acting Commissioner did not modify or revise the recommended decision within the prescribed 60-day period. Consequently, the attached recommended decision is the final decision of the Commissioner in this case.

Under section 1129(d)(1) of the Social Security Act, "[a]ny person adversely affected by a determination of the Commissioner [under section 1129] may obtain a review of such determination," by filing a petition for judicial review in the United States Court of Appeals for the circuit in which the respondent resides, or in which the statement or representation found to violate section 1129 was made, within 60 days after the person is served with a copy of the final decision. 42 U.S.C. § 1320a-8(d)(1). *See also* 20 C.F.R. § 498.127 (providing that section 1129 of the Act authorizes judicial review of any penalty and assessment that has become final).

Pursuant to 20 C.F.R. § 498.222(c)(2), if a petition for judicial review is filed, a copy of the filed petition must be sent by certified mail, return receipt requested, to the General Counsel, Social Security Administration, who is at the following address:

Social Security Administration
Office of the General Counsel
Office of General Law
6401 Security Blvd.
Room 617 Altmeyer Bldg.
Baltimore, MD 21235

Sincerely yours,

/s/

Constance B. Tobias, Chair
Departmental Appeals Board

Attachment

cc: Acting Commissioner
Social Security Administration
Attn: Associate General Counsel for General Law
Social Security Administration

Civil Remedies Division

APPENDIX C

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Docket No. A-15-104

[Filed November 30, 2015]

Michelle Valent	)
	)
	)

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.

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

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 organization founded and operated by Respondent's brother and his wife.[3] SSA Exs. 1, at 15-17; 3, at 6, 12;

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[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).

[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

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.

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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.

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 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

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[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.

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.

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

[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).

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]

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[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's 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.

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").

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's 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.

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

[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.

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.

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

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[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.

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 reasonable 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]

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[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

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.

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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.

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 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 (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's 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

[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.

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]

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[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

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.

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

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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.

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

APPENDIX D

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Civil Remedies Division

Docket No. C-15-713 (On Remand)
Decision No. CR4-89

[Filed July 31, 2015]

Social Security Administration, Inspector General,	)
Petitioner,	)
v.	)
Michelle Valent,	)
Respondent.	)

DECISION

There is no basis for the imposition of a civil money penalty (CMP) or an assessment in lieu of damages (assessment) under section 1129(a)(1) of the Social Security Act (the Act) (42 U.S.C. § 1320a-8(a)(1)), against Respondent, Michelle Valent.

I. Procedural History

The Counsel for the Inspector General (IG) of the Social Security Administration (SSA) notified Respondent, Michelle Valent, by letter dated June 3, 2013, that the SSA IG proposed imposition of a CMP of $100,000 and an assessment of $68,547 against Respondent, pursuant to section 1129 of the Social Security Act (Act) (42 U.S.C. § 1320a-8).[1] The SSA IG cited as the basis for the CMP and assessment that during the period September 2009 through January 2013, Respondent failed to report to SSA that she worked while she received Social Security Disability Insurance Benefits and she falsely reported during an April 2012 Continuing Disability Review (CDR) that she had not worked since 2004. SSA IG Exhibit (SSA Ex.) 4.

Respondent requested a hearing pursuant to 20 C.F.R. § 498.202,[2] by letter dated June 11, 2013. The case was assigned to me for hearing and decision.

On January 14, and 15, 2014, a hearing was convened by video teleconference (VTC). The SSA IG, represented by Penny Collender, Esq. and Erin Justice, Esq., appeared by VTC from New York City. Respondent appeared by VTC from Livonia, Michigan represented by Marianne McCauley. I participated by

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[1] The current version of the Act is available at http://www.ssa.gov/OP_Home/ssact/ssact-toc.htm. The Code of Federal Regulations (C.F.R.), Federal Register (Fed. Reg.), and the United States (U.S.C.) cited in this decision are available at http://www.gpo.gov/fdsys/.

[2] References are to the 2012 revision of the C.F.R. unless otherwise stated.

VTC from Kansas City with the court reporter. Witnesses testified by VTC from Livonia, Michigan, Baltimore, and San Diego. A transcript (Tr.) of the proceedings was prepared. The SSA IG offered SSA Exs. 1 through 18 and the exhibits were admitted as evidence. Tr. 37-38. Respondent offered Respondent's exhibits (R. Ex.) 1 through 6 and they were admitted as evidence. Tr. 38-39. The SSA IG called the following witnesses: Resident Agent in Charge (RAC) Adam Lowder; Special Agent (SA) Kathryn Krieg; Alan Watt, the confidential source; Respondent Michelle Valent; Mark McCauley, Respondent's brother; and B. Chad Bungard, Counsel to the SSA IG. Respondent called no witnesses.

The SSA IG filed a post-hearing brief (SSA Br.) on March 26, 2014. Respondent also filed her post-hearing brief (R. Br.) on March 26, 2014. Respondent filed a post-hearing reply brief (R. Reply) on April 10, 2014. The SSA IG filed a post-hearing reply brief (SSA Reply) on April 11, 2014.

On June 11, 2014, I issued a decision holding that there was no basis for imposing either a CMP or assessment under section 1129(a)(1) of the Act. *Michelle Valent*, DAB CR3261 (2014). The SSA IG requested review by the Departmental Appeals Board (the Board). An appellate panel of the Board issued a decision on November 24, 2014. *Michelle Valent*, DAB No. 2604 (2014). The Board reversed my legal conclusion that Respondent's work activity was not material as a matter of law under section 221(m)(1) of the Act. The Board remanded for me to make findings of fact and conclusions of law regarding whether

Respondent is liable for a CMP and assessment under section 1129(a)(1) of the Act. If I conclude she is liable, the Board specified that I must determine if the SSA IG has established the months for which a CMP and assessment may be imposed; and the reasonable CMP and assessment to be imposed. *Valent*, DAB No. 2604 at 1-2, 13-15.

The record was returned to me on January 30, 2015. On February 26, 2015, I ordered that the parities submit new proposed findings of fact, conclusions of law, and briefing on the issues specified by the Board. On March 24, 2015, the SSA IG filed proposed findings of fact and conclusions of law but no brief discussing the issues of fact and law. On May 1, 2015, Respondent filed proposed findings of fact, conclusions of law, argument (R. Remand Br.) and Respondent's exhibit (R. Ex. 1 on Remand). On June 1, 2015, the SSA IG filed a waiver of its right to reply to Respondent. The SSA IG did not object to my consideration of R. Ex. 1 on Remand and it is admitted as evidence.

On June 1, 2015, Respondent filed a response to the SSA IG's proposed findings of fact and conclusions of law (R. Remand Reply). Respondent also filed the statements of: Kimberly Catenacci dated July 11, 2014; Brittney Brooks dated April 11, 2015; and Pauline Brooks dated April 13, 2015. The statements are not marked as Respondent's exhibits, but I treat them as if marked R. Ex. 2 on Remand, R. Ex. 3 on Remand, and R. Ex. 4 on Remand, respectively. The statements are recorded on SSA Form SSA-795 titled "Statement of Claimant" and the attestation for each form satisfies the requirements of 28 U.S.C. § 1746 for a declaration

acceptable for filing in a federal court. The SSA IG has not objected to my consideration of R. Exs. 2, 3 and 4 on Remand or requested to cross-examine the declarants and the statements are admitted and considered as evidence. 20 C.F.R. §§ 498.213, 498.215(e)(2), 498.217(a), (g).

II. Discussion

A. Applicable Law

Pursuant to title II of the Act, an individual who has worked in jobs covered by Social Security for the required period of time, who has a medical condition that meets the definition of disability under the Act, and who is unable to work for a year or more because of the disability, may be entitled to monthly cash disability insurance benefits (DIB). 20 C.F.R. §§ 404.315-404.373. Pursuant to title XVI of the Act, certain eligible individuals are entitled to the payment of Supplemental Security Income (SSI) on a needs basis. To be eligible for SSI payments, a person must meet U.S. residency requirements and must be: (1) 65 years of age or older; (2) blind; or (3) disabled. Disability under both programs is determined based on the existence of one or more impairments that will result in death or that prevent an individual from doing his or her past work or other work that exists in substantial numbers in the economy for at least one year. 20 C.F.R. §§ 416.202, 416.905, 416.906. SSI is not at issue in this case as Respondent received no benefits under that program.

Section 1129(a)(1) of the Act authorizes the imposition of a CMP or an assessment against:

> (a)(1) Any person . . . who –
>
> > (A) makes, or causes to be made, a statement or representation of a material fact, for use in determining any initial or continuing right to or the amount of monthly insurance benefits under title II or benefits or payments under title VIII or XVI, that the person knows or should know is false or misleading,
> >
> > (B) makes such a statement or representation for such use with knowing disregard for the truth, or
> >
> > (C) omits from a statement or representation for such use, or otherwise withholds disclosure of, a fact which the person knows or should know is material to the determination of any initial or continuing right to or the amount of monthly insurance benefits under title II or benefits or payments under title VIII or XVI, if the person knows, or should know, that the statement or representation with such omission is false or misleading or that the withholding of such disclosure is misleading . . . .

The Commissioner of SSA (the Commissioner) delegated the authority of section 1129 of the Act to the IG. 20 C.F.R. § 498.102(a). A material fact is a fact that the Commissioner may consider in evaluating whether

an applicant is entitled to benefits or payments under titles II, VIII, or XVI of the Act. Act § 1129(a)(2); 20 C.F.R. § 498.101. Individuals who violate section 1129 are subject to a CMP of not more than $5,000 for each false or misleading statement or representation of material fact or failure to disclose a material fact. Violators are also subject to an assessment in lieu of damages, of not more than twice the amount of the benefits or payments made as a result of the statements, representations, or omissions. Act § 1129(a)(1); 20 C.F.R. § 498.103(a).

In determining the amount of the CMP to impose, the SSA IG must consider: (1) the nature of the subject statements and representations and circumstances under which they occurred; (2) the degree of culpability of the person committing the offense; (3) the person's history of prior offenses; (4) the person's financial condition; and (5) such other matters as justice requires. Act § 1129(c); 20 C.F.R. §498.106(a).

Section 1129(b)(2) of the Act specifies that the Commissioner shall not decide to impose a CMP or assessment against a person until that person is given written notice and an opportunity for the determination to be made on the record after a hearing at which the person is allowed to participate. The Commissioner has provided by regulations at 20 C.F.R. pt. 498 that a person against whom a CMP is proposed by the SSA IG may request a hearing before an administrative law judge (ALJ). The ALJ has jurisdiction to determine whether the person should be found liable for a CMP and/or an assessment and the amount of each. 20 C.F.R. §§ 498.215(a), 498.220(b).

The person requesting the hearing, the Respondent, has the burden of going forward and the burden of persuasion with respect to any affirmative defenses and any mitigating circumstances. 20 C.F.R. § 498.215(b)(1). The SSA IG has the burden of going forward as well as the burden of persuasion with respect to all other issues. 20 C.F.R. § 498.215(b)(2). The burdens of persuasion are to be judged by a preponderance of the evidence. 20 C.F.R. § 498.215(c).

B. Issues

Whether there is a basis for the imposition of a CMP pursuant to section 1129(a)(1) of the Act and 20 C.F.R. § 498.102(a).

Whether there is a basis for the imposition of an assessment pursuant to section 1129(a)(1) of the Act and 20 C.F.R. § 498.102(a).

Whether a CMP and assessment should be imposed and, if so, in what amount considering the factors specified by section 1129(c) of the Act and 20 C.F.R. § 498.106(a).

Issues specified by the Board on remand:

Whether Respondent is liable for a CMP and assessment under section 1129(a)(1) of the Act;

Whether, if Respondent is liable, the SSA IG has established the months for which a CMP and assessment may be imposed; and

Whether the proposed CMP and assessment are reasonable.

Valent, DAB No. 2604 at 1-2, 13-15.

Whether or not Respondent may be liable for an overpayment of Social Security benefits and whether or not she continued to meet the requirements for payment of Social Security benefits are not issues before me.

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the statement of pertinent facts and my analysis. I have carefully considered all the evidence and the arguments of both parties, although not all may be specifically discussed in this decision. I have also carefully considered the Board's opinion in support of its decision to remand this case and the issues specified therein. I discuss the credible evidence given the greatest weight in my decision-making.[3] I also discuss any evidence that I find is not credible or worthy of weight. The fact that evidence is not specifically discussed should not be considered sufficient to rebut the presumption that I considered all the evidence and assigned such weight or probative value to the credible evidence that I determined appropriate within my discretion as an ALJ. There is no requirement for me to discuss the weight given every piece of evidence considered in this case, nor would it be consistent with

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[3] "Credible evidence" is evidence that is worthy of belief. *Black's Law Dictionary* 596 (18th ed. 2004). The "weight of evidence" is the persuasiveness of some evidence compared to other evidence. *Id.* at 1625.

notions of judicial economy to do so. Charles H. Koch, Jr., *Admin. L. and Prac.* § 5:64 (3d ed. 2013).

Following are my conclusions of law from my first decision in this case. *Valent*, DAB CR3261 at 6-7.

> **1. Respondent was entitled to receive DIB under section 223 of the Act for at least 24 months.**
>
> **2. Pursuant to section 221(m)(1)(B) of the Act, the Commissioner is prohibited from considering any work activity of Respondent as evidence that Respondent was no longer disabled and no longer entitled to DIB.**
>
> **3. Respondent's work activity after she received DIB for at least 24 months is not a fact that the Commissioner was permitted to evaluate to determine if Respondent was entitled to continuing receipt of DIB, and therefore, not a material fact within the meaning of section 1129(a)(2) of the Act or 20 C.F.R. § 498.101.**
>
> **4. Although Respondent failed to report work activity in violation of the regulation, the fact she engaged in work activity was not a material fact and the failure to report is not a basis for the imposition of a CMP or an assessment under section 1129 of the Act.**
>
> **5. The SSA IG failed to show by a preponderance of the evidence that**

Respondent knew or should have known that her work activity was a material fact that she failed to report because, pursuant to section 221(m) of the Act, her work activity is not material as a matter of law.

The Board, in its remand decision, rejected my legal interpretation and application of section 221(m) of the Act to bar the imposition of a CMP and assessment against Respondent in this case. *Valent*, DAB No. 2604 at 9-12. I attribute the Board's rejection of my interpretation of section 221(m) to a lack of clarity in my prior analysis. Accordingly, I conclude it is both necessary and appropriate to explain my analysis with more clarity to permit the Board to reconsider its legal ruling to ensure that the Act is applied consistent with the manifest intent of Congress and to avoid injustice. If the Board does not change its interpretation of section 221(m) of the Act as it applies to the facts of this case, I encourage the Commissioner of Social Security to consider the legal issue as the agency head responsible for implementing section 221(m) of the Act.

The following is a clarification of my original legal analysis for why section 221(m)(1) of the Act prevents the SSA IG from citing a failure to report "work activity" as a basis for imposing a CMP or an assessment.

Counsel to the Inspector General, B. Chad Bungard, notified Respondent by letter dated June 3, 2013, that he proposed to impose against Respondent a CMP of $100,000 and an assessment in the amount of $68,547, pursuant to section 1129 of the Act and 20 C.F.R. §§ 498.100-.224. The letter advised that the proposed

CMP and assessment were based on Mr. Bungard's determination that Respondent:

> [W]ithheld material information from SSA, which [she] knew or should have known, was false or misleading. **During the period from September 2009 through January 2013, [Respondent] failed to report to SSA that [she] worked at the War Era Veterans Alliance, which is owned by [her] brother, Mark McCauley.** In addition, during an April 2012 Continuing Disability Review (CDR), [she] falsely states that [she] had not worked since 2004. [Respondent] failed to report [her] work activity to facilitate the improper receipt of Title II Disability Insurance Benefits (DIB).

SSA Ex. 4 (emphasis added). Mr. Bungard testified at hearing that the only basis for the CMP and assessment was the 41 months from September 2009 through January 2013, during which Respondent failed to report that she worked at War Era Veterans Alliance. Tr. 361-63.

Section 1129(a)(1)(C) of the Act authorizes the Commissioner to impose a CMP and assessment against one who fails to disclose a material fact. Pursuant to section 1129(a)(1)(C) the Commissioner may impose a CMP and assessment against any person who:

> (C) omits from a statement or representation for such use, or otherwise withholds disclosure of, **a fact which the person knows or should know is material to the determination of any initial or continuing right to or the amount of monthly insurance benefits** under title II or benefits or payments under title VIII or XVI, if the person knows, or should know, that the statement or representation with such omission is false or misleading or that the withholding of such disclosure is misleading . . . .

Act § 1129(a)(1)(C) (emphasis added). The Act defines a "material fact" as a fact "which the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under title II or title VIII, or eligible for benefits or payments under title XVI." Act § 1129(a)(2).

The Commissioner delegated the authority of section 1129 of the Act to the IG. The regulatory delegation applicable in this case provides:

> (a) The Office of the Inspector General may impose a penalty and assessment, as applicable, against any person who it determines in accordance with this part—
>
> * * * *
>
> (3) Omitted from a statement or representation, or otherwise withheld

> disclosure of, **a material fact for use in determining any initial or continuing right to or amount of benefits or payments**, which the person knew or should have known was material for such use and that such omission or withholding was false or misleading.

20 C.F.R. § 498.102(a)(3) (emphasis added). The regulation defines a "material fact" as a fact that the Commissioner may consider in evaluating whether an applicant is entitled to benefits or payments under titles II, VIII, or XVI of the Act. 20 C.F.R. § 498.101. The phrase "otherwise withheld disclosure" is defined as:

> the failure to come forward to notify the SSA of a material fact when such person knew or should have known that the withheld fact was material and that such withholding was misleading for purposes of determining eligibility or Social Security benefit amount for that person or another person.

20 C.F.R. § 498.101.

According to the June 3, 2013 IG notice to Respondent, as clarified by Mr. Bungard in testimony, the CMP and assessment in this case are based on Respondent's failure to report that she "worked" at War Era Veterans Alliance and that she failed to report the work for 41 months from September 2009 through January 2013. SSA Ex. 4; Tr. 361-63. The June 3, 2013 IG notice did not charge Respondent with failure to

report earnings or failure to report substantial gainful activity. SSA Ex. 4. Mr. Bungard did not testify that he determined that Respondent failed to report earnings or substantial gainful activity. Tr. 361-63.

Understanding the meaning of the terms "work," "earnings," and "substantial gainful activity" are important to a proper interpretation of the provisions of the Act and regulations at issue in this case. "Work," "earnings," and "substantial gainful activity" are not synonymous. The SSA IG in its briefing to the Board and the Board in its decision appear to use the terms as if they have the same meaning or refer to the same thing, which clearly they do not. As a threshold matter, it is important to understand that whether or not one is disabled for purpose of receiving DIB benefits is not based on whether or not one can do "work." Disability for purposes of entitlement to DIB payments is the "inability to engage in **substantial gainful activity** by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." Act § 223(d)(1)(A) (emphasis added). However, an individual may only be determined to be under a disability if his or her physical or mental impairment or impairments prevent **previous work**, and considering the individual's age, education, and work experience, **any other substantial gainful work** that exists in significant numbers in the national economy. Act § 223(d)(2)(A).

The Board recognized that the term "work" is not defined in the Act or regulations. *Valent*, DAB No. 2604

at 3. Earnings as used in the regulations for purposed of determining DIB coverage (insured status), include wages, compensation, self-employment income, and deemed military wage credits creditable to an individual for Social Security purposes. 20 C.F.R. § 404.221(b). "Substantial gainful activity" is work that involves "significant and productive physical or mental duties" and is "done (or intended) for pay or profit." 20 C.F.R. §§ 404.1510, 404.1572. Generally, work, whether or not legal, is a fact that may be considered to determine whether an individual can work at the level of substantial gainful activity. If one can work at the level of substantial gainful activity, he or she is not disabled for purposes of receiving DIB payments even if the individual meets the medical requirements for DIB. The regulation provides that even work done that was not substantial gainful activity may be considered to decide whether or not an individual should be able to perform substantial gainful activity. 20 C.F.R. § 404.1571. Self-care, household tasks, hobbies, therapy, school attendance, club activities, or social programs are generally not considered to be substantial gainful activity. 42 C.F.R. § 404.1572. The nature of work activity, how well the work was performed, whether work is done under special conditions (accommodated), whether work was performed by one self-employed, and time spent in work, are all factors considered to determine whether work is "substantial gainful activity." 20 C.F.R. § 404.1573. Based on the definitions provided by the regulations, work or work activity may or may not be substantial gainful activity; substantial gainful activity is defined as work at a certain intensity and quality with or without earnings; and earnings are derived from work and may be

evidence that work is at the level of substantial gainful activity. As a general rule, all these facts related to work are facts that the Commissioner may consider in determining whether an applicant is engaging in substantial gainful activity and is initially entitled to benefits or continuing benefits under title II of the Act (DIB) and, therefore, they are material facts under section 1129(a)(2) of the Act and 20 C.F.R. § 498.101. Furthermore, the facts listed related to work are the type of material facts which may be the basis for the imposition of a CMP or assessment by the SSA IG because they are facts "**for use in determining any initial or continuing right to or amount of benefits or payments**." Act § 1129(a)(1)(C) (emphasis added); 20 C.F.R. § 498.102(a)(3) (emphasis added). Therefore, as I stated in my prior decision, because a DIB beneficiary has a regulatory duty to report work activity under 42 C.F.R. § 404.1588(a) and work activity is material to a determination of continuing entitlement,[4] I would generally find a DIB beneficiary who failed to report work activity, no matter how minimal the activity, is subject to a CMP or an assessment under section 1129(a)(1) of the Act. *Valent*, DAB No. CR3261 at 15.

In my initial decision in this case I concluded that Congress acted to prohibit the Commissioner from

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[4] Unlike retirement benefits and SSI, the amount of DIB payments is generally not affected by earnings. 42 C.F.R. §§ 404.317, 404.401, 404.415(a), 404.417, 416.420. However, DIB payments may be suspended or terminated as provided by the regulations. 20 C.F.R. §§ 404.401a, 404.467, 404.1592, 404.1592a, 404.1596, 404.1597.

considering work activity in certain cases and, thereby, removed "work activity" from status as a material fact for purposes of the SSA IG imposing a CMP or assessment. My conclusion was based on the plain language of the Act.

> (1) In any case where an individual entitled to disability insurance benefits under section 223 or to monthly insurance benefits under section 202 based on such individual's disability (as defined in section 223(d)) has received such benefits for at least 24 months—
>
> > **(A) no continuing disability review conducted by the Commissioner may be scheduled for the individual solely as a result of the individual's work activity;**
> >
> > **(B) no work activity engaged in by the individual may be used as evidence that the individual is no longer disabled;** and
> >
> > (**C) no cessation of work activity** by the individual may give rise to a presumption that the individual is unable to engage in work.
>
> (2) An individual to which paragraph (1) applies shall continue to be subject to—

> (A) continuing disability reviews on a regularly scheduled basis that is **not triggered by work**; and
>
> (B) **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.**

Act § 221(m) (emphasis added). The Board criticizes my analysis stating that I failed to consider the entire statutory provision. *Valent*, DAB No. 2604 at 9. However, I set forth in my decision the entirety of subsection 221(m) of the Act to show that I did, in fact, consider that entire subsection. The language of subsection 221(m) is clear and requires no interpretation as to its meaning. Subsection 221(m)(1) states that it applies to DIB beneficiaries such as Respondent, who have been receiving DIB benefits for at least 24 months (24-month DIB beneficiaries). Subsection 221(m)(1) has no application to those initially filing for DIB benefits, those who have been DIB beneficiaries for less than 24 months, or to individuals receiving SSI benefits. Subsection 221(m)(1) (A), (B), and (C) specifically prohibit the Commissioner from considering work activity of a 24-month DIB beneficiary as: (1) the basis for scheduling a continuing disability review, that is, a review to determine if the DIB beneficiary is no longer disabled and entitled to benefits; (2) evidence that the DIB beneficiary is no longer disabled; or (3) triggering a

presumption that the cessation of work activity indicates the individual is unable to engage in work. Subsection 221(m)(2) does not permit consideration of work activity prohibited by subsection 221(m)(1). Rather, subsection 221(m)(2)(A) provides that the 24-month DIB beneficiary remains subject to continuing disability reviews that are regularly scheduled as required under the Act and regulations and not triggered by work activity. Subsection 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**. Subsection 221(m)(2)(B) refers to "earnings" as the factual basis for determining whether a 24-month DIB beneficiary is exceeding the level of substantial gainful activity. Subsection 221(m)(2)(B) does not state that the Commissioner can consider work activity of the 24-month DIB beneficiary to determine whether or not the work activity rises to the level of substantial gainful activity, which would be contrary to the prohibition on considering work activity of the 24-month beneficiary either as a basis for triggering a continuing disability review or as a basis for terminating entitlement established by subsection 221(m)(1). My interpretation gives effect to all provisions of section 221(m) of the Act. The SSA IG's interpretation advanced to the Board does not. The legislative history of section 221(m) cited by the Board actually supports my interpretation of the provision, rather than the Board's:

> The history explains that section 221(m) "is intended to encourage long-term [DIB] beneficiaries to return to work by ensuring that work activity would not

> trigger an unscheduled **medical review of their eligibility**" but that "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." H.R. Rep. 106-393(1), at 45 (1999) (emphasis added).

Valent, DAB No. 2604 at 11. This history simply states that for a 24-month DIB beneficiary no continuing disability review may be triggered by work activity (with or without earnings) but earnings may be the basis for finding substantial gainful activity, which would be a basis for suspending benefit payments. The legislative history does not indicate that Congress intended that the Commissioner is permitted to consider the 24-month DIB beneficiaries work activity. To the contrary the legislative history is clear that Congress 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. This is clearer from a reading the complete section of the cited legislative history in context:

> Present law
>
> Eligibility for Social Security disability insurance [DIB] cash benefits requires an applicant to meet certain criteria, including the presence of a disability that renders the individual unable to engage in substantial gainful activity.

Substantial gainful activity is defined as work that results in earnings exceeding an amount set in regulations ($700 per month, as of July 1, 1999). Continuing disability reviews (CDRs) are conducted by the Social Security Administration (SSA) to determine whether an individual remains disabled and thus eligible for continued benefits. CDRs may be triggered by evidence of recovery from disability, including return to work. SSA is also required to conduct periodic CDRs every 3 years for beneficiaries with a nonpermanent disability, and at times determined by the Commissioner for beneficiaries with a permanent disability.

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.

H.R. Rep. 106-393(1), at 45. This legislative history 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 and terminating benefits. Congress only authorized consideration of earnings from work activity as a basis for suspension of a 24-month DIB beneficiary's DIB payments.

Under the Act and regulations a material fact is a fact the Commissioner may consider in evaluating whether an applicant is entitled to benefits or payments under the Act. Act § 1129(a)(2); 20 C.F.R. § 498.101. For the 24-month DIB beneficiary, Congress has specifically limited the Commissioner to considering earnings and substantial gainful activity in evaluating continuing entitlement and payments. Congress has specifically prohibited consideration of work activity to encourage long-term beneficiaries to attempt work activity. Thus, earnings and substantial gainful activity are material facts while "work activity" is not as a matter of law. Because work activity is not a material fact for a 24-month DIB beneficiary, which Respondent was, her failure to report work activity cannot be the basis for

imposition of a CMP or assessment under section 1129(a)(1) of the Act. It is important to recognize that the SSA IG did not charge Respondent with failure to report earnings or failure to report substantial gainful activity, both of which are material facts. The SSA IG cited failure to report work activity as the basis for the CMP and assessment. SSA Ex. 4; Tr. 361-63.

The SSA IG argument that earnings and substantial gainful activity both refer to work activity and therefore work activity remains a material fact flies in the face of the carefully drafted language of section 221(m) of the Act and fails to give meaning to both subsections of section 221(m). In section 221(m) the drafters used all three terms, "work activity," "earnings," and "substantial gainful activity." The use of the three specific terms clearly reflects that the terms have different meanings and the drafter's intend those specific meanings be accorded those specific terms. The drafter's specifically prohibited consideration of "work activity" but equally clearly preserved consideration of "earnings" and "substantial gainful activity."

SSA IG argued to the Board and the Board seemed to attach some significance to the fact that I blind-sided the parties with my legal ruling based on section 221(m) of the Act. The Board noted that neither party cited section 221(m) and I did not request that the parties brief the issue. *Valent*, DAB No. 2604 at 9. I am not sure what the Board suggests by its comment but the Board cited no authority for the proposition that an ALJ need give notice to the parties before resolving a case on an issue of law; or that an ALJ must assist

counsel, particularly government counsel, by giving notice of the particular sections of the statute that the government counsel are charged with enforcing or by suggesting theories for counsel to explore. Certainly, specifying issues for counsel to brief may be helpful in some cases. However, in this case Respondent was not represented by an attorney and requesting that the non-attorney representative brief the legal impact of a provision of the Act would not be beneficial to me as the decision-maker. The SSA IG was represented by competent counsel who I am entitled to presume knows the law they are responsible to discharge. Furthermore, I specifically inquired of Mr. Bungard during the hearing about the difference between work activity and substantial gainful activity in the context of this case. Tr. 354-55; 364-66. The SSA IG counsel apparently did not successfully determine why that inquiry from the judge regarding the difference between work activity and substantial gainful activity was significant. But certainly counsel for the SSA IG should have been aware of section 221(m) of the Act and its potential application to this Respondent, who clearly had been a DIB recipient for more than 24 months.

To be clear, I do not mean to suggest that the SSA IG cannot consider work activity as evidence of earnings or substantial gainful activity that may affect the suspension or termination of benefits. But the law is clear that, in the case of a 24-month DIB beneficiary, Congress specifically prohibited the Commissioner from considering work activity as a basis for determining continuing entitlement to receive benefits. Therefore, work activity cannot be a material fact under the definitions found in the Act and regulations.

Because work activity of a 24-month DIB beneficiary is not a material fact, failure of the 24-month DIB beneficiary to report the work activity cannot be the basis for the imposition of a CMP or assessment. I also do not suggest that the 24-month DIB beneficiary is relieved of the regulatory obligation to report work activity, only that the failure to report work activity is not the basis for a CMP or assessment authorized by section 1129(a)(1) of the Act.

Anticipating that the Board will not reconsider its prior ruling and decide this case on the narrowest possible grounds, I proceed to address the issues specified by the Board treating the prior ruling regarding section 221(m) as the law of the case. The following conclusions of law in bold, followed by the discussion of pertinent facts, address the specific issues identified by the Board. I begin numbering my conclusions of law on remand with the next number in sequence following the conclusions of law from my prior decision for ease of reference in the event the Board should chose to revisit the prior conclusions.

> **6. 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.**
>
> **7. Respondent engaged in reportable work activity in September 2009 that she failed to report for 41 months as alleged by the SSA IG.**
>
> **8. Based upon de novo review of the factors required by the Act and regulations, no**

CMP or assessment is reasonable in this case.

Set forth here is the section from my first decision titled "Facts." *Valent*, DAB CR3261 at 7-13. The section is set forth here, with some modifications, to avoid the need for the reader to refer back to my prior decision.

a. Facts

The SSA IG evidence shows that Respondent filed for DIB on October 29, 2003. She was determined disabled and entitled to DIB payments with a disability onset date of March 25, 2003, based on the primary diagnosis of affective disorders, which refers to a set of psychiatric diseases including depression, bipolar disorder, and anxiety disorder. Her prior work was as a receptionist or administrative assistant from 1988 to March 2003. A CDR completed on March 31, 2010, resulted in continuation of her entitlement to DIB. Respondent was entitled and received DIB benefits for more than 24 months.

In January 2012, the SSA IG received an allegation that Respondent had been working as a customer service representative for War Era Veterans Alliance, LLC since 2009. Respondent was interviewed by a SSA Claims Representative on April 20, 2012. During the interview, Respondent completed forms and statements in which she stated that she had not worked since 2004 and listed no work since 2004. SSA Ex. 9 at 7; SSA Ex. 12 at 1-2. Respondent's maiden name was Michelle L. McCauley. SSA Ex. 12 at 2.

On September 12, 2013, an SSA Technical Expert, Deborah Buchholz, completed a special work

determination report. SSA Ex. 12. The Technical Expert determined that Respondent started working for War Era Veterans Alliance, owned by Respondent's brother and sister-in-law, Mark and Marianne McCauley, on September 1, 2008.[5] The Technical Expert concluded that Respondent's brother paid her $400 per week, an average of $1733.33 gross pay per month. SSA determined that Respondent's earnings were substantial gainful activity; Respondent's trial work period was September 2008 through May 2009; her entitlement to DIB ended with June 2009; and the last check to which she was entitled was issued for August 2009. SSA determined that Respondent was overpaid $49,795.90 in benefits for herself and $15,608.00 for her daughter. SSA Ex. 12 at 8; SSA Ex. 1 at 22. The amount of the overpayment to Respondent is different in this document than the amount stated in SSA Ex. 1 at 21-22, and SSA Ex. 3 at 12 but whether or not Respondent was overpaid is not a matter within my jurisdiction.

SSA notified Respondent by letter dated December 5, 2012 that based on review of her work and earnings for March 2003 through December 2012, she may not be eligible for DIB payments beginning with September 2009 and continuing thereafter. Respondent was invited to send in information within ten days. SSA Ex. 3 at 1. SSA advised Respondent that SSA records show that Respondent worked from January 2003 to December 2004 for Hanover Grove Consumer Housing and from September 2008 and continuing for War Era

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[5] The registered agent for War Era Veterans Alliance, LLC is Marianne McCauley. SSA Ex. 14; R. Ex. 1 at 1; R. Ex. 3.

Veterans Alliance. SSA Ex. 3 at 2. The SSA letter advised Respondent that her trial work period was September 2008 through May 2009, with continuing entitlement to DIB during that period. SSA Ex. 3 at 3. SSA notified Respondent by letter dated January 14, 2013, that her entitlement to DIB payments ended beginning September 2009. SSA Ex. 3 at 6. The SSA notice advised Respondent that because her checks were not stopped until January 2013, she was overpaid $52,938.90. SSA Ex. 3 at 7. Respondent was also advised by a letter from SSA dated January 14, 2013, that her daughter was no longer eligible to receive payments, and that her daughter was overpaid $15,608 in benefits. SSA Ex. 3 at 12.

SA Kathryn Krieg prepared an initial report of investigation for the period February 13, 2012 to June 8, 2012. The case was assigned to her by RAC Lowder on February 13, 2012. Subsequently, she obtained a copy of Respondent's Michigan driver's license photograph and her address information from the license. She determined that Respondent was receiving DIB payments, and that Respondent had no reported wages since 2004. On or about March 14, 2012, she conducted surveillance of Respondent's home in Macomb, Michigan and the War Era Veterans Alliance office in Chesterfield Township, Michigan, where she was reportedly working. Her report does not indicate that she saw Respondent or established her presence at either location. SSA Ex. 1 at 2-3. SA Krieg opined that Respondent may have been working from home. On April 2, 2012, she referred the allegations against Respondent to SSA for a CDR and more development. Tr. 124-25; SSA 1 at 3. On or about May 9, 2012, SA

Krieg received a copy of a letter from Alan Watt to the SSA IG with other documents. On May 10, 2012, SA Krieg conducted more surveillance at Respondent's residence and the War Era Veterans Alliance. Her report fails to show that she saw Respondent or established her presence at either location. On May 23, 2012, she interviewed Alan Watt about his allegations that Respondent was working for War Era Veterans Alliance. Watt told her that Respondent either worked at the office or at home. Watt stated that Respondent's brother, Mark McCauley owns War Era Veterans Alliance and that it was common knowledge that Respondent was collecting Social Security. Watt told SA Krieg that probably half the employees are paid under the table. He told SA Krieg that he believed Respondent was paid $10 to $15 per hour and worked full-time or close to full-time. He told SA Krieg that he believed that Respondent was already working for War Era Veterans Alliance when he started in May 2009. He quit working for War Era Veterans Alliance on April 18, 2011, and that was his last contact with Respondent. SSA Ex. 1 at 1-6.

Alan Watt testified consistent with the statements recorded by SA Krieg. He admitted in response to my questions at hearing that he was only present in the Michigan office one or two days a month from June 2009 through August 2010, for one to four hours at a time. He estimated that Respondent was at the office 50 to 75 percent of the time that he was present. Tr. 191-93. He also testified that he had contact with Respondent when he called in and she answered the phone on roughly a daily basis until August 2010 and then about 30 percent of the time when he called later

in the day from August 2010 until he left the company in April 2011. Tr. 193-95. I find that Mr. Watt's credibility regarding his assertions as to Respondents work activity is significantly limited by his limited opportunity to observe Respondent and her activities.

SA Brian Reitz prepared a Status Report for the period June 8, 2012, in which he recorded an interview with Aimee Konal who worked at War Era Veterans Alliance. Ms. Konal told SA Reitz and his partner, SA Judith Amaro, that she was not an official employee but worked there off and on for two years and was paid under the table. Ms. Konal told the agents that Respondent answered the telephone for War Era Veterans Alliance from her home. Ms. Konal told the agents that when she started at War Era Veterans Alliance, Respondent worked in the office answering the telephone about 32 hours or more each week, earning $8 to $10 per hour, but for the past year she had been working from home. However, Ms. Konal admitted that she did not know how much Respondent earned or how many hours she worked, but she believed she worked a lot based on work-related messages she received from Respondent. SSA Ex. 1 at 9-10. Aimee Konal completed a written sworn statement which is consistent with the agent's summary. SSA Ex. 7.

SA Krieg completed a status report for the period June 8, 2012 to June 12, 2012, in which she records interviews with Respondent and others. On June 8, 2012, SA Krieg, RAC Lowder, SA Amaro, and SA Reitz interviewed Jacquie Scalet, an employee of War Era Veterans Alliance at the War Era Veterans Alliance

office. Scalet told the agents that Respondent helped War Era Veterans Alliance by answering the phone from her home. Ms. Scalet denied knowing Respondent's hours or pay. Scalet stated that Respondent used to work in the office but that had ended in the spring of 2011 when Respondent started working from her home. Ms. Scalet stated that she started working for War Era Veterans Alliance in 2010 and that Respondent worked there prior to that. Ms. Scalet provided contact information for Mark McCauley. SSA Ex. 1 at 11-13; Tr. 53, 106-07.

SA Krieg and RAC Lowder interviewed Respondent at her residence on June 8, 2012. Respondent denied working for War Era Veterans Alliance but stated that a year prior she had trained some people and that she answered the phones a few times for the business. Respondent denied knowledge of her photograph, biography, or a description of her work on the War Era Veterans Alliance website. She stated that her voice is on the War Era Veterans Alliance telephone recording. Respondent told the agents that she will answer the telephone for War Era Veterans Alliance when an employee is sick and that she does so from the office. Respondent denied having an email associated with War Era Veterans Alliance. Respondent admitted that she had a specific phone for answering War Era Veterans Alliance phone calls at home. Respondent stated that Mark McCauley has paid some bills for her. She denied working for War Era Veterans Alliance except for here and there and she denied receiving cash payments for work or money from Mark McCauley. Respondent stated that she was last at the War Era Veteran Alliance office in 2010 when she filled-in for

Adrianne Watt and that she would fill in approximately two to three times a week. She stated that she did tell neighbors that she worked. SSA Ex. 1 at 13-15; Tr. 54-59, 109-15, 146-48.

SA Krieg and RAC Lowder interviewed Respondent's husband on June 8, 2012. He denied that Respondent worked for War Era Veterans Alliance for pay. SSA Ex. 1 at 15.

SA Krieg and SA Amaro interviewed Mark McCauley on June 8, 2012. Mr. McCauley told them that Respondent is his sister and he does not consider her an employee of War Era Veterans Alliance. He stated that he gives Respondent money as he promised his dad to take care of her. Mr. McCauley stated that Respondent had no schedule or set hours; he gave her a phone that she could answer if she chose to; and that she could not work in an office environment. He stated that he gifts her $12,000 per year whether or not she answers a phone; but he subsequently stated that he gives her $400 per week, which would amount to $20,800 per year. Mr. McCauley referred to Respondent as Missy. He agreed that Respondent was listed on the War Era Veterans Alliance website as "Vale." McCauley admitted that Respondent did answer phones for the business and scheduled people to attend the financial classes he taught but he denied knowing how much she actually worked. SSA Ex. 1 at 15-17; Tr. 98, 115-21.

SA Krieg prepared a status report for the period October 10, 2012 to January 14, 2013. SA Krieg reported that Deborah Buchholz, an SSA employee, determined that Respondent was overpaid $68,546.90,

which included an overpayment of DIB of $52,938.90 and an overpayment of CIB to her child in the amount of $15,608. SSA Ex. 1 at 21-22. The SSA IG has offered no evidence of the actual amount of monthly DIB and CIB benefits Respondent and her child received during the pertinent period.

SA Krieg referred the matter to the US Attorney but criminal prosecution was declined because the evidence was insufficient to show that the money given to Respondent was earnings rather than a gift. SSA Ex. 1 at 21-22; SSA Ex. 2. SA Krieg referred the matter to the SSA IG and closed her investigation on February 12, 2013. SSA Ex. 1 at 23. RAC Lowder sent a letter dated January 11, 2013, to the US Attorney, Detroit Michigan to confirm that the US Attorney declined to prosecute Respondent. RAC Lowder summarized in his letter some of the investigative findings, including that DIB payments to Respondent were terminated in January 2013, resulting in an overpayment of $68,546. SSA Ex. 2 at 1.[6]

Respondent does not dispute that she signed a statement on April 20, 2012, in which she stated "I have not worked since 2004." SSA Ex. 8. Respondent also does not dispute that on April 20, 2012, she completed a "Work Activity Report – Employee" on which she wrote "I have not worked since 2004." SSA Ex. 9 at 7. She also checked the "no" box in response to

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[6] SA Krieg provided a declaration dated December 10, 2013, which is consistent with her investigative reports. SSA Ex. 16. RAC Lowder also submitted a declaration that is consistent with SA Krieg's investigative reports. SSA Ex. 17.

the question of whether she had any "employment income or wages" since her disability onset date. SSA Ex. 9 at 1. Mr. Bungard testified that the checked "no" box and the statement on the "Work Activity Report – Employee" were not a basis for the CMP proposed. He testified that the only basis for the CMP was the 41 months from September 2009 through January 2013 that Respondent failed to report that she worked for War Era Veterans Alliance. Tr. 361-62.

Respondent does not dispute that on June 7, 2012, she was listed on the War Era Veterans Alliance website as Michelle Vale and described as the "voice of War Era Veterans" who had been "taking calls and managing all War Era Veterans Alliance calendars for over four years." SSA Ex. 13 at 58.

Mark McCauley submitted a letter in which he stated that he gifted money to Respondent and he asked that she do little things for War Era Veterans Alliance to help her sense of self-worth. R. Ex. 2. Mr. McCauley testified that he and his wife worked together to form War Era Veterans Alliance but his wife is the owner. Tr. 254-55. He admitted that it was possible that he told SA Krieg that Respondent answered phones and scheduled classes for him. He admitted that he gave Respondent a phone, albeit for her personal use. He also admitted that calls for War Era Veterans Alliance would ring on the phone that he provided Respondent and she could answer if she chose to. Tr. 257-59, 282-83. He explained that he gave her a phone that was billed to him with all the other phones he used for his homes and offices. Tr. 284-85. He testified that he never paid Respondent but gifted her about $12,000 per

year, which he understood to be the Internal Revenue Service limit at the time. Tr. 262-63, 277. He agreed that the "Michelle Vale" listed on the website (SSA Ex. 13 at 58) was his sister, Michelle Valent, but he testified that he had nothing to do with creating or maintaining the website. Tr. 264-64. He testified that War Era Veterans Alliance was not his company and he had nothing to do with paying staff, but he did not deny that he may have stated to SA Krieg that one War Era Veterans Alliance employee may have been paid in cash and that he would ensure that they were being paid legally in the future. Tr. 268-69. He testified that he was told by an SSA representative that it was permissible to give his sister money. Tr. 270. When asked about whether he gave his sister $400 per week or $12,000 per year, which would have been less than $400 per week, he testified that he may have been referring to giving Respondent $400 one week but he could not recall with certainty. Tr. 271-73, 278-79.

Respondent testified that she did not work for War Era Veterans Alliance and that she only trained one person on how to operate the telephones. She testified that she was given a phone to use at home by War Era Veterans Alliance but it was so she could reach the McCauley's. She testified that she only answered as War Era Veterans Alliance when told to do so by Marianne McCauley, her sister-in-law and the owner. She testified that she did record the stories of some veterans that called. She denied that Mark McCauley gave her money but testified that he did pay some of her bills. She admitted that she did airport runs for the McCauley's. Tr. 206-52.

c. Analysis

The Board remanded to me to "make findings on factual issues necessary to resolve the case." *Valent*, DAB No. 2604 at 12. The Board directed:

> On remand, [I] should evaluate the evidence, including the testimony, to determine whether Respondent knew or should have known that the information she withheld from SSA was material to SSA's determination of her right to receive benefits or to the amount of benefits she received and that the withholding of the information was misleading.

Id. at 13. The Board said:

> In any event, the ALJ found that Respondent had notice she should report her work. ALJ Decision at 14. Notice of the requirement to report work is relevant in determining whether Respondent knew or should have known that her work was material and that withholding information about her work would be misleading, but such notice is not determinative of these issues.

Id. at 12. The Board directed that if I conclude that Respondent knew or should have known that the information she failed to report, i.e. her work activity for War Era Veterans Alliance, was material to the determination of her right to continue to receive benefits or the amount of benefits and that her

withholding of the information from SSA was misleading, the Board directed that I consider:

> • *Whether the SSA IG has established the duration of the period for which CMPs and assessments may be imposed.*
>
> • *Whether the SSA IG has shown that the CMP amount is reasonable based on the factors in the regulations.*

Id. at 13-14.

In my prior decision I concluded that, despite Respondent's protestations to the contrary, she did work for War Era Veterans Alliance. Respondent and Mark McCauley admitted in testimony that Respondent answered the phone for War Era Veterans Alliance and she did some scheduling, at least occasionally. Therefore, I concluded that Respondent did engage in some work activity for the benefit of War Era Veterans Alliance. I further concluded that the preponderance of the evidence does not show whether Respondent was actually paid for her work or that she only received gifts from her brother, Mark McCauley unrelated to work at War Era Veterans Alliance. I concluded that the evidence also does not show that Respondent's work rose to the level of "substantial gainful activity;" or when and how frequently gainful work activity was actually performed by Respondent. I stated "[i]t is not necessary to resolve these specific fact issues given the decision in this case." *Valent*, DAB CR3261 at 14. Perhaps my choice of the term "resolve" created confusion. My intent was to convey that I did not need to resolve the case against the SSA IG on

these fact issues, i.e. decide the case, based on the conclusions that the preponderance of the evidence did not show substantial gainful activity; when substantial gainful activity was actually performed; and whether Respondent had earnings based on work activity or whether she received gifts. In my prior decision, I concluded that the SSA IG was proposing a CMP and assessment based on unreported work activity. However, work activity could not be a material fact because in section 221(m)(1) of the Act Congress prohibited the Commissioner from considering work activity in the case of a 24-month DIB beneficiary, which Respondent was. I noted that section 221(m)(2)(B) of the Act permitted the Commissioner to consider earnings and substantial gainful activity in the case of a 24-month DIB beneficiary. *Valent*, DAB CR3261 at 17 n.6. My opinion in that regard is not changed – earnings and substantial gainful activity are arguably material facts in the case of a 24-month DIB beneficiary and failure to report earnings and substantial gainful activity could be a basis for the imposition of a CMP and assessment under section 1129(a) of the Act. However, the fact remains that the SSA IG did not notify Respondent as required by 20 C.F.R. § 498.109, or allege before me that failure to report substantial gainful activity and/or earnings was the basis for the proposed CMP and assessment. Because the Board concluded that work activity can be a material fact in the case of a 24-DIB beneficiary and the SSA IG did not notify Respondent that earnings or substantial gainful activity were the material facts not reported, whether or not Respondent had earnings or engaged in substantial gainful activity (with or without

earnings) are not relevant to the issue of liability for a CMP and assessment.

The issues specified by the Board are considered in the order they appear in the Board's remand decision.

> • *Whether Respondent knew that failure to report work activity was failure to report a material fact and that failure to report was misleading.*

The SSA IG bears the burden to show by a preponderance of the evidence the statutory or regulatory basis for the imposition of a CMP and assessment. 20 C.F.R. § 498.215(b)(2), (c). The elements the SSA IG must prove under section 1129(a)(1)(C) of the Act are:

> 1. Respondent omitted from a statement or representation, or otherwise withheld disclosure of a fact or facts;
>
> 2. Respondent knew or should have known that the fact or facts omitted or withheld were material to the determination of any initial or continuing right to or the amount of monthly insurance benefits under title II or benefits or payments under title VIII or XVI; and
>
> 3. Respondent knew or should have known that the statement or representation with such omission was false or misleading or that the withholding of such disclosure was misleading.

The wording of 20 C.F.R. § 498.102(a)(3) is slightly different than that of section 1129(a)(1)(C) of the Act, but the elements the SSA IG must prove are the same.

Regarding the first element, the evidence shows that Respondent did engage in work activity for War Era Veterans Alliance. There is no dispute that Respondent did not disclose her work activity for War Era Veterans Alliance to SSA. My prior findings were not disturbed by the Board. *Valent*, DAB CR3261 at 7, 14, 16; *Valent*, DAB No. 2604 at 7. The period or periods of such work activity will be discussed in more detail later.

The second element is whether Respondent knew or should have known that the fact she did work activity for War Era Veterans Alliance was material to any initial or continuing right to or the amount of DIB benefits. Respondent was a 24-month DIB beneficiary, a fact that is not subject to dispute and only Respondent's continuing right to benefits is at issue. The second element requires proof by a preponderance of the evidence that Respondent knew when she failed to report her work activity to SSA that that work activity was material, that is that it could be considered by the Commissioner with regard to Respondent's continuing entitlement to benefits. In my prior decision, I concluded that, as a matter of law, Respondent could not know and should not have known her work activity was material because it was not a fact the Commissioner could consider in determining continuing entitlement by virtue of section 221(m)(1) of the Act. Based on the Board's contrary conclusion it is necessary to look at the law and evidence to determine

whether Respondent either knew or should have known that her work activity was material.

I had no trouble concluding that Respondent had at least constructive knowledge of her obligation to report her work activity to SSA. The applicable regulation provides:

> (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.
>
> (b) Our responsibility when you report your work to us. When you or your representative report changes in your work activity to us under paragraphs (a)(2), (a)(3), and (a)(4) of this section, we will issue a receipt to you or your representative at least until a centralized computer file that records the information that you give us and the date that you make your report is in place. Once the centralized computer file is in place, we will continue to issue receipts to you or

> your representative if you request us to do so.

20 C.F.R. § 404.1588.

The Act defines "material fact" as a fact "which the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under title II or title VIII, or eligible for benefits or payments under title XVI." Act § 1129(a)(2). The regulation defines a "material fact" as a fact that "the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under title II or eligible for benefits or payments under titles VIII or XVI of the Act." 20 C.F.R. § 498.101. Title VIII provides special benefits for certain World War II Veterans. Title XVI provides for SSI. Neither titles VIII or XVI apply in this case. Based on the statute and regulation, I also conclude that Respondent had constructive knowledge that a material fact is a fact the Commissioner may consider in evaluating whether an applicant is entitled to benefits. However, 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. Accordingly, I cannot conclude that Respondent had constructive knowledge that a material fact would be a fact that may be considered related to her continuing eligibility for DIB benefits.

The Administrative Procedure Act requires publication of legislative rules adopted by federal agencies and, based on that publication the public has at least constructive, if not actual knowledge of the requirements of the regulations. 5 U.S.C. §§ 552(a)(1),

553(d); 2 Am. Jur. 2d Administrative Law § 166 (2015). "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552(a)(1). Therefore, if the Commissioner properly published a regulation that stated that work activity is material to a determination of continuing entitlement, the conclusion that Respondent had constructive notice that work activity was material would be supported. However, there is no regulation in 20 C.F.R. pts. 404 or 498 that states that work activity is material. The SSA IG has provided me no citation to a regulation on which I could base a conclusion that Respondent had constructive notice that work activity was material to a determination of her continuing entitlement.[7] Therefore it is necessary to consider whether the SSA IG has presented evidence to show it is more likely than not that Respondent had actual and timely notice that her work activity for War Era Veterans Alliance was material to the issue of her continuing entitlement to DIB benefits.

The SSA IG offered copies of no documents created by, signed by, or allegedly received by Respondent related to Respondent's initial application for benefits in 2003 or her continuing disability review in March 2010. The documents the SSA IG did offer as evidence are signed

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[7] Of course, as already discussed, at least I was convinced that section 221(m)(1) of the Act actually provides to the contrary, i.e. that the Commissioner cannot consider the work activity of a 24-month DIB beneficiary as evidence of continuing entitlement.

and dated by Respondent on April 20, 2012, specifically SSA IG Exs. 8, 9, and 10. The documents admitted as SSA IG Exs. 8, 9, and 10, that were signed by Respondent on April 20, 2012, were executed by Respondent after the SSA IG had begun its investigation based on the allegation received in January 2012 from Alan Watt. The SSA IG arranged for Respondent to be interviewed by a SSA Claims Representative who had Respondent complete the forms. SSA Ex. 12 at 1. There is no evidence that Respondent was advised she was under suspicion for fraud during the interview by the SSA Claims Representative or that she was advised regarding the meaning of material or the potential for a CMP and assessment being imposed. I understand that advising Respondent that she was under suspicion may have been counterproductive from an investigator's perspective and in the administrative context arguably protections in the Bill of Rights against self-incrimination do not apply. The SSA documents show that the I.G. referred the matter to SSA for a CDR. SSA Ex. 1 at 3; SSA Ex. 12 at 1. As already discussed in detail, because Respondent was a 24-month DIB beneficiary a CDR based on work activity was prohibited by section 221(m)(1)(A) of the Act.[8]

The forms Respondent executed during the CDR did not give her actual notice that failure to report work activity was a "material" omission and misleading. The Form SSA-795 titled "Statement of Claimant or Other

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[8] Even if one viewed the CDR as being triggered by a failure to report work activity, arguably the CDR was based on work activity and transgresses the prohibition of section 221(m)(1)(A).

Person" that Respondent signed on April 20, 2012 states on the second page under "Privacy Act Statement"

Collection and Use of Personal Information

> Section 205a of the Social Security Act (42 U.S.C. § 405a), as amended, authorizes us to collect the information on this form. We will use this information to determine your potential eligibility for benefit payments.
>
> Furnishing us this information is voluntary. However, failing to provide us with all or part of the requested information may affect our ability to evaluate the decision on your claim. We rarely use the information you provide for any purpose other than for determining entitlement to benefit payments. However, we may use the information you give us for the administration and integrity of our programs. We may also disclose information to another person or to another agency in accordance with approved routine uses, which include, but are not limited to, the following:
>
> 1. To enable a third party or an agency to assist us in establishing rights to Social Security benefits and/or coverage;
> 2. To comply with Federal laws requiring the release of information from our records (e.g., to the Government

> Accountability Office and the Department of Veterans's Affairs);
> 3. To make determinations for eligibility in similar health and income maintenance programs at the Federal, State, and local level; and,
> 4. To facilitate statistical research, audit, or investigative activities necessary to assure the integrity and improvement of Social Security programs.
>
> We may also use the information you provide in computer matching programs. Matching programs compare our records with records kept by other Federal, State, or local government agencies. We use the information from these programs to establish or verify a person's eligibility for federally-funded or administered benefit programs and for repayment or incorrect payments or delinquent debts under these programs.

Above Respondent's signature on page 2 is the following declaration in bold as it appears here:

> **I declare under penalty of perjury that I have examined all the information on this form, and on any accompanying statements or forms, and it is true and correct to the best of my knowledge. I understand that anyone who knowingly gives a false or misleading statement about a material fact in this information, or**

> **causes someone else to do so, commits a crime and may be sent to prison, or may face other penalties, or both.**

SSA Ex. 8 at 2. The Privacy Act Statement does not mention or define the term "material fact." The Privacy Act Statement clearly states only one effect of failure to provide information, that is, failure to provide information may delay a timely decision regarding benefits. The Privacy Act Statement also states that the information used on the form is rarely used for any purpose other than determining entitlement to benefit payments. The statement "we may use the information you give us for the administration and integrity of our programs" may be recognized by one employed by SSA, an attorney, or law enforcement as a threat to use the information provided or not provided against the person who completes the form in the interest of program integrity. But a reasonable lay person exercising reasonable diligence in reading and understanding the form is unlikely to get that vague reference. Similarly, the statement in item 4 of the Privacy Act Statement states that routine uses of the information provided is investigative activities necessary to assure the integrity and improvement of Social Security programs. The statement in item 4 is another vailed reference to the fact that SSA intends to use false information or omitted information for criminal prosecution or as the basis for imposing a CMP or assessment to ensure program integrity. The declaration statement does not include the words "and complete" and does not mention omission of a material fact. Therefore the form does not give one notice that

omitted facts may be the basis for criminal action or administrative penalties. The declaration statement does use the term "material fact" but it does not define or describe what constitutes a material fact. I conclude that a person of reasonable intelligence exercising reasonable diligence in reading and attempting to understand the warnings on this form could not determine what is "a material fact" or that the omission or failure to report a material fact could result in the imposition of administrative penalties. Therefore, this form did not provide Respondent actual notice of what constituted a material fact or that omission of a material fact could result in criminal or administrative penalties.

Respondent completed a Form SSA-821-BK titled "Work Activity Report – Employee" on April 20, 2012. SSA Ex. 9. The copy of the form offered by SSA as evidence does not include the Privacy Act Statement such as that printed on the Form SSA-795. The SSA-821 does include the same declaration statement that appears on the Form SSA-795 (SSA Ex. 8). SSA Ex. 9 at 7. For the reasons already discussed, the declaration statement does not provide Respondent actual notice of what constituted a material fact or that omission of a material fact could result in criminal or administrative penalties.

Respondent completed a Form SSA-464-BK titled "Continuing Disability Review Report" on April 20, 2012. The copy of this form placed in evidence does not have a printed Privacy Act Statement, a declaration statement, or a signature line for the disabled person. The word material does not appear on the form. SSA

Ex. 10. Because material fact is not a term used, it is not explained. Therefore the form does not provide Respondent actual notice of what constituted a material fact or that omission of a material fact could result in criminal or administrative penalties.

The three forms could have and should have explained to the beneficiary or claimant in plain language that is easy for even a cognitively impaired person or a representative payee to understand, the following:

- What is considered to be work activity;
- That a change in medical condition, any work activity or change in work activity, earnings of any amount or a change in earnings must all be reported to SSA as required by the regulation (20 C.F.R. § 404.1588);
- The method for reporting and how quickly reporting must occur;
- That these facts are all considered to be material because they may be considered by SSA in determining entitlement or continued entitlement to benefits; and
- That failure to report these facts, incorrectly reporting these facts, or falsely reporting these facts may result in criminal prosecution or the imposition of civil penalties including a CMP for each false statement of fact or for each month in which the claimant or beneficiary failed to report the facts or an assessment of twice the amount of any benefits received.

I am confident that the SSA regulation and form drafters can be even more precise than I and create text that gives claimants and beneficiaries actual

notice of what is required and what sanctions they are subject to for false, incomplete, and erroneous responses. The Form SSA-795 (SSA Ex. 8 at 2) for example includes more than half a page setting forth the Privacy Act Statement but similar care was not exercised to ensure that claimants and beneficiaries completing the form understood exactly what information was required, e.g., work or work activity and what is included, earnings as defined by the regulations, substantial and gainful activity compensated or uncompensated; the ramifications, including criminal and administrative sanctions, of making errors, intentional or not, in completing the information requested by the form or failure to disclose all requested information. The oversight in providing adequate notice is inexcusable and unjust particularly when the SSA IG then attempts to rely upon those unclear and confusing forms to attempt to impose large CMPs and assessments against beneficiaries for their erroneous and incomplete responses. The oversight also fails to ensure protection of the Social Security Trust Fund because the SSA Commissioner is not receiving all the information from beneficiaries needed to ensure benefits are not inappropriately paid.

The SSA IG also provided copies of notices to Respondent dated December 5, 2012 and January 14, 2013. SSA Ex. 3. The December 5, 2012 notice advised Respondent that SSA had reviewed her work record to determine whether she continued to be eligible for disability payments. This is a clear statement that SSA was conducting a CDR based on reported work activity, arguably a violation of the prohibition of section 221(m)(1)(A) of the Act. The letter invited Respondent

to provide more information about her work activity. The letter gave Respondent ten days to respond and advised that SSA may suspend her disability payments based on information SSA had at that time. The letter falsely states that SSA records of Respondent's earnings showed she started working for War Era Veterans Alliance in September 2008 and that Respondent continued to work there. SSA Ex. 3 at 2. In fact, there is no evidence in the record of any reported earnings for Respondent from September 2008 through the date of the letter. The letter did not state that the only evidence of earnings was collected by the SSA IG investigators in interviews with various witnesses. The letter did not mention the investigation or provide an explanation of the term "material fact" or the potential ramifications of failure to report a material fact. SSA Ex. 3 at 1-5.

The January 14, 2013 letter advised Respondent that SSA decided that Respondent was no longer disabled and not entitled to DIB benefit payments beginning September 2009. The letter further advised that SSA had determined that because Respondent had substantial earnings during her extended period of eligibility from September 2009 through May 2012, she was not entitled to any benefit payment for any month during that period. The letter advised Respondent that she was overpaid benefits in the amount of $52,938.90. SSA Ex. 3 at 6-11. SSA IG sent Respondent a similar letter dated January 14, 2013, regarding to an overpayment of benefits to her daughter. SSA Ex. 3 at 12-16.

Neither letter dated January 14, 2013, discussed the term "material fact" or the potential ramifications of failure to report material facts.

I conclude that letters from SSA to Respondent dated December 5, 2012 and January 14, 2013, did not give Respondent actual notice of what constituted a material fact or that omission of a material fact could result in criminal or administrative penalties.

Respondent does not concede that she knew what work had to be reported, what was a material fact, or that she was subject to criminal or administrative penalties for failure to report a material fact.

In his prehearing brief, the SSA IG sets forth the elements that the SSA IG must prove by a preponderance of the evidence to impose a CMP or assessment under section 1129(a)(1). The SSA IG included the element that the person who withheld or omitted to report information either knew or should have known that the omitted fact was material and that its omission was misleading. SSA Prehearing Brief (SSA PHB) at 11. The SSA IG alleges that Respondent knowingly withheld material information, but fails to address how Respondent knew the information withheld was material. The SSA IG argues that Respondent knew of her duty to report work, which is not at issue because the regulation gave at least constructive knowledge of the duty even absent evidence that Respondent had actual knowledge based on various publications or documents which SSA

mentions in briefing but did not offer as evidence.[9] The SSA IG argues that Respondent's work activity for War Era Veterans Alliance was material, but does not point to any evidence that Respondent had actual or constructive knowledge that her work activity was material. SSA PHB at 11-15.

In his post hearing briefing the SSA IG again assured me that Respondent was told she must report work activity. SSA called my attention to the SSA policy, Program Operations Manual System (POMS), which directs SSA staff in the receipt and processing of disability claims. SSA Br. at 2-3; SSA Reply at 3-4. The POMS provisions cited and described by the SSA IG and the presumption that such provisions are routinely implemented by SSA staff, is some evidence that Respondent was given actual notice of her duty to report work activity. The SSA IG also pointed to 20 C.F.R. §§ 404.1571, 404.1572, and 404.1573 to show that Respondent had at least constructive knowledge of her duty to report work – a legal conclusion with which I agree. The SSA IG also argues that Respondent was

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[9] SSA failed to offer as evidence the various publications discussed in its briefs and did not request judicial notice (see e.g. Fed. R. Evid 201). Because the publications to which the SSA IG referred were not promulgated as regulations, they are not law and the publications must be offered so that Respondent may review and object or present conflicting evidence. I note that in some cases the SSA IG refers to publications implying that they apply or were delivered to Respondent without any evidence that those publications even existed when Respondent was granted benefits in 2003, in 2010 when she was subject to a CDR, or during the period when she failed to report work activity, September 2009 through January 2013.

given a certain publication explaining her duty to report work activity when she was notified of the award of benefits in 2003. SSA makes this assertion without citing any evidence in support of the assertion and no copy of the publication has been placed in evidence. SSA argues that Respondent admitted in her testimony that she was aware of the requirement to report work activity. Respondent admitted that every year she received forms from SSA to complete and that every three or four years she had to go to the SSA office, but she did not state that the forms required reporting work activity or that she understood from the forms that she was required to report work activity. SSA has presented no evidence of what forms were actually sent to Respondent on an annual basis. Of course, I have concluded that Respondent had at least constructive notice of the obligation to report work activity so the failure to present the additional evidence did not prejudice the SSA IG. The SSA IG also points to the forms completed by Respondent on April 20, 2012, which I have already analyzed in detail. SSA Exs. 8, 9, 10; SSA Br. at 2-6; SSA Reply at 4-6. None of the evidence on which the SSA IG relies shows that Respondent had actual or constructive knowledge that work activity is a material fact or the ramifications of failure to report such a material fact. The SSA IG argues that Respondent knowingly withheld material information and that she knew or should have known that withholding the material information was misleading. SSA Br. at 10-11. I found in my first decision that Respondent did work activity for War Era Veterans Alliance based on the evidence summarized above. Respondent certainly did not report that work activity on SSA Exs. 8, 9, and 10 during the continuing

disability review completed in April 2012. The SSA IG failed in his post hearing brief to point to evidence or regulations to show that Respondent had actual or constructive knowledge that her work activity for War Era Veterans Alliance was a material fact that she was required to report and the ramifications of failure to report that work activity.

In his brief on appeal (SSA App.), the SSA IG also refers to the "SSA Red Book" from 2014 as evidence of Respondent's obligation to report work activity. The SSA IG has not offered the 2014 "SSA Red Book" as evidence, and the relevance of that particular document is subject to question given that Respondent was granted disability in 2003, her first CDR was in 2010, her second CDR was in 2012, and her entitlement ended in 2012. Because the "SSA Red Book" is not promulgated as a regulation it does not have the force of law under the Administrative Procedure Act. Furthermore, SSA does not argue that Respondent was provided a copy of any version of the "SSA Red Book" or that it provided Respondent actual knowledge that work activity is a material fact or the ramifications of failure to report that material fact. SSA App. at 3. SSA argued on appeal that Respondent's work activity was material, but does not explain how Respondent had actual or constructive knowledge that her work activity was a material fact that required reporting or the ramifications of omission of that material fact. SSA App. at 4-5.

Following remand I requested the parties to submit proposed findings of fact, conclusions of law, and briefs addressing the issues raised by the Board. The SSA IG

filed proposed findings of fact and conclusions of law on March 24, 2015 and, on June 1, 2015, waived the right to file a reply to Respondent's submissions. The SSA IG proposed that I conclude that "Respondent received notice of her reporting responsibilities regarding work activity which is relevant in determining whether Respondent knew or should have known that her work was material." The SSA IG cites to the pages of its briefings that I have already discussed. Therefore, the SSA IG's proposed findings of fact and conclusions of law provide no further enlightenment on the issue of whether Respondent had actual or constructive knowledge that work activity is a material fact the omission of which is misleading subjecting her to administrative penalties.

The SSA IG bears the burden to show by a preponderance of the evidence the statutory or regulatory basis for the imposition of a CMP and assessment. 20 C.F.R. § 498.215(b)(2), (c). The elements the SSA IG must prove under section 1129(a)(1)(C) of the Act include the requirement to show that Respondent knew or should have known that her failure to report that she engaged in work activity for War Era Veterans Alliance was the omission or withholding of a fact that was material to the determination of her continuing right receive DIB benefit payments. The SSA IG failed to meet its burden to show this element.

The SSA IG also failed to establish the third element by a preponderance of the evidence, that is:

> Respondent knew or should have known that the statement or representation with

> such omission was false or misleading or that the withholding of such disclosure was misleading.

Under section 1129(a)(1)(C) it is not enough for the failure to report a fact to be misleading, the person who omitted to report the fact must have known, or should have known, that the omission of the information from a statement or representation or the failure to disclose was misleading. Respondent has not conceded that she knew that failure to report her work activity for War Era Veterans Alliance was misleading. The SSA IG has not pointed to evidence that Respondent knew or should have known that the failure to report her work activity for War Era Veterans Alliance was misleading with regard to a possible determination as to her continuing entitlement to her DIB payments or with regard to any other determination by SSA.

There are at least two possible explanations, pertinent to this case, for why Respondent did not report her work activity for War Era Veterans Alliance when she completed the documents marked SSA Exs. 8, 9 and 10 during the continuing disability review on April 20, 2012, or at any other time between September 2009 and January 2013, either:

> 1. Respondent did not actually know that her work activity met some definition of work activity that had to be reported either on those forms or in another fashion such as by telephone or in person; and thus, she would not have known, and it cannot be concluded she should have known, that failure to report that work activity was misleading; or

> 2. She actually knew that her work activity should be reported on those forms, by telephone, in person or in some other fashion, but she did not report, from which fact I could infer that she knew or should have known that the omission of the information was misleading.

The SSA IG must prove the second explanation or a similar explanation by a preponderance of the evidence, that is, the evidence must show it was the more likely explanation of the two. Respondent cannot argue that she did not have at least constructive or imputed knowledge that work activity should be reported, for as already discussed in detail publication of the requirement to report work in the regulations constitutes constructive knowledge for the public.

However, Respondent also argues that she did not recognize that her efforts for War Era Veterans Alliance was actually work activity that was required to be reported. Respondent's assertion that she did not understand that her activities constituted work activity that was required to be reported has an air of credibility. Respondent testified at hearing. My assessment of Respondent was that she displayed above average intelligence, though she may have been distractible and her attention span was clearly limited. Her mental impairments and psychotropic medications might have some impact upon her ability to understand or comprehend as Respondent argues (R. Br.; R. Exs. 1, 2; R. Remand Br.; R. Remand Reply; R. Exs. 1, 2, 3 on Remand). 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.

There is no dispute that the SSA regulations do not provide a definition of work of which Respondent may be presumed to have constructive knowledge and against which Respondent could be required to compare her activities for War Era Veterans Alliance. *Valent*, DAB No. 2604 at 3. The regulations state that any work, whether legal or not, may show that one is able to work at the substantial gainful activity level, in which case it may be determined that a person is not disabled. 20 C.F.R. §404.1571. The regulation does not explain what activity constitutes work, though it does provide an explanation for how work is considered by SSA. The regulation also indicates that criminal activity may be work activity. The regulation creates some confusion as to whether all work activity needs to be reported. For example, 20 C.F.R. § 404.1572(a) and (b) provide the following definitions:

- "Substantial gainful activity" is work activity that is both substantial and gainful.
- "Substantial work activity" is work involving significant physical or mental activity.
- "Gainful work activity" is work of the kind that is usually done for pay or profit whether or not there is actual pay or profit.

The regulation provides that not all work activity need be reported, even if it could be characterized as substantial and gainful. The regulation states that, generally hobbies, activities of daily living, household tasks, club activities, school attendance, and social

programs are not considered substantial gainful activity. 20 C.F.R. § 404.1572(c); Social Security Ruling 83-33: *Titles II and XVI: Determining Whether Work Is Substantial Gainful Activity –Employees.* Under these regulations tying flies for your brother to use for fishing might be a hobby that need not be reported as work activity. But, if you tie lots of flies that your brother uses in his professional guide business or that you give or sell to tourists during fishing season, even if as part of your medically prescribed therapy, SSA may consider it work activity that needs to be reported, even if you do not receive any money for the flies or your labor and even if you are stealing the parts or killing protected species to obtain the materials.

The forms Respondent completed on April 20, 2012, also do not clearly state what she was to report. SSA Exs. 8, 9, 10. SSA Ex. 8 is a statement of Respondent that she has not worked since 2004. The statement does not elaborate on what Respondent intended. The Work Activity Report (SSA Ex. 9) asks that Respondent describe her work activity since March 25, 2003. SSA Ex. 9 at 1. Question 1 on the form asks whether Respondent had any employment income or wages since March 25, 2003. Question 2 asks Respondent if she did not work, what other income she may have had. Question 3 asks Respondent to tell about work but then asks questions about her employer which presumes her work activity was as an employee. Question 4 asks about payments or benefits from an employer. Question 5 asks about special conditions related to jobs done with the employers listed under question 3. Question 6 also asks about employers listed in question 3. Question 7 asks about unreimbursed work related

expenses. The form includes no definition of "work" or "work activity" or asks questions about work activity other than that done as an employee. SSA Ex. 9. The Continuing Disability Review Report, section 4, asked Respondent whether she had worked since her last medical disability decision. No definition or explanation of what constitutes work is provided. SSA Ex. 10 at 2. Section 9 of the form asked questions about vocational rehabilitation, employment, or other support services, but it does not define work or other terms that would not be familiar to people not regularly involved with the SSA disability program. SSA Ex. 10 at 9-10.

SSA is required to show it is more likely than not that Respondent knew or should have known that her failure to report her work activity for War Era Veterans Alliance was misleading. Based on my review of the regulations and the forms Respondent completed on April 20, 2012, I conclude that it was more likely than not that Respondent did not understand that her failure to report her work activity with War Era Veterans Alliance was misleading. The forms that Respondent completed do not specifically describe what activity is considered to be work activity and must be reported as such. The Work Activity Report form is confusing in that it requests employer information rather than a listing and description of work activity. SSA Ex. 9. The regulations seem to require the reporting of all work activity, but then provide that some work activity need not be reported even if it is activity that is both substantial and gainful. In light of the lack of clarity in the regulations and the form, in the absence of some evidence that Respondent was actually told to report all work activity, whether legal

or illegal, for pay, profit, with or without benefits; I will not infer that Respondent knew that her failure to report her work activity with War Era Veterans Alliance was misleading.

I conclude that the preponderance of the evidence does not show that Respondent knew or should have known that the withholding of the information about her work activity for War Era Veterans was misleading.

Accordingly, I conclude that the SSA IG has failed to establish a basis for the imposition of a CMP or assessment.

> • *Whether the SSA IG has established the duration of the period for which CMPs and assessments may be imposed.*

Although the Board may resolve this case on the basis that work activity for a 24-month DIB beneficiary is not material and, therefore, not a basis for the imposition of a CMP and assessment; or that the SSA IG failed to prove that Respondent knew that work activity was a material fact she omitted to report; or that the Respondent did not know her failure to report was misleading; I address the additional two issues directed by the Board in its remand decision.

It is important to note that the September 12, 2013, report of Deborah Buchholz is Ms. Buchholz's summary and view of the evidence. SSA Ex. 12. Ms. Buchholz's report is not based on her direct observations or discussions with witnesses, but her report suggests that she reviewed many if not all the same documents presented to me as evidence. Ms. Buchholz did not testify at hearing. Her interpretations of the facts,

factual findings, and conclusions are not binding upon me as my review is de novo.

However, Ms. Buchholz's determination and the evidence upon which she relied is clearly the basis for the SSA IG's determination to impose the CMP and assessment in this case. Ms. Buchholz determined that Respondent began working for War Era Veterans Alliance on September 1, 2008; that Respondent received pay of $400 per week, an average of $1,733.33 gross pay per month; and that the Respondent's earnings were substantial gainful activity. Ms. Buchholz determined that Respondent was entitled to a Trial Work Period of nine months beginning September 2008 and continuing through May 2009. Entitlement to DIB benefit payments ceased in June 2009, with Respondent's last check in August 2009. SSA Ex. 12 at 8. Ms. Buchholz relied upon the January 2012 allegation of Alan Watt that Respondent was working. Ms. Buchholz also considered the documents Alan Watt submitted that include a picture and a biography for Respondent that indicated she worked for War Era Veterans Alliance for four years, both of which were printed from the War Era Veterans Alliance website; and email purportedly from Respondent while working for War Era Veterans Alliance. Ms. Buchholz indicates in her Special Determination that Alan Watt reported to the SSA IG that Respondent made $10 to $15 per hour; she worked full-time or close to full-time, either from the office in Michigan or from home; Respondent was paid in cash; Mr. Watt started working for War Era Veterans Alliance in May 2009 and Respondent was already working there; he reported that another employee told him he or she

started around September 2008, which was when Respondent was hired; and his last contact with Respondent was around April 18, 2011 when he quit. SSA Ex. 8 at 2-3. Ms. Buchholz states she considered statements and forms collected from Respondent on April 20, 2012; and the report of contact by Ms. Moua that records her telephone call to War Era Veterans Alliance on April 30, 2012, and her conversation with Bridgette in which Bridgette indicated that Respondent was on the phone with a customer at the time; that Respondent worked every day from open to close and that Respondent was referred to as "Ms. Dependable." SSA Ex. 8 at 1-2. Ms. Buchholz relied on the reports of the SSA IG agents regarding their interviews. The SSA IG agents interviewed Jacquie Scalet at the office of War Era Veterans Alliance and June 8, 2012, who told them Respondent answered the phone from her residence; she did not know how many hours Respondent worked; Respondent had not worked in the office since spring 2011; and Respondent worked for War Era Veterans Alliance prior to 2010. Ms. Buchholz also relied on the statement of Aimee Konal, another employee of War Era Veterans Alliance obtained by SSA IG investigators on June 8, 2012, in which Ms. Konal stated she worked for War Era Veterans Alliance off and on for over two years; Respondent worked with her in the beginning; she did not know how many hours Respondent worked or her pay but believed in the beginning it was up to 32 hours per week at $8 to $10 per hour; and Respondent worked at home since possibly June 2011. SSA Ex. 8 at 8. Apparently, Ms. Buchholz did not treat as credible the statements of Respondent to the SSA IG agents that she did not work for War Era Veterans Alliance; she only did some

training a year prior; answered the phone a few times; and she filled-in for another employee two or three times per week for a couple hours in 2010.

Ms. Buchholz also did not credit the statements of Mark McCauley that Respondent was not an employee; Respondent had no set hours; answered the phone when she wanted; she scheduled people for his financial class but he was unsure how often she answered the phone or actually worked; and that he gave her gifts of money because she was his sister and he was taking care of her. SSA Ex. 8 at 3-7. The SSA IG report included printed copies of webpages with the web address wareravet.com, printed on June 7, 2012. A biography for "Michelle Vale" on the webpage, that Respondent "has been taking calls and managing all War Era Veterans Alliance calendars for over four years." SSA Ex. 13 at 58; Tr. 146-48. The evidence does not show who wrote the biography for Respondent or who posted to the website. Respondent denies that the biography is accurate. Tr. 222. I give the statement from the website no weight as the author is not known and was not subject to cross-examination to test the accuracy of the statement. It is well-known in our society that almost anything can be posted on a website, and the mere fact that something can be found on the internet does not weigh in favor of credibility.

The SSA IG presented printed copies of a LexisNexis report dated March 12, 2012. SSA Ex. 6. The report shows that as of February 2012, Respondent shared an address with Scott Valent (Respondent's husband) and Pauline Brooks at [redacted]. Respondent was listed as the sole occupant

of the same address in April 2006. Deed records show that Respondent purchased [redacted] in May 1999. According to the report Respondent was residing at [redacted] in November 2011, with Chadd Valent and Scott Valent. Michigan Deed records show that Respondent purchased the property at [redacted] with Scott Valent in July 2004. Respondent was listed as residing at a different address in September 2003, when she was reported to reside with Pauline Brooks and Scott Valent. Respondent had a valid vehicle operator's license issued by the State of Michigan. According to the March 2012 LexisNexis report, Respondent owned a 20-year-old Cadillac Deville, which she titled with Chadd Valent in September 2009. In 2008, Respondent was the registered owner of a 1993 Dodge pickup truck. In 2001, she was registered as co-owner with Scott Valent of a 2000 Grand Caravan minivan. In 2009 and 2003, there is a record of civil judgments being filed in the amounts of $1,941 and $3,667, respectively, by creditors. SSA Ex. 6. Respondent's registered vehicles show she was not spending excessively for new lavish vehicles. I can discern nothing from the registered real estate ownership without some evidence of the mortgage, tax, and other payments associated with those properties; and in the case of the co-ownership with Scott of [redacted], his contributions. The SSA IG offered no bank and investment records, no credit records, no tax records, or other financial records for Respondent from which I might be able determine when Respondent had earnings or income, even unreported income.

The SSA IG presented the sworn statement of Aimee Konal to SA Amaro. SSA Ex. 7. Neither Aimee Konal nor SA Amaro were called to testify by the SSA IG and they were not subject to cross-examination.[10] The SSA IG did elicit testimony from SA Krieg about the interview of Ms. Konal by SA Amaro, but SA Krieg was not present at that interview and she had no detail beyond the written statement, so her testimony added nothing to the probative value of the statement. Tr. 107-08. Ms. Konal stated that she began working for War Era Veterans Alliance two years prior to her statement which was taken on June 8, 2012. Ms. Konal stated that Respondent worked with her in the office in the beginning. Ms. Konal initially stated that she believed Respondent worked at least part-time and she did not know Respondent's rate of pay. At the end of the statement however, Ms. Konal speculated that Respondent may have been earning $8 to $10 per hour for up to 32 hours per week. Ms. Konal stated that Respondent had been working from home for the past

[10] Fact and expert witnesses are called to testify, not only to permit the opposing party an opportunity to cross-examine, but to permit the fact finder to judge the credibility of the witness in responding to both direct and cross-examination. The fact finder's opportunity to judge credibility is greatly impaired when a witness is not called and a party attempts to rely upon an affidavit or declaration, or in this case the testimony of an individual who did not even witness the out-of-court statements. Calling witnesses to testify before the fact finder is no less important in the context of administrative hearings than it is in criminal and civil proceedings, only the quantum of credible evidence required is different. Failure to call witnesses whose direct observations and perceptions are necessary to establish an element of a party's prima facie case is a serious error.

year, possibly since June 2011. SSA Ex. 7. I have no reason to doubt that Ms. Konal is a credible person. However, her statement is clearly speculation regarding the rate of pay for Respondent and the hours she worked. Ms. Konal's statement also lacks detailed facts upon which I could base findings about which months Respondent actually worked between 2010, when Ms. Konal was first employed, and 2012, when her statement was taken. Ms. Konal's statement really only supports my finding from my prior decision that Respondent engaged in some work activity for War Era Veterans alliance. SA Brian Reitz's Report of Investigation for June 8, 2012, reports on the taking of the statement of Aimee Konal, and raises significant concern about the credibility of her statement. For example SA Reitz reports that Aimee Konal told him and SA Amaro that she only worked for War Era Veterans Alliance off and on for two years, a couple days per week and only four and one-half hours per day. SSA Ex. 1 at 10. These facts, which were omitted from Ms. Konal's statement, are significant because they reflect Ms. Konal's very limited ability to actually witness Respondent's work activity and her knowledge of the number of hours Respondent worked and her rate of pay. Accordingly I give little weight to Ms. Konal's sworn statement or the investigator's report regarding the taking of that incomplete statement, which also taints the reliability of the investigator's report.

The SSA IG presented an unsworn and unsigned statement of Ms. Moua on a Report of Contact Form SSA-5002 dated April 30, 2012. Ms. Moua recorded that she called War Era Veterans Alliance on April 30,

2012 and spoke with Bridgette. Ms. Moua states that when she asked to speak with Respondent, Bridgette stated that Respondent was on the phone with a customer and Ms. Moua would need to leave a message on Respondent's answering machine. Ms. Moua recorded that Bridgette stated that Respondent worked every day from open to close. Ms. Moua concluded on this limited information that Respondent was working for her brother Mark McCauley. SSA Ex. 11. SA Krieg testified about a conversation she had with Ms. Moua in which Ms. Moua told SA Krieg about her telephone conversation with Bridgette. Tr. 91-92, 94-95. Ms. Moua and Bridgette were not called to testify as witnesses by the SSA IG, which has a significant negative impact upon the weight to be given this triple hearsay. If called to testify as witnesses Ms. Moua and Bridgette could only testify under oath or affirmation. 20 C.F.R. § 498.216(a). Ms. Moua and Bridgette were not called to testify, their statements in SSA Ex. 11 are unsworn, and they were not subject to cross-examination. I conclude that their unsworn statements are entitled to no weight. Although 20 C.F.R. § 498.216(b) permits me to receive witness testimony in writing, that section does not create an exception to the requirement of 20 C.F.R. § 498.216(a) that testimony be under oath or affirmation. Accepting and giving weight to unsworn statements in lieu of live testimony under oath, would violate the clear purpose of requiring that testimony be given under oath or affirmation. Furthermore, the fact that SA Krieg relied on information about the communication between Ms. Moua and Bridgette and then SA Krieg testified about the conversation between Ms. Moua and Bridgette lends no credibility to the hearsay, as SA Krieg did not

witness the conversation and is merely relying upon the unsworn statement of Ms. Moua.

The SSA IG presented as evidence the affidavits of RAC Lowder (SSA Ex. 17) and SA Krieg (SSA Ex. 16). Neither affidavit states findings as to when Respondent began working for War Era Veterans Alliance or what months if any the investigators determined Respondent worked between September 2009 and January 2013, how many hours she worked, or how much she was paid. Similarly, the Reports of Investigations by SA Krieg placed in evidence by the SSA IG reflect no findings by the investigators as to when Respondent began working for War Era Veterans Alliance, what months Respondent worked, or how much she earned between September 2009 and January 2013. SSA Ex. 1 at 1-8, 11-26. RAC Lowder and SA Krieg testified consistent with the IG investigative reports. Tr. 45, 86. RAC Lowder admitted that the SSA IG failed to enforce the I.G. subpoena issued to obtain records of War Era Veterans Alliance, if any, related to Respondent. SA Krieg admitted that the SSA IG did not attempt to subpoena any bank records and did not seek enforcement of the subpoena served on War Era Veterans Alliance. Tr. 64-68, 106, 121, 143.

SA Krieg and RAC Lowder both testified about their June 8, 2012 visit to the War Era Veterans Alliance office where they met Jacquie Scalet, upon whom they served the subpoena and who told them that Respondent used to work in the office answering phones but for the past year, starting in the spring 2011, Respondent worked from home. Ms. Scalet told

them she started working for War Era Veterans Alliance in 2010 and Respondent already worked there. Ms. Scalet declined to answer further questions. Tr. 52-54, 106-07. The agents's testimony and reports do not show that Ms. Scalet told them how often or how much Respondent worked. Ms. Scalet's statements to the agents support a finding that Respondent was doing some work for War Era Veterans Alliance, which I find credible because it is consistent with other evidence.

RAC Lowder and SA Krieg interviewed Respondent on June 8, 2012 at 11:23 a.m. During the interview Respondent admitted to training some people and answering the phone a few times for the business a year ago (June 2011). She admitted that she filled-in answering phones when employees were sick. Respondent also admitted training Adrianne Watt approximately two years prior (June 2010) or maybe 2011. Respondent told the agents that she had been at the War Era Veterans Alliance office in 2010 when she filled in for Adrianne Watt for approximately two or three times a week for a couple hours at a time. But that she had not been at the War Era Veterans Alliance since she filled in for Ms. Watt in 2010. SSA Ex. 1 at 13; Tr. 54-59, 110-15; SSA Ex. 1 at 14-15. Mark McCauley told SA Krieg during his interview that Respondent did answer the phone and do some scheduling for War Era Veterans Alliance, he gave her $400 per week, but she did not work for War Era Veterans Alliance. Tr. 116-17; SSA Ex. 1 at 15-17.

Alan Watt filed the complaint alleging Respondent was committing fraud. The SSA IG presented his unsworn letter and attachments. Mr. Watt alleges no specific

date when Respondent began working for War Era Veterans Alliance in his letter. SSA Ex. 15. He attached to his letter a copy of the webpage with Respondent's biography which states she had been with War Era Veterans Alliance for over four years. SSA Ex. 15 at 5. The web page has no more credibility as an enclosure to Mr. Watt's letter and is given no weight for the reasons already discussed. Mr. Watt did attach copies of email from Respondent with the email address michelle@wareravet.com to him dated September 8, 2009, September 10, 2010, and October 13, 2010. SSA Ex. 15 at 7-9. The email dated September 8, 2009 is from michelle@wareravet.com to Alan@wareravet.com. SSA Ex. 15 at 9. Two of the three emails appear on their face to be related to business activity of War Era Veterans Alliance and Mr. Watt. SSA Ex. 15 at 7, 9. Mr. Watt also testified at hearing. Tr. 157. He testified that he recalled having contact with Respondent at War Era Veterans Alliance in late August or early September 2009. He stopped working for War Era Veterans Alliance on April 13, 2011. Tr. 158. He testified that Respondent did customer service, answering calls, booking appointments, forwarding messages. He believed she answered all calls to the toll free number. Tr. 158-59. Mr. Watt testified that Respondent worked full-time, 40 hours per week, and that he believed she had the same hourly rate of $10 as other employees. He believed that Respondent would have been paid by check initially and later by electronic funds transfer or direct deposit. Tr. 167-68. On cross-examination Mr. Watt admitted he was in the Michigan office one day to three or four days per month, a couple hours at a time. His ex-wife worked in the Michigan office. Tr. 170. He admitted on cross-

examination that there were actually six or seven people who answered the telephone for War Era Veterans Alliance. Tr. 172. He testified that he knew Respondent answered the telephone because she answered when he called. He also testified that Respondent was listed on the organizational chart for War Era Veterans Alliance as vice president of customer service. Tr. 173. In response to my questioning, he testified he began at War Era Veterans Alliance in May 2009 and only did a couple weeks orientation in Michigan before going to California in June 2009. He testified that he essentially commuted from Detroit to California spending eight or nine days in Detroit and then two weeks in California but then he changed to working two weeks in California then a three day weekend in Michigan. He agreed he was only in the Michigan office a couple of days each month for one to four hours each day. He estimated that he saw Respondent in the office only 50 to 75 percent of the time he was in the office, which I calculate is roughly four to six hours per month on the high-side. In August 2010, he stopped commuting and spent full-time in California and only visited Michigan a couple times but not the Michigan office. He testified that he called the toll-free number about four days per week until April 2011. He 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. Tr. 187-95.

Respondent testified that she did not work for War Era Veterans Alliance. 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 that 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.

Mark McCauley testified that it is possible that Respondent answered phones for War Era Veterans Alliance and scheduled people to attend his financial advice classes. He agreed that the telephone he gave Respondent was a telephone that could receive calls intended for War Era Veterans Alliance. Tr. 257-58, 282. He explained that his wife, the president of War Era Veterans Alliance, gave Respondent things to do to help Respondent feel she had a sense of purpose. He testified that Respondent had no schedule and no formal duties. Tr. 282-83. He also testified that he gave Respondent a phone because he wanted her to have reliable phone service and the phone had the War Era Veterans Alliance number so he could treat the cost of the phone as a business expense. Tr. 284-86. He testified that he gave Respondent about $12,000 a year as a gift, which he believed was the limit set by the Internal Revenue Service at the time. He testified that he had helped Respondent, his sister, financially throughout her life. Tr. 262-63, 269-70, 277. He testified that he had nothing to do with paying employees for War Era Veterans Alliance because it

was not his company. Tr. 268, 279-80. He admitted that he may have given Respondent as much as $400 per week but he does not recall when that was. Tr. 271-73, 278. He also testified that he did not always give Respondent money. Tr. 278.

The SSA IG proposes that a CMP and assessment be imposed against Respondent because she failed to report to SSA that she worked at War Era Veterans Alliance during the period September 2009 through January 2013. SSA Ex. 4 at 1; Tr. 361-63. The SSA IG does not propose to impose a CMP and assessment against Respondent based on failure to report earnings from work activity or substantial gainful activity. The basis cited by the SSA IG does not require that I find that Respondent had any earnings from her work activity, or that the work activity was substantial and gainful. Whether or not Respondent's work activity may have been accommodated, less than full time, not substantial, or not gainful are not issues that I need to resolve. Further, under that Board's interpretation and application of section 221(m) of the Act in the case of a 24-month DIB beneficiary, whether or not Respondent had earnings that rose to the level of substantial gainful activity is not an issue that affects whether the SSA IG has a basis for imposition of a CMP and assessment in this case. The dispositive facts are that Respondent engaged in work activity that she failed to report.

The most convincing and credible evidence that Respondent engaged in work activity for War Era Veterans Alliance are the printed copies of email provided by Alan Watt to the SSA IG on February 9,

2012, shortly after filing his complaint. SSA Ex. 15 at 1. Two of the three printed copies of email appear on their face to be work activity. The earliest email dated September 8, 2009 at 12:45 p.m., from "Michelle Valent [michell@wareravet.com]" to "Alan@wareravet.com" advised that an individual had called regarding benefits. The email also includes in the body Respondent's name, "War Era Veterans Alliance," the web address for War Era Veterans Alliance, and a toll free telephone number. SSA Ex. 15 at 9. The printed copy of the email dated September 22, 2010 at 10:36 a.m., from "Michelle Valent [michelle@wareravet.com]" to "Alan Watt" advised that an individual was going to be late for an appointment. The email also includes in the body Respondent's name, "War Era Veterans Alliance," the web address for War Era Veterans Alliance, and a toll free telephone number. SSA Ex. 15 at 7. Respondent admitted that she did send some email though under supervision. Respondent has not disputed the authenticity of either email or provided evidence rebutting the emails or otherwise showing that the emails should not be considered probative. Respondent has not rebutted this convincing evidence that she did some work for War Era Veterans Alliance as early as September 8, 2009 and again in September 22, 2010. Respondent's denials that she engaged in any work activity fly in the face of the emails. There is no evidence that Respondent reported to SSA the work activity in which she engaged on September 8, 2009 and September 22, 2010. SSA Ex. 4 at 1; Tr. 361-63. Accordingly, I conclude 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.

The SSA IG's evidence also supports a finding that Respondent engaged in some other activity at War Era Veterans Alliance during the period September 2009 through January 2013, which she also failed to report. However, when exactly the work activity occurred, over what period, and for how many hours work activity was performed cannot be determined based on the record before me. The credibility of Alan Watt and the information he purportedly received from his wife, and the statement of Aimee Konal all lack credibility, not because Mr. Watt was a jilted employee and Ms. Konal was his relative, but because of their inability to observe how much work Respondent actually did and their willingness to suggest that there was far more work by Respondent than they could have actually witnessed. Adrienne Watt; Bridgett the individual to whom Ms. Moua spoke on April 30, 2012 (SSA Ex. 11); and Jacquie Scalet (the individual at War Era Veterans Alliance to whom the investigators spoke on June 8, 2012 (SSA Ex. 1 at 12-13)) were not called as witnesses and their hearsay statements are simply too unreliable to be considered credible and probative.

- *Whether the SSA IG has shown that the CMP amount is reasonable based on the factors in the regulations.*[11]

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[11] Pursuant to 20 C.F.R. § 498.220(b), I may affirm, deny, increase, or reduce the penalties or assessments proposed by the IG. In determining the CMP or assessment to impose, I am bound to follow the guidance of 20 C.F.R. §§ 498.102 through 498.106. The regulations do not provide that I am limited to reviewing whether

A maximum CMP of $5,000 for each false statement or representation of material fact and for each month of withholding or failure to report a material fact is authorized by section 1129(a)(1) of the Act and 20 C.F.R. §§ 498.102(a) and 498.103(a). Also authorized is an assessment of not more than twice the amount of benefits or payments received as a result of the false statements, representations, omissions or failure to report material facts. Act 1129(a)(1); 20 C.F.R. § 498.104.

Pursuant to 20 C.F.R. § 498.220(b), I have the authority to affirm, deny, increase, or reduce the penalties or assessment proposed by the SSA IG. In determining the amount of penalties or assessment, my review is de novo, and, just as the I.G. did when proposing penalties, I must consider the factors specified by section 1129(c) of the Act:

> (1) the nature of the statements, representations . . . and the circumstances under which they occurred; (2) the degree of culpability, history of prior offenses, and financial condition of the person committing the offense; and (3) such other matters as justice may require.

Act § 1129(c); 20 C.F.R. § 498.106.

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the CMP or assessment proposed by the IG is "reasonable." *Cassandra Ballew*, Recommended Decision, App. Div. Docket No. A-14-98 at 9-10 (2014) (ALJ evaluated and applied regulatory factors and determined a lesser assessment that the Board recommend the Commissioner approved).

The SSA IG proposes a CMP of $100,000 and an assessment in lieu of damages of $68,547. SSA Ex. 4 at 1. The SSA IG advised Respondent that after considering the required factors he determined not to impose the maximum CMP of $5,000 for each of the 41 months Respondent did not report her work activity. SSA Ex. 4 at 1. He also advised her that rather than an assessment of twice the amount of overpaid benefits Respondent received during the period September 2009 through January 2012, he was only imposing the actual amount of the overpayment. SSA Ex. 4 at 2.

Mr. Bungard considered the following facts. He considered that during the period September 2009 through January 2013, Respondent worked as a customer service representative for War Era Veterans Alliance earning $400 per week while collecting disability benefits. As I have discussed, the SSA IG's evidence does not show how much Respondent actually worked, whether part or full-time, whether the work was accommodated, and whether the work was actually substantial and gainful. I give Mr. Bungard's factual findings no weight as he did no personal investigation and apparently relied upon the same evidence presented to me. Mr. Bungard also found that Respondent was paid $400 per week by Mr. McCauley, which is also not supported by the evidence. There is no question that Mr. McCauley gave Respondent some money. The testimony of Mr. McCauley that the money he gave Respondent is not connected to her work at War Era Veterans Alliance is unrebutted. His testimony is also consistent with the fact that he was not the owner of War Era Veterans Alliance and he had no role in paying staff. Although the SSA IG would

have me conclude that there are inconsistencies in Mr. McCauley's statements to investigators and at hearing, the fact is he was consistent in his assertions that he only gave money to his sister to help her, not to compensate her for her work. There is no question that Mr. McCauley gave Respondent a phone that rang when the business number was dialed, but the evidence does not show that he paid Respondent any money for answering that phone. Therefore, I find that Mr. Bungard's finding that Respondent was paid $400 per week for her work activity is unsupported by the evidence. I note that if Respondent was receiving $400 per week from her brother as a gift that would have no impact on her entitlement to DIB benefits or the amount of those benefits.

Mr. Bungard found Respondent highly culpable because he concluded she intended to defraud SSA. He cites no evidence that would support such a conclusion. The mere allegations of the investigators are insufficient to support a finding of fraudulent intent. He considered that Respondent had no prior offenses. Mr. Bungard also purported to consider Respondent's financial consideration, but that is inaccurate. What Mr. Bungard did consider is that he reduced the proposed CMP and assessment from the maximum he was authorized to impose, and Respondent did not provide any financial disclosure that he could consider. SSA Ex. 4 at 1-2.

I evaluate the required factors as follows:

(a) Nature of the statements and representations and the circumstances under which they occurred.

Respondent failed to report work activity in September 2009 and September 2010. As discussed in detail earlier in this decision, the Social Security regulations clearly require reporting of work. Respondent had at least constructive knowledge of the requirement to report work. However, the regulations do not clearly describe what activity is work activity that must be reported. The SSA IG has failed to present any evidence that Respondent had actual knowledge of what activity constituted work activity that she was obliged to report. The evidence does not show it was more likely than not that Respondent intended to defraud SSA. The evidence does not show it was more likely than not that Respondent engaged in any more than sporadic work activity for War Era Veterans Alliance. The evidence does not show it was more likely than not that Respondent received any compensation for her work activity. The evidence does not show it was more likely than not that Respondent's work activity was substantial and gainful.

(b) Degree of culpability, history of prior offenses, financial condition of Respondent, and such other matters as justice may require.

There is no evidence of any prior offenses by Respondent. There is no evidence that Respondent is

unable to pay a CMP and assessment in the amount proposed by the SSA IG.

The simple definition for culpability is blameworthiness. *Black's Law Dictionary* 406 (18th ed. 2004). In this case, Respondent failed to report that she did some work for War Era Veterans Alliance. I do not find Respondent's failure to report to be blameworthy. The SSA regulations are not clear enough for a person of reasonable intelligence to know what activity is reportable as work activity. The SSA IG has also acknowledged that Respondent's medical condition met the requirements for disability, while maintaining that Respondent engaged in disqualifying work activity. SSA App. Br. at 3, n.1. Respondent testified and argued that her mental impairments and medication side effects limit her ability to engage in activities of daily living, including managing her checkbook and bill paying. Tr. at 235-41; P. Br. Respondent's testimony is unrebutted by any qualified medical evidence and I treat her complaints of limitation as credible. The fact that Respondent does not have a representative payee may reflect that no representative payee was determined necessary by SSA, though there is no affirmative evidence that a review and determination were made. The absence of a representative payee does not make Respondent's complaints of limitations incredible or show that the complaints are exaggerated.

I conclude that no CMP or assessment should be imposed against Respondent on the facts of this case.

III. Conclusion

For the foregoing reasons, I conclude that there is no basis for the imposition of a CMP or assessment in this case.

/s/
Keith W. Sickendick
Administrative Law Judge

STATEMENT OF APPEAL RIGHTS PURSUANT TO 20 C.F.R. § 498.221

> (a) Any party may appeal the decision of the ALJ to the DAB by filing a notice of appeal with the DAB within 30 days of the date of service of the initial decision. The DAB may extend the initial 30-day period for a period of time not to exceed 30 days if a party files with the DAB a request for an extension within the initial 30-day period and shows good cause.
>
> * * * *
>
> (c) A notice of appeal will be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions, and identifying which finding of fact and conclusions of law the party is taking exception to. Any party may file a brief in opposition to exceptions, which may raise any relevant issue not addressed in the exceptions, within 30 days of receiving the notice of appeal and accompanying brief. The DAB

may permit the parties to file reply briefs.
(d) There is no right to appear personally before the DAB, or to appeal to the DAB any interlocutory ruling by the ALJ.
(e) No party or person (except employees of the DAB) will communicate in any way with members of the DAB on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.
(f) The DAB will not consider any issue not raised in the parties's briefs, nor any issue in the briefs that could have been, but was not, raised before the ALJ.
(g) If any party demonstrates to the satisfaction of the DAB that additional evidence not presented at such hearing is relevant and material and that there were reasonable grounds for the failure to adduce such evidence at such hearing, the DAB may remand the matter to the ALJ for consideration of such additional evidence.

* * * *

(i) When the DAB reviews a case, it 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.(j) Within 60 days after the time for submission of

> briefs or, if permitted, reply briefs has expired, the DAB will issue to each party to the appeal and to the Commissioner a copy of the DAB's recommended decision and a statement describing the right of any respondent who is found liable to seek judicial review upon a final decision.

Respondent's request for review by the DAB automatically stays the effective date of this decision. 20 C.F.R. § 498.223.

APPENDIX E

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Docket No. A-14-92
Decision No. 2604

[Filed November 24, 2014]

Michelle Valent)
)
)

REMAND OF ADMINISTRATIVE LAW JUDGE DECISION

The Social Security Administration Office of Inspector General (SSA I.G.) appeals a June 11, 2014 decision by an Administrative Law Judge holding that there was no basis to impose a civil monetary 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). *Michelle Valent*, DAB CR3261 (2014) (ALJ Decision). The SSA I.G. proposed the CMP and assessment on the ground that Respondent failed to notify SSA about work she did while receiving Social Security Disability Insurance Benefits (DIB) when she knew or should have known that the work was material (and that such withholding was misleading) for purposes of determining her eligibility for, or the amount of, DIB. The ALJ found

that she had failed to disclose information about her work but concluded that her work was not material (that is, not a fact SSA was permitted to consider in determining a right to or amount of benefits). The ALJ relied on a provision of section 221(m) of the Act precluding SSA from using work activity as evidence that an individual who has received DIB for at least 24 months is no longer disabled.

For the reasons explained below, we conclude that Respondent's work was material for purposes of determining liability under section 1129(a)(1) of the Act. In concluding that section 221(m)(1) of the Act barred SSA from considering Respondent's work activity, the ALJ failed to correctly consider other provisions in section 221(m) of the Act and in the implementing regulations that permit SSA to terminate DIB payments to a 24-month DIB recipient based on the amount of the recipient's earnings. Under these provisions, SSA evaluates earnings **derived from work** and therefore may consider work in determining whether a recipient's income constitutes earnings at a level that shows the recipient has engaged in substantial gainful activity, despite any mental or physical impairments the recipient has, a determination that affects the recipient's right to benefits.

Although the ALJ suggested that, but for section 221(m) of the Act, he would find Respondent liable for a CMP, he did not make separate factual findings necessary to that conclusion, nor did he resolve issues related to the amount of the CMP and assessment. The record contains conflicting evidence relevant to these

issues, including statements by witnesses whom the ALJ observed at the hearing he held. Accordingly, we reverse the ALJ's conclusion that Respondent's work was not material information that she was required to report to SSA, and we remand the case to the ALJ to make the necessary findings relating to Respondent's liability and, if he finds her liable, to then address issues about the amount of the CMP and assessment.

Legal background

1. SSA determines eligibility for Social Security Disability Insurance benefits by considering, among other things, whether an individual has engaged in substantial gainful activity.

The DIB program at title II of the Act pays benefits to insured individuals who are aged, blind, or disabled. 20 C.F.R. Part 404. Section 223(d)(1) of the Act defines "disability" in part as including "inability to engage in any **substantial gainful activity** by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; . . . ." (Emphasis added.) Section 223(d)(2) states that an "individual shall be determined to be under a disability only if his . . . impairment or impairments are of such severity that he is not only unable to do his previous work but cannot . . . engage in any other kind of substantial gainful work which exists in the national economy . . . ." Section 223(d)(4)(A) requires SSA to issue regulations that "prescribe the criteria for determining when **services performed or earnings derived from services** demonstrate an individual's ability to

engage in substantial gainful activity" and states that "an individual whose services or earnings meet such criteria shall . . . be found not to be disabled," notwithstanding the severity of the impairment. (Emphasis added.)

The DIB regulations at 20 C.F.R. Part 404, Subpart P (§§ 404.1501-404.1599) define "substantial gainful activity" as 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).

As we discuss below, the regulations SSA adopted to prescribe the criteria for determining when services performed or earnings derived from services demonstrate an individual's ability to engage in "substantial gainful activity" permit SSA to discontinue DIB payments to a recipient without having to review whether the recipient no longer has a medically determinable impairment. The regulations provide that the work a person has done may show that person is able to work at the substantial gainful activity level and is no longer disabled. They also, however, specify the amount of monthly earnings from work that show substantial gainful activity, and they permit SSA to terminate DIB payments to a recipient, including a 24-month DIB recipient, whose earnings show substantial gainful activity. We address these provisions in our analysis of the ALJ's conclusion that section 221(m) of

the Act barred SSA from considering information about Respondent's work.

2. Recipients must report information about work they do to SSA, which periodically reviews entitlement to benefits.

DIB recipients must inform SSA of changes in disability or employment status. Section 404.1588, "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.

The regulations do not define "work" but several provisions describe the type of activities SSA will consider in determining whether a person has engaged in or is able to engage in substantial gainful activity. *See, e.g.,* 20 C.F.R. §§ 404.1571, 404.1573, 404.1574(b)(3)(ii).

SSA periodically reviews a DIB recipient's "continued entitlement to such benefits" including whether "there has been any medical improvement in your impairment(s) and, if so, whether this medical improvement is related to your ability to work." 20 C.F.R. § 404.1594(a). SSA conducts "continuing disability reviews" at intervals ranging from 6 months

to 7 years and also if (among other reasons) a DIB recipient reports having recovered from his disability or that he is working, or if SSA receives sufficiently reliable information that a DIB recipient is not disabled or has returned to work. 20 C.F.R. §§ 404.1589, 404.1590(a), (b), (d).

3. Section 221(m) of the Act limits SSA's ability to review the disability of a person who has received DIB for at least 24 months and provides exceptions to those limits.

Section 221(m) of the Act states:

> (1) In any case where an individual entitled to disability insurance benefits under section 223 . . . based on such individual's disability (as defined in section 223(d)) has received such benefits for at least 24 months—
>
> (A) no continuing disability review conducted by the Commissioner may be scheduled for the individual solely as a result of the individual's work activity;
>
> (B) no work activity engaged in by the individual may be used as evidence that the individual is no longer disabled; and
>
> (C) no cessation of work activity by the individual may give rise to a presumption that the individual is unable to engage in work.
>
> (2) An individual to which paragraph (1) applies shall continue to be subject to—
>
> (A) continuing disability reviews on a regularly scheduled basis that is not triggered by work; and

> (B) 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.

We address the provisions of section 221(m), and the implementing regulations, more fully in our analysis of the ALJ's conclusion that section 221(m)(1) precluded SSA from considering information about Respondent's work activity.

4. The SSA I.G. may impose CMPs and assessments for certain false statements about or failures to report a material fact to SSA.

Section 1129(a)(1) of the Act authorizes SSA to impose CMPs and assessments on any person who –

> (A) makes, or causes to be made, a statement or representation of a material fact, for use in determining any initial or continuing right to or the amount of monthly insurance benefits . . . that the person knows or should know is false or misleading,
>
> (B) makes such a statement or representation for such use with knowing disregard for the truth, or
>
> (C) omits from a statement or representation for such use, or otherwise **withholds disclosure of, a fact which the person knows or should know is material** to the determination of any initial or continuing right to or the amount of monthly insurance benefits . . . **if the person knows, or should know**,

> that the statement or representation with such omission is false or misleading or **that the withholding of such disclosure is misleading** . . . .

See also 20 C.F.R. § 498.102(a) (implementing regulation).

A "material fact" as relevant here is a fact that 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. "Otherwise withhold disclosure" means "the failure to come forward to notify the SSA of a material fact when such person knew or should have known that the withheld fact was material and that such withholding was misleading for purposes of determining eligibility or Social Security benefit amount" for that or another person. 20 C.F.R. § 498.101.

Section 1129(a)(1) authorizes CMPs of up to $5,000 for each covered false or misleading statement or representation or "each receipt of such benefits or payments while withholding disclosure of such fact," and the regulations authorize CMPs 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) (emphasis added). Benefits are paid monthly. 20 C.F.R. Part 404, subpart D; Act § 1129(a)(1). Thus, SSA may impose a CMP for each month during which material information is withheld and DIB payments are received. The Act and regulations also authorize 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 the CMP and assessment to impose, the SSA I.G. must consider: (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).

Any person against whom the SSA I.G. imposes a CMP or assessment under section 1129(a) may request a hearing before an ALJ, and that person and the SSA I.G. may appeal the ALJ's decision to the Board. Act § 1129(b); 20 C.F.R. §§ 498.109(a), (b); 498.202; 498.221. The Board may remand a case to an ALJ for further proceedings, or may issue a recommended decision to the Commissioner of Social Security to decline review or affirm, increase, reduce, or reverse any penalty or assessment determined by the ALJ. 20 C.F.R. § 498.221.

Before the ALJ in CMP cases, the "respondent has the burden of going forward and the burden of persuasion with respect to affirmative defenses and any mitigating circumstances" and the "Inspector General has the burden of going forward and the burden of persuasion with respect to all other issues." 20 C.F.R. § 498.215(b)(1), (2). "The burden of persuasion" in a case before an ALJ "will be judged by a preponderance of the evidence." 20 C.F.R. § 498.215(c).

Case background[1]

Respondent, whose prior work was as a receptionist or administrative assistant, filed for DIB in October 2003 and was found disabled and entitled to DIB with a disability onset date of March 25, 2003 based on a primary diagnosis of affective disorders including depression. ALJ Decision at 8. The SSA I.G. stipulated that Respondent "had disabling medical conditions." SSA I.G. Br. at 3, n.1.

In January 2012 an informant who said he had worked for the "War Era Veterans Alliance" (WERA), an organization formed by Respondent's brother and owned by his wife, told the SSA I.G. that Respondent worked there answering phones and had been paid under the table while collecting DIB. The SSA began an investigation that lasted through June 2012. Special agents from the SSA I.G. interviewed Respondent, the informant and staff of WERA, reviewed materials including the WERA website, and conducted surveillance of Respondent. The SSA I.G. determined that Respondent started working at WERA in September 2008 and was paid $400 in cash per week, and that her earnings were considered substantial gainful activity.[2] SSA Exs. 1, at 15-17; 12, at 8; 16, at 3-

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[1] The information in the background section and in our analysis is from the ALJ Decision and the record before him and should not be treated as new findings.

[2] The determination that Respondent was paid $400 per week was based on her brother's statement to that effect to a special agent for the SSA I.G. SSA Ex. 16, at 3-4. Respondent's brother did not deny making that statement but said he might have meant that he

4. Before the ALJ, the SSA I.G. relied on the statements of coworkers that Respondent worked at or for WERA or for her brother and the SSA I.G.'s findings that she was listed on the WERA website as an employee, had a phone that would ring when someone called WERA, had a WERA email address, and received regular payments of money from her brother.

On April 20, 2012, Respondent stated during a continuing disability review that she had not worked since 2004, and she completed forms listing no work since 2004 and stating "I have not worked since 2004" and that she had not received any employment income or wages since March 25, 2003. ALJ Decision at 8; SSA Exs. 8, at 1-2; 9, at 1, 7; 10, at 2, 10; 12, at 1. In the interview, she did not report having worked for WERA.

The SSA I.G. found that Respondent falsely reported to SSA in the April 2012 recertification interview that she had not worked since 2004 and that she had failed to report that she worked for WERA. SSA Exs. 4, 5. The SSA I.G. proposed a CMP of $100,000 (reduced from $205,000), based on Respondent's failure to report her work for the 41 months from September 2009 through January 2013.[3] SSA Ex. 4. The SSA I.G. also proposed

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had paid her $400 for that week, and he stated that he gave Respondent $12,000 per year as a gift. Tr. at 271-73.

[3] A DIB recipient may work while receiving benefits during a 9-month "period of trial work." Act § 222(c); 20 C.F.R. § 404.1592(a). A recipient who performs substantial gainful activity after the end of the trial work period is paid benefits for three more months, after which SSA stops benefits in any month

an assessment of $68,547, the amount of benefits SSA determined Respondent was overpaid during those 41 months for herself ($52,938.90) and on behalf of her daughter ($15,608). *Id.*; SSA Ex. 3, at 6, 12. SSA also notified Respondent by letter dated January 14, 2013 that her entitlement to DIB payments ended beginning September 2009. SSA Ex. 3, at 6. Respondent requested an ALJ hearing on the SSA I.G.'s determination to impose the CMP and assessment. The ALJ received the parties's briefing and exhibits and held a hearing by video teleconference on January 14, and 15, 2014.

The ALJ Decision

The ALJ found "Respondent's argument . . . that she did no work for War Era Veterans Alliance" to be "not persuasive" because she and her brother "admitted in testimony that Respondent answered the phone for War Era Veterans Alliance and she did some scheduling, at least occasionally." ALJ Decision at 14. The ALJ thus found "that Respondent did engage in some work activity for the benefit of War Era Veterans Alliance" and that she failed to report her work activity to SSA. *Id.* at 7, 14, 16.

The ALJ noted Respondent's argument "that it was not explained to her what was considered work that had to

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in which the recipient does substantial gainful activity. 20 C.F.R. § 404.1592a(2)(i). SSA determined that Respondent began working at WERA in September 2008, assigned her a 9-month trial work period of September 2008 through May 2009, and imposed CMPs and assessments beginning three months later, in September 2009. SSA Exs. 3, at 3; 12, at 8.

be reported and, therefore, she did not intentionally or unintentionally omit to report a material fact" but concluded that "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. The ALJ stated that "normally I 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 "was entitled to receive DIB . . . for at least 24 months," section 221(m)(1) of the Act "prohibited consideration of Respondent's work activity as evidence that she was no longer disabled" and that "her work activity is not a fact that the Commissioner [of Social Security] may consider in evaluating whether Respondent continued to be entitled to benefits or payments under the Act." *Id*. at 6-7, 16. "Therefore," the ALJ concluded, "Respondent's work activity is not material within the meaning [of] section 1129(a)(2) of the Act and 20 C.F.R. § 498.101" and her "failure to report her work activity for War Era Veterans Alliance 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)." *Id*. at 16-17.

The SSA I.G.'s arguments

The SSA I.G. argues that the ALJ erred because section 221(m)(1) barring use of a 24-month DIB recipient's work activity as evidence he or she is no longer disabled does "not abrogate" a recipient's "obligation to report her work activity to SSA," and "does not preclude SSA from evaluating a recipient's work activity to determine ***earnings*** or income to calculate whether the earnings exceed the substantial gainful activity ('SGA') dollar limits for eligibility to receive benefits." SSA I.G. Br. at 3 (emphasis in original). The SSA I.G. cites section 221(m)(2)(B) of the Act which "expressly states that, where section 221(m)(1) applies, recipients '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.'"[4] *Id*. at 4 (emphasis in original). The SSA I.G. argues that

[4] The SSA I.G. also argues that even if Respondent's work activity was not material as the ALJ held, "the Respondent's *failure* to report her work activity is clearly material" because "failure to report work activity is a fact that SSA may consider in determining Respondent's continued eligibility for benefits, as it provides an independent basis to initiate a continuing disability review for development of earnings or medical improvement review." SSA I.G. Br. at 6 (emphasis in original), citing 20 C.F.R. § 404.1590(i) (SSA may start a continuing disability review of a 24-month DIB recipient "if you failed to report your work to us."). In light of our conclusion that the ALJ erred in holding that Respondent's work activity is not material, it is not necessary to address SSA's argument that Respondent could be sanctioned for, in effect, failing to report to SSA that she had not reported her work.

Respondent's work activity "is material because it is a fact that the SSA Commissioner 'may consider' in evaluating an individual's earnings in accordance with section 221(m)(2)(B) of the Act – to determine whether the individual is 'entitled to benefits or payments under the Act'" and that "her failure to disclose the work activity and earnings constitutes a material omission for purposes of Section 1129 of the Act." *Id*. at 4, 5. The SSA I.G. argues that Respondent was required to report her work to SSA by 20 C.F.R. § 404.1588(a) (recipient 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").

The SSA I.G. also argues that Respondent was aware of her "reporting responsibilities to SSA regarding work activity and knowingly withheld this information from SSA" and that the proposed penalty and assessment are reasonable. SSA I.G. Br. at 10.

Respondent declined to submit a response to the SSA I.G.'s appeal and brief. Board letter confirming phone conversations (Oct. 8, 2014).

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 limited "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

1. The ALJ's conclusion that section 221(m)(1) of the Act renders information about Respondent's work not material is legally erroneous.

The ALJ based his determination that the SSA I.G. could not impose a CMP or assessment on Respondent for withholding information about her work on his conclusion that section 221(m)(1) of the Act barred SSA from considering information about her work, making such information not "material." The ALJ did so despite the fact that neither party cited section 221(m) to the ALJ, and without asking the parties to address the effect of that section.

The ALJ's reliance on section 221(m)(1) of the Act is misplaced. He failed to consider the effect of the language in section 221(m)(2), even though he quoted the language, and he did not consider how the section was implemented in the DIB regulations. The statute and regulations permit SSA to discontinue DIB payments to a 24-month recipient based on the amount of the recipient's earnings. Section 221(m)(2)(B) states that "[a]n individual to which paragraph (1) applies" – that is, a 24-month DIB recipient – "shall continue to be subject to . . . termination of benefits . . . in the event that the individual has earnings that exceed the level of earnings established by the Commissioner to represent substantial gainful activity." The plain language of section 221(m)(2)(B) 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.

As we explain below, the law and regulations generally permit SSA to terminate DIB payments to a recipient who has engaged in "substantial gainful activity." The regulations state that earnings will constitute substantial gainful activity resulting in the termination of benefits when (as relevant here) the earnings derive from work and exceed monthly amounts established by regulation. Since work is relevant in determining whether amounts paid to a recipient are earnings from work, work is a fact SSA may consider in determining whether a 24-month recipient is entitled to benefits.

First, the Act and regulations permit SSA to terminate DIB payments to recipients who engage in substantial gainful activity. In addition to the language to that effect in section 221(m)(2)(B) of the Act, section 223(e) states that "[n]o benefit shall be payable" under the DIB program "to an individual for any month, after the third month, in which he engages in substantial gainful activity during the 36-month period following the end of his trial work period . . . ."[5] Section 404.1592a(a) of 20 C.F.R. states that when a recipient with "a disabling impairment" works after the nine-month trial work period, "we may decide that your disability has ceased because your work is substantial gainful activity and stop your benefits" but that "if . . . you stop engaging in substantial gainful activity, we will start paying you benefits again; you will not have to file a new application." Section 404.1590(i)(4), "*Reviews to*

[5] As noted earlier, SSA assigned Respondent a 9-month trial work period of September 2008 through May 2009, and imposed CMPs and assessments beginning three months later, in September 2009. SSA Exs. 3, at 3; 12, at 8.

determine whether the work you have done shows that you are able to do substantial gainful activity," states that section 404.1590(i)(1), which implements the 24-month rule from Act § 221(m)(1), "does not apply to reviews we conduct . . . to determine whether the work you have done shows that you are able to do substantial gainful activity and are, therefore, no longer disabled."

Second, 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. Section 404.1574(a)(1) of 20 C.F.R. states that "[t]he amount of your earnings from work you have done . . . may show that you have engaged in substantial gainful activity" and that "[g]enerally, if you worked for substantial earnings, we will find that you are able to do substantial gainful activity." Section 404.1574(b)(2), entitled "*Earnings that will ordinarily show that you have engaged in substantial gainful activity*," applicable to DIB recipients who are employees, sets out a formula establishing the level of earnings based on which "your earnings from your work activity as an employee . . . show that you engaged in substantial gainful activity . . . ."

Third, the regulations specify that earnings must derive from work activity in order to show that the recipient has engaged in substantial gainful activity. Section 404.1574(b)(2) states that SSA "will consider that your earnings **from your work activity** . . . show that you engaged in substantial gainful activity," and section 404.1574(a)(1) states that "in evaluating your

work activity for substantial gainful activity purposes, our primary consideration will be the **earnings you derive from the work activity**." (Emphasis added.) Section 404.1574(a)(2) states that "[w]hen we decide whether your earnings show that you have done substantial gainful activity, we do not consider any income that is not directly related to your productivity." SSA cannot decide whether earnings derive from work activity without considering work.

The legislative history of section 221(m) also shows that SSA may consider a 24-month DIB recipient's earnings to determine whether the recipient has engaged in substantial gainful activity. The history explains that section 221(m) "is intended to encourage long-term [DIB] beneficiaries to return to work by ensuring that work activity would not trigger an unscheduled **medical review of their eligibility**" but that "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." H.R. Rep. 106-393(I), at 45 (1999) (emphasis added).

The preamble to the final rule implementing section 221(m) of the Act, like the legislative history, distinguishes between reviewing a 24-month DIB recipient's medically determinable **impairment** based on what work activity shows about a recipient's abilities, which section 221(m)(1) prohibits, and considering whether the recipient's earnings show substantial gainful activity, which section 221(m)(2) permits. SSA stated in the preamble that "if section

221(m) of the Act applies to you, we may not be able to start a medical continuing disability review, but we can still start a work continuing disability review to determine if you are doing substantial gainful activity." 71 Fed. Reg. 66,840, 66,848 (Nov. 17, 2006); *see also id.* at 66,850 (an effect of the 24-month rule is that SSA will "disregard information about your work that would otherwise be evidence about your physical and mental abilities"). SSA further explained that "[w]e may still consider your earnings from [your] work under the earnings guidelines to decide whether your earnings show that you have engaged in substantial gainful activity for the purpose of determining whether your disability has ceased." *Id.* at 66,846. Thus, we conclude that 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.

The Act and regulations, as relevant here, define "material fact" as one that SSA "may consider in evaluating whether an applicant is entitled to benefits under title II" of the Act. Act § 1129(a)(2); 20 C.F.R. § 498.101. As the ALJ observed, the definition of "material fact" (one that SSA "may consider" in evaluating entitlement to DIB) does not require that SSA actually evaluate the material fact or cite it as a basis to terminate benefits. *Id.*; ALJ Decision at 15 ("[w]hether a statement of fact or omitted fact is material does not depend on whether . . . any decision

would have been different" on Respondent's entitlement to benefits).[6]

Since we conclude that section 221(m) did not preclude SSA from considering Respondent's work for purposes of determining whether she had earnings from that work at the substantial gainful activity level, we further conclude that the ALJ's determination that her work was not material for purposes of section 1129(a)(1) was legally erroneous.

2. We remand the case to the ALJ to make findings on factual issues necessary to resolve the case.

The ALJ stated that, but for section 221(m)(1) of the Act, he would "normally" find that Respondent's failure to report her work activity was an omission of material fact subjecting Respondent to a CMP and an assessment. ALJ Decision at 15. Respondent would be subject to a CMP and assessment, however, only if she knew or should have known that the withheld fact was material and that such withholding was misleading for purposes of determining eligibility or benefit amount.

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[6] This is true because whether SSA has grounds to terminate benefit payments is not before ALJs in appeals of CMPs and assessments that the SSA I.G. imposes. An ALJ's role in a proceeding under 20 C.F.R. Part 498 is to "determine whether the respondent should be found liable [for CMPs and assessments] under this part" and the ALJ may only "affirm, deny, increase, or reduce the penalties or assessments proposed" by the SSA I.G. 20 C.F.R. §§ 498.215(a), 498.220(b). There are other appeal processes for recipients to challenge the termination of their benefits. 20 C.F.R. Part 404, subpart J.

Act § 1129(a)(1)(C).[7] The ALJ made no separate findings of fact about what Respondent knew or should have known. The SSA I.G. argues that Respondent "knew that she had yearly reporting responsibilities" and cites her testimony that she would go to the SSA office for "the yearly thing" and that "[e]very year, they send you papers, and you have to sign stuff." SSA I.G. Br. at 9; Tr. at 224. The SSA I.G. also states that "written communication with the Respondent provided frequent reminders to report work activity and earnings," but does not cite to any materials in the record to support this assertion. SSA I.G. Br. at 8.[8] The SSA I.G. does, however, cite a Work Activity Report Respondent completed on April 20, 2012 instructing her to report work activity "with as many details as you can." *Id*. at 9, citing SSA Ex. 9.

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[7] Section 1129(a)(1)(A) of the Act by contrast imposes CMPs and assessments on any person who makes a statement of material fact that the person knows or should know is false or misleading, without the additional requirement present in section 1129(a)(1)(C) that the person know or should know that the fact is material. The SSA I.G. determined that Respondent falsely stated during the continuing disability review on April 20, 2012 that she had not worked, but Counsel for the SSA I.G. testified that those false statements were not the basis for the CMP and may have been an aggravating factor, and that the basis of the penalty was "the 41 material omissions" from September 2009 through January 2013. SSA Ex. 4, at 1-2; Tr. at 361-62.

[8] The SSA I.G. does state that, when she "received her Award Notice for Title II DIB" SSA gave her "a pamphlet in plain language explaining her reporting responsibilities." SSA I.G. Br. at 8-9, citing SSA Publication No. 05-10153, What You Need to Know When You Get Social Security Disability Benefits. This pamphlet is not in the record.

In any event, the ALJ found that Respondent had notice she should report her work. ALJ Decision at 14. Notice of the requirement to report work is relevant in determining whether Respondent knew or should have known that her work was material and that withholding information about her work would be misleading, but such notice is not determinative of these issues. Respondent argued in her post-hearing brief below that she did not meet the knowledge standard in the statute and regulation because of her disabling mental conditions and the side effects of her medications. R. Post-H'g Br. at 6 (citing testimony). In its post-hearing brief, the SSA I.G. pointed to inconsistencies in Respondent's testimony, and relied in part on the fact that Respondent had no representative payee and other admissions that the SSA I.G. said she made that show that she was able to handle her finances independently. SSA Post-H'g Br. at 5-6.

On remand, the ALJ should evaluate the evidence, including the testimony, to determine whether Respondent knew or should have known that the information she withheld from SSA was material to SSA's determination of her right to receive benefits or to the amount of benefits she received and that the withholding of the information was misleading.

The ALJ also stated that "the evidence . . . does not show that Respondent's work rose to the level of 'substantial gainful activity'" or "whether Respondent was actually paid for her work or . . . only received gifts from her brother." ALJ Decision at 14. He said he found it unnecessary to resolve those questions in light

of his conclusion that Respondent's work activity was not material, but did not explain the relevance of these issues in determining whether Respondent is liable for a CMP. On remand, the ALJ should address such issues to the extent he needs to resolve them to determine whether Respondent knew or should have known that her work was material and that withholding disclosure about her work would be misleading.

In summary, although the ALJ found that Respondent had notice she should report her work, he did not determine whether she knew or should have known that the withheld information was material to the determination of her right to receive benefits or to the amount of benefits, and that her withholding was misleading. If the ALJ answers those questions in the affirmative, and concludes that Respondent is, therefore, liable for a CMP and assessment under section 1129(a)(1) of the Act, the ALJ should address:

● *Whether the SSA I.G. has established the duration of the period for which CMPs and assessments may be imposed.* To support the full amount of the proposed CMP and assessment, the SSA I.G. had to show, by a preponderance of the evidence, that Respondent withheld information about her work from SSA for a period of 41 months, from September 2009 through January 2013. Act § 1129(a)(1) and 20 C.F.R. §§ 498.103(a), 498.104 (CMPs based on each monthly benefit payment received while withholding disclosure of material fact, assessments based on amount of benefits paid as a result of withholding disclosure); 20 C.F.R. § 498.215(b), (c) (SSA I.G. has "the burden of

going forward and the burden of persuasion" on all issues other than Respondent's affirmative defenses and mitigating circumstances; burden of persuasion "judged by a preponderance of the evidence"); SSA Ex. 4 (SSA I.G. notice letter); Tr. at 361-62 (testimony of counsel to the SSA I.G. that basis for CMP was "the 41 material omissions" from September 2009 through January 2013 and not false statements made to SSA in April 2012). Determining whether the SSA I.G. is correct that Respondent withheld information about her work for 41 months – or whether it was some other period –requires, at the least, determining when she began the work that she failed to disclose.

The SSA I.G. apparently based its determination that Respondent began working in September 2008 on a statement to the SSA I.G. of the informant who said he had worked for WERA, that his then-wife began working at WERA in September 2008, and that Respondent was working there at that time. SSA Ex. 1, at 6; *see also* Tr. at 100, 105. The informant testified at the hearing, and the ALJ found that his "credibility regarding his assertions as to Respondent's work activity is significantly limited by his . . . limited opportunity to observe Respondent and her activities." ALJ Decision at 10. The ALJ did not, however, state whether he gave any credence to the information about when Respondent was working that the informant attributed to his former wife. The ALJ also found that Respondent did not dispute that a WERA web page accessed in June 2012 stated that Respondent had been "taking calls and managing all War Era Veterans Alliance calendars for over four years." *Id*. at 12; SSA Ex. 13, at 58. The ALJ ultimately made no findings,

however, about when Respondent began working or about the duration of the period during which she withheld information about her work from SSA. On remand, the ALJ should assess the evidence including the witness testimony and make findings of fact as to when Respondent began performing the work that he found she did not disclose to SSA.

- *Whether the SSA I.G. has shown that the CMP amount is reasonable based on the factors in the regulations.* The ALJ did not review the factors in 20 C.F.R. § 498.106(a) that the SSA I.G. must consider in determining the amount of the CMP. Applying some of the factors, such as the circumstances under which false statements occurred, the degree of culpability of the person committing the offense, and such "other matters as justice requires," entails assessing witness testimony and credibility, including that of Respondent, who testified to the effect that her mental impairments affect her ability to carry out activities of daily living. Tr. at 235-41. The ALJ on remand should assess the reasonableness of the CMP based on the factors in the regulations and make findings of fact necessary to that determination.

Conclusion

For the reasons stated above, we reverse the ALJ's conclusion that under section 221(m)(1) of the Act information about Respondent's work was not material information that she was required to disclose to SSA. We remand the case to the ALJ for further proceedings consistent with this decision.

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan

/s/
Judith A. Ballard
Presiding Board Member

APPENDIX F

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Civil Remedies Division

Docket No. C-13-984
Decision No. CR3261

[Filed June 11, 2014]

Social Security Administration, Inspector General, Petitioner,	)
v.	)
Michelle Valent, Respondent.	)

DECISION

There is no basis for the imposition of a civil money penalty (CMP) or an assessment in lieu of damages (assessment), pursuant to section 1129(a)(1) of the Social Security Act (the Act) (42 U.S.C. § 1320a-8(a)(1)), against Respondent, Michelle Valent.

I. Procedural History

The Counsel for the Inspector General (IG) of the Social Security Administration (SSA) notified Respondent, Michelle Valent, by letter dated June 3, 2013, that the

SSA IG proposed imposition of a CMP of $100,000 and an assessment of $68,547 against Respondent, pursuant to section 1129 of the Social Security Act (Act) (42 U.S.C. § 1320a-8).[1] The SSA IG cited as the basis for the CMP and assessment that during the period September 2009 through January 2013, Respondent failed to report to SSA that she worked while she received Social Security Disability Insurance Benefits (DIB) and she falsely reported during an April 2012 Continuing Disability Review (CDR) that she had not worked since 2004. SSA IG Exhibit (SSA Ex.) 4.

Respondent requested a hearing pursuant to 20 C.F.R. § 498.202,[2] by letter dated June 11, 2013. The case was assigned to me for hearing and decision and the parties were notified by letter dated July 12, 2013, that I would convene a prehearing conference by telephone on August 8, 2013, at 11:00 a.m. Eastern Time. The prehearing conference was convened by telephone as scheduled. The substance of the prehearing conference is memorialized in my Scheduling Order and Notice of Hearing issued on August 9, 2013 (Scheduling Order).

Pursuant to the Scheduling Order, the SSA IG and Respondent were required to file and exchange lists of exhibits and witnesses and copies of proposed exhibits not later than December 13, 2013, and prehearing briefs not later than December 30, 2013. Scheduling Order ¶¶ IV, IX. SSA timely filed its exchange of

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[1] The current version of the Act is available at http://www.ssa.gov/OP_Home/ssact/ssact-toc.htm.

[2] References are to the 2012 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

witness lists, witness statements, and proposed exhibits and a copy of its prehearing brief. Respondent failed to file her exchange by December 13, 2013 as required by the Scheduling Order. Therefore, on December 19, 2013, I issued an order for Respondent to show cause why her case should not be dismissed for abandonment or as a sanction. Respondent responded to the order to show cause on December 27, 2013, and filed her exchange of lists of exhibits and witnesses and copies of proposed exhibits, but did not file her prehearing brief by December 30, 2013 as required. On January 6, 2014, the SSA IG requested sanctions, including dismissal of this case, because Respondent failed to timely file her exchange and she failed to timely file her prehearing brief. The SSA IG argues that Respondent's delayed exchange and failure to file a prehearing brief prejudiced the SSA IG, but the SSA IG does not specifically articulate the prejudice suffered. Pursuant to section 1129(b)(4) of the Act and 20 C.F.R. § 498.214, I may sanction a party or attorney for failure to comply with an order or procedure, for failure to defend, or for such other conduct that interferes "with the speedy, orderly, or fair conduct of the hearing." The sanction must reasonably relate to the severity and nature of the conduct. Authorized sanctions include: drawing a negative factual inference or deeming a fact admitted or established in the case of refusal to provide or permit discovery; prohibiting a party from introducing evidence; striking pleadings; staying proceedings; dismissal of the case; default judgment against the offending party; ordering the offending counsel or party to pay fees and costs caused by the failure or misconduct; or refusal to consider a motion or pleading not filed in a timely manner. In this

case, Respondent's failure to timely file her exchange and failure to file a prehearing brief caused no delay of the trial in this case and the SSA IG has failed to specifically identify any prejudice that warrants punishing Respondent. Accordingly, the SSA IG motion for sanctions is denied.

On January 14, and 15, 2014, a hearing was convened by VTC. The SSA IG, represented by Penny Collender, Esq. and Erin Justice, Esq., appeared by VTC from New York City. Respondent appeared by VTC from Livonia, Michigan represented by Marianne McCauley. I participated by VTC from Kansas City with the court reporter. Witnesses testified by VTC from Livonia, Michigan, Baltimore, and San Diego. A transcript of the proceedings was prepared. The SSA IG offered SSA Exs. 1 through 18, which were admitted as evidence. Tr. 37-38. Respondent offered Respondent's exhibits (R Ex.) 1 through 6, which were admitted as evidence. Tr. 38-39. The SSA IG called the following witnesses: Resident Agent in Charge (RAC) Adam Lowder; Special Agent (SA) Kathryn Krieg; Alan Watt, the confidential source; Respondent Michelle Valent; Mark McCauley, Respondent's brother and purported employer; and B. Chad Bungard, Counsel to the SSA IG. Respondent called no witnesses.

The SSA IG filed a post-hearing brief (SSA Br.) on March 26, 2014. Respondent also filed her post-hearing brief (R. Br.) on March 26, 2014. Respondent filed a post-hearing reply brief (R. Reply) on April 10, 2014. The SSA IG filed a post-hearing reply brief (SSA Reply) on April 11, 2014. The parties reply briefs were

received on April 14, 2014, and the record was considered closed and the case ready for decision.

II. Discussion

A. Applicable Law

Pursuant to title II of the Act, an individual who has worked in jobs covered by Social Security for the required period of time, who has a medical condition that meets the definition of disability under the Act, and who is unable to work for a year or more because of the disability, may be entitled to monthly cash disability benefits. 20 C.F.R. §§ 404.315-404.373. Pursuant to title XVI of the Act, certain eligible individuals are entitled to the payment of Supplemental Security Income (SSI) on a needs basis. To be eligible for SSI payments, a person must meet U.S. residency requirements and must be: (1) 65 years of age or older; (2) blind; or (3) disabled. Disability under both programs is determined based on the existence of one or more impairments that will result in death or that prevent an individual from doing his or her past work or other work that exists in substantial numbers in the economy for at least one year. 20 C.F.R. §§ 416.202, 416.905, 416.906. Additionally, a person must have limited income and resources to be eligible for SSI. 20 C.F.R. §§ 416.202(c) and (d), 416.1100-.1182, 416.1201-.1266. All assets, other than a car and a primary residence, are considered resources when determining whether an individual has "limited" resources. 20 C.F.R. § 416.1210. The income and resources of a spouse or other individuals in a household are also subject to being considered. 20 C.F.R. §§ 416.1201-.1204; 416.1802. SSI is not at issue

in this case as Respondent received no benefits under that program.

Section 1129(a)(1) of the Act authorizes the imposition of a CMP or an assessment against:

> (a)(1) Any person . . . who –
>
> > (A) makes, or causes to be made, a statement or representation of a material fact, for use in determining any initial or continuing right to or the amount of monthly insurance benefits under title II or benefits or payments under title VIII or XVI, that the person knows or should know is false or misleading,
> >
> > (B) makes such a statement or representation for such use with knowing disregard for the truth, or
> >
> > (C) omits from a statement or representation for such use, or otherwise withholds disclosure of, a fact which the person knows or should know is material to the determination of any initial or continuing right to or the amount of monthly insurance benefits under title II or benefits or payments under title VIII or XVI, if the person knows, or should know, that the statement or representation with such omission is false or misleading or that the withholding of such disclosure is misleading . . . .

The Commissioner of SSA (the Commissioner) delegated the authority of section 1129 of the Act to the IG:

> (a) The Office of the Inspector General may impose a penalty and assessment, as applicable, against any person who it determines in accordance with this part—
>
> (1) Has made, or caused to be made, a statement or representation of a material fact for use in determining any initial or continuing right to or amount of:
>
> (i) Monthly insurance benefits under title II of the Social Security Act; or
>
> (ii) Benefits or payments under title VIII or title XVI of the Social Security Act; and
>
> (2)(i) Knew, or should have known, that the statement or representation was false or misleading, or
>
> (ii) Made such statement with knowing disregard for the truth; or
>
> (3) Omitted from a statement or representation, or otherwise withheld disclosure of, a material fact for use in determining any initial or continuing right to or amount of benefits or payments, which the person knew or

> should have known was material for such use and that such omission or withholding was false or misleading.

20 C.F.R. § 498.102(a). A material fact is a fact that the Commissioner may consider in evaluating whether an applicant is entitled to benefits or payments under titles II, VIII, or XVI of the Act. Act § 1129(a)(2); 20 C.F.R. § 498.101. Individuals who violate section 1129 are subject to a CMP of not more than $5,000 for each false or misleading statement or representation of material fact or failure to disclose a material fact. Violators are also subject to an assessment in lieu of damages, of not more than twice the amount of the benefits or payments made as a result of the statements, representations, or omissions. Act § 1129(a)(1); 20 C.F.R. § 498.103(a).

In determining the amount of the CMP to impose, the SSA IG must consider: (1) the nature of the subject statements and representations and circumstances under which they occurred; (2) the degree of culpability of the person committing the offense; (3) the person's history of prior offenses; (4) the person's financial condition; and (5) such other matters as justice requires. Act § 1129(c); 20 C.F.R. §498.106(a).

Section 1129(b)(2) of the Act specifies that the Commissioner shall not decide to impose a CMP or assessment against a person until that person is given written notice and an opportunity for the determination to be made on the record after a hearing at which the person is allowed to participate. The Commissioner has provided by regulations at 20 C.F.R. pt. 498 that a person against whom a CMP is proposed

by the SSA IG may request a hearing before an ALJ of the Departmental Appeals Board (the Board). The ALJ has jurisdiction to determine whether the person should be found liable for a CMP and/or an assessment and the amount of each. 20 C.F.R. §§ 498.215(a), 498.220(b). The person requesting the hearing, the Respondent, has the burden of going forward and the burden of persuasion with respect to any affirmative defenses and any mitigating circumstances. 20 C.F.R. § 498.215(b)(1). The SSA IG has the burden of going forward as well as the burden of persuasion with respect to all other issues. 20 C.F.R. § 498.215(b)(2). The burdens of persuasion are to be judged by a preponderance of the evidence. 20 C.F.R. § 498.215(c).

B. Issues

Whether there is a basis for the imposition of a CMP pursuant to section 1129(a)(1) of the Act and 20 C.F.R. § 498.102(a).

Whether there is a basis for the imposition of an assessment pursuant to section 1129(a)(1) of the Act and 20 C.F.R. § 498.102(a).

Whether the CMP and assessment proposed are reasonable considering the factors specified by section 1129(c) of the Act and 20 C.F.R. § 498.106(a).

Whether or not Respondent may be liable for an overpayment of Social Security benefits and whether or not she continues to meet the requirements for payment of Social Security benefits are not issues before me.

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the statement of pertinent facts and my analysis. I have carefully considered all the evidence and the arguments of both parties, although not all may be specifically discussed in this decision. I discuss the credible evidence given the greatest weight in my decision-making.[3] I also discuss any evidence that I find is not credible or worthy of weight. The fact that evidence is not specifically discussed should not be considered sufficient to rebut the presumption that I considered all the evidence and assigned such weight or probative value to the credible evidence that I determined appropriate within my discretion as an ALJ. There is no requirement for me to discuss the weight given every piece of evidence considered in this case, nor would it be consistent with notions of judicial economy to do so. Charles H. Koch, Jr., *Admin. L. and Prac.* § 5:64 (3d ed. 2013).

1. Respondent was entitled to receive DIB under section 223 of the Act for at least 24 months.

2. Pursuant to section 221(m)(1)(b) of the Act, the Commissioner is prohibited from considering any work activity of Respondent as evidence that Respondent

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[3] "Credible evidence" is evidence that is worthy of belief. *Black's Law Dictionary* 596 (18th ed. 2004). The "weight of evidence" is the persuasiveness of some evidence compared to other evidence. *Id.* at 1625.

was no longer disabled and no longer entitled to DIB.

3. Respondent's work activity after she received DIB for at least 24 months is not a fact that the Commissioner was permitted to evaluate to determine if Respondent was entitled to continuing receipt of DIB, and therefore, not a material fact within the meaning of section 1129(a)(2) of the Act or 20 C.F.R. § 498.101.

4. Although Respondent failed to report work activity in violation of the regulation, the fact she engaged in work activity was not a material fact and the failure to report is not a basis for the imposition of a CMP or an assessment under section 1129 of the Act.

5. The SSA IG failed to show by a preponderance of the evidence that Respondent knew or should have known that her work activity was a material fact that she failed to report because, pursuant to section 221(m) of the Act, her work activity is not material as a matter of law.

a. Allegations

Counsel to the SSA IG, B. Chad Bungard, notified Respondent, Michelle Valent, by letter dated June 3, 2013, that the SSA IG proposed imposition of a CMP of $100,000 and an assessment of $68,547 against Respondent, pursuant to section 1129 of the Social Security Act (Act) (42 U.S.C. § 1320a-8). The SSA IG

cited as the basis for the CMP and assessment that during the period September 2009 through January 2013, Respondent failed to report to SSA that she worked while she received DIB and she falsely reported during an April 2012 CDR that she had not worked since 2004. The SSA IG notice indicates that the SSA IG determined that Respondent committed 41 separate violations, one violation for each of the 41 months beginning September 2009 and continuing through January 2013, that she omitted or failed to report that she worked as a customer service representative for War Era Veterans Alliance where she earned $400 per week, while collecting DIB payments. The SSA IG notice also indicates that Respondent falsely reported on April 20, 2012, that she had not worked since 2004. The SSA IG advised Petitioner that rather than imposing the maximum CMP of $5,000 per violation and twice the amount of benefits improperly received, he proposed a reduced CMP of $100,000 and an assessment of $68,547, the actual amount of benefits received. SSA Ex. 4. Mr. Bungard testified that the only basis for the CMP was the 41 months from September 2009 through January 2013 that Respondent failed to report the material fact that she worked for War Era Veteran's Alliance. Tr. 361-62.

The SSA IG alleges before me Respondent knowingly withheld material information from SSA for 41 months, from September 2009 through January 2013, by failing to report that she worked for War Era Veterans Alliance. SSA Br. at 10-11. The SSA IG also alleges that Respondent falsely stated to SSA on one occasion that she had not worked since 2004. SSA Br. 12. The SSA IG requests that I approve a combined CMP and

assessment of $ 168,547. SSA Br. at 14; SSA Reply at 10.

SSA has the burden to establish by a preponderance of the evidence, that is, that it is more likely than not, that Respondent failed to report the material fact that he worked while receiving DIB. 20 C.F.R. §§ 498.102(a), 498.215(b)(2) and (c).

b. Facts

The SSA IG evidence shows that Respondent filed for DIB on October 29, 2003. She was determined disabled and entitled to DIB payments with a disability onset date of March 25, 2003, based on the primary diagnosis of affective disorders, which refers to a set of psychiatric diseases including depression, bipolar disorder, and anxiety disorder. Her prior work was as a receptionist or administrative assistant from 1988 to March 2003. A CDR completed on March 31, 2010, resulted in continuation of her entitlement to DIB. In January 2012, the SSA IG received an allegation that Respondent had been working as a customer service representative for War Era Veterans Alliance, LLC since 2009. Respondent was interviewed by a SSA Claims Representative on April 20, 2012. During the interview, Respondent completed forms and statements in which she stated that she had not worked since 2004 and listed no work since 2004. SSA Ex. 9 at 7; SSA Ex. 12 at 1-2. Respondent's maiden name was Michelle L. McCauley. SSA Ex. 12 at 2.

On September 12, 2013, an SSA Technical Expert, Deborah Buchholz, completed a special work determination report. SSA Ex. 12. The Technical

Expert determined that Respondent started working for War Era Veteran's Alliance, owned by Respondent's brother and sister-in-law, Mark and Marianne McCauley, on September 1, 2008.[4] The Technical Expert concluded that Respondent's brother paid her $400 per week, an average of $1733.33 gross pay per month. SSA determined that Respondent's earnings were substantial gainful activity; Respondent's trial work period was September 2008 through May 2009; her entitlement to DIB ended with June 2009; and the last check to which she was entitled was issued for August 2009. SSA determined that Respondent was overpaid $49,795.90 in benefits for herself and $15,608.00 for her daughter. SSA Ex. 12 at 8; SSA Ex. 1 at 22. The amount of the overpayment to Respondent is different in this document than the amount stated in SSA Ex. 1 at 21-22, and SSA Ex. 3 at 12.

SSA notified Respondent by letter dated December 5, 2012 that based on review of her work and earnings for March 2003 through December 2012 she may not be eligible for DIB payments beginning with September 2009 and continuing thereafter. Respondent was invited to send in information within ten days. SSA Ex. 3 at 1. SSA advised Respondent that SSA records show that Respondent worked from January 2003 to December 2004 for Hanover Grove Consumer Housing and from September 2008 and continuing for War Era Veterans Alliance. SSA Ex. 3 at 2. The SSA letter advised Respondent that her trial work period was September 2008 through May 2009, with continuing

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[4] The registered agent for War Era Veterans Alliance, LLC is Marianne McCauley. SSA Ex. 14; R. Ex. 1 at 1; R. Ex. 3.

entitlement to DIB during that period. SSA Ex. 3 at 3. SSA notified Respondent by letter dated January 14, 2013, that her entitlement to DIB payments ended beginning September 2009. SSA Ex. 3 at 6. The SSA notice advised Respondent that because her checks were not stopped until January 2013, she was overpaid $52,938.90. SSA Ex. 3 at 7. Respondent was also advised by a letter from SSA dated January 14, 2013, that her daughter was no longer eligible to receive payments, and that her daughter was overpaid $15,608 in benefits. SSA Ex. 3 at 12.

SA Kathryn Krieg prepared an initial report of investigation for the period February 13, 2012 to June 8, 2012. The case was assigned to her by RAC Lowder on February 13, 2012. Subsequently, she obtained a copy of Respondent's Michigan driver's license photograph and her address information from the license. She determined that Respondent was receiving DIB payments, and that she had no reported wages since 2004. On or about March 14, 2012, she conducted surveillance of Respondent's home in Macomb, Michigan and the War Era Veterans Alliance office in Chesterfield Township, Michigan, where Respondent was reportedly working. Her report does not indicate that she saw Respondent or established her presence at either location. SSA Ex. 1 at 2-3. SA Krieg opined that Respondent may have been working from home. On April 2, 2012, she referred the allegations against Respondent to SSA for a CDR and more development. Tr. 124-25; SSA 1 at 3. On or about May 9, 2012, SA Krieg received a copy of a letter from Alan Watt to the SSA IG with other documents. On May 10, 2012, SA Krieg conducted more surveillance at Respondent's

residence and the War Era Veterans Alliance. Her report fails to show that she saw Respondent or established her presence at either location. On May 23, 2012, she interviewed Alan Watt about his allegations that Respondent was working for War Era Veterans Alliance. Watt told her that Respondent either worked at the office or at home. Watt stated that Respondent's brother, Mark McCauley owns War Era Veterans Alliance and that it was common knowledge that Respondent was collecting Social Security. Watt told SA Krieg that probably half the employees are paid under the table. He told SA Krieg that he believed Respondent was paid $10 to $15 per hour and worked full-time or close to full-time. He told SA Krieg that he believed that Respondent was already working for War Era Veterans Alliance when he started in May 2009. He quit working for War Era Veterans Alliance on April 18, 2011, and that was his last contact with Respondent. SSA Ex. 1 at 1-6.

Alan Watt testified consistent with the statements recorded by SA Krieg. He admitted in response to my questions at hearing that he was only present in the Michigan office one or two days a month from June 2009 through August 2010, for one to four hours at a time. He estimated that Respondent was at the office 50 to 75 percent of the time that he was present. Tr. 191-93. He also testified that he had contact with Respondent when he called in and she answered the phone on roughly a daily basis until August 2010 and then about 30 percent of the time when he called later in the day from August 2010 until he left the company in April 2011. Tr. 193-95. I find that Mr. Watt's credibility regarding his assertions as to Respondents

work activity is significantly limited by his by his limited opportunity to observe Respondent and her activities.

SA Brian Reitz prepared a Status Report for the period June 8, 2012, in which he recorded an interview with Aimee Konal who worked at War Era Veterans Alliance. Konal told SA Reitz and his partner, SA Judith Amaro, that she was not an official employee but worked there off and on for two years and was paid under the table. Konal told the agents that Respondent answered the telephone for War Era Veterans Alliance from her home. Konal told the agents that when she started at War Era Veterans Alliance Respondent worked in the office answering phone about 32 hours or more each week, earning $8 to $10 per hour, but for the past year she had been working from home. Konal did not know how much Respondent earned or how many hours she worked, but she believed she worked a lot based on work-related messages she received from Respondent. SSA Ex. 1 at 9-10. Aimee Konal completed a written sworn statement which is consistent with the agent's summary. SSA Ex. 7.

SA Krieg completed a status report for the period June 8, 2012 to June 12, 2012, in which she records interviews with Respondent and others. On June 8, 2012, SA Krieg, RAC Lowder, SA Amaro, and SA Reitz interviewed Jacquie Scalet, and employee of War Era Veterans Alliance at the War Era Veterans Alliance office. Scalet told the agents that Respondent helped War Era Veterans Alliance by answering the phone from her home. Scalet denied knowing Respondent's hours or pay. Scalet stated that Respondent used to

work in the office but that had ended in Spring 2011 when Respondent started working from her home. Scalet stated that she started working for War Era Veterans Alliance in 2010 and that Respondent worked there prior to that. Scalet provided contact information for Mark McCauley. SSA Ex. 1 at 11-13; Tr. 53, 106-07.

SA Krieg and RAC Lowder interviewed Respondent at her residence on June 8, 2012. Respondent denied working for War Era Veterans Alliance but stated that a year prior she had trained some people and that she answered the phones a few times for the business. Respondent denied knowledge of her photograph, biography, or a description of her work on the War Era Veterans Alliance website. She stated that her voice is on the War Era Veterans Alliance telephone recording. Respondent told the agents that she will answer the telephone for War Era Veterans Alliance when an employee is sick and that she does so from the office. Respondent denied having an email associated with War Era Veterans Alliance. Respondent admitted that she had a specific phone for answering War Era Veterans Alliance phone calls at home. Respondent stated that Mark McCauley has paid some bills for her. She denied working for War Era Veterans Alliance except for here and there and she denied receiving cash payments for work or money from McCauley. Respondent stated that she was last at the War Era Veteran Alliance office in 2010 when she filled-in for Adrianne Watt and that she would fill in approximately two to three times a week. She stated that she did tell neighbors that she worked. SSA Ex. 1 at 13-15; Tr. 54-59, 109-15, 146-48.

SA Krieg and RAC Lowder interviewed Respondent's husband on June 8, 2012. He denied that Respondent worked for War Era Veterans Alliance for pay. SSA Ex. 1 at 15.

SA Krieg and SA Amaro interviewed Mark McCauley on June 8, 2012. McCauley told them that Respondent is his sister and he does not consider her an employee of War Era Veterans Alliance. He stated that he gives Respondent money as he promised his dad to take care of her. McCauley stated that Respondent had no schedule or set hours; he did give her a phone that she could answer if she choose to; and that she could not work in an office environment. He stated that he gifts her $12,000 per year whether or not she answers a phone; but he subsequently stated that he gives her $400 per week, which would amount to $20,800. McCauley referred to Respondent as Missy. He agreed that Respondent was listed on the War Era Veterans Alliance website as "Vale." McCauley admitted that Respondent did answer phones for the business and scheduled people to attend the financial classes he taught but he denied knowing how much she actually worked. SSA Ex. 1 at 15-17; Tr. 98, 115-21.

SA Krieg prepared a status report for the period October 10, 2012 to January 14, 2013. SA Krieg reported that Deborah Buchholz, an SSA employee, determined that Respondent was overpaid $68,546.90, which included an overpayment of DIB of $52,938.90 and an overpayment of CIB to her child in the amount of $15,608. SSA 1 at 21-22. The SSA IG has offered no evidence of the actual amount of monthly DIB and CIB

benefits Respondent and her child received during the pertinent period.

SA Krieg referred the matter to the US Attorney but criminal prosecution was declined because the evidence was insufficient to show that the money given to Respondent was earnings rather than a gift. SSA Ex. 1 at 21-22; SSA Ex. 2. SA Krieg referred the matter to the SSA IG and closed her investigation on February 12, 2013. SSA Ex. 1 at 23. RAC Adam Lowder sent a letter dated January 11, 2013, to the US Attorney, Detroit Michigan to confirm that the US Attorney declined to prosecute Respondent. RAC Lowder summarized in his letter some of the investigative findings, including that DIB payments to Respondent were terminated in January 2013, resulting in an overpayment of $68,546. SSA Ex. 2 at 1.[5]

Respondent does not dispute that she signed a statement on April 20, 2012, in which she stated "I have not worked since 2004." SSA Ex. 8. Respondent also does not dispute that on April 20, 2012, she completed a "Work Activity Report – Employee" on which she wrote "I have not worked since 2004." SSA Ex. 9 at 7. She also checked the no box in response to the question of whether she had any "employment income or wages" since her disability onset date. SSA Ex. 9 at 1. Mr. Bungard testified that the checked no box and the statement on the "Work Activity Report –

[5] SA Krieg provided a declaration dated December 10, 2013, which is consistent with her investigative reports. SSA Ex. 16. RAC Adam Lowder also submitted declaration that is consistent with SA Krieg's investigative reports. SSA Ex. 17.

Employee" were not a basis for the CMP proposed. He testified that the only basis for the CMP was the 41 months from September 2009 through January 2013 that Respondent failed to report the material fact that she worked for War Era Veteran's Alliance. Tr. 361-62.

Respondent does not dispute that on June 7, 2012, she was listed on the War Era Veterans Alliance website as Michelle Vale and described as the "voice of War Era Veterans" who had been "taking calls and managing all War Era Veterans Alliance calendars for over four years." SSA Ex. 13 at 58.

Mark McCauley submitted a letter in which he stated that he gifted money to Respondent and he asked that she do little things for War Era Veterans Alliance to help her sense of self-worth. R. Ex. 2. Mr. McCauley testified that he and his wife worked together to form War Era Veterans Alliance but his wife is the owner. Tr. 254-55. He admitted that it was possible that he told SA Krieg that Respondent answered phones and scheduled classes for him. He admitted that he gave Respondent a phone, albeit for her personal use. He also admitted that calls for War Era Veterans Alliance would ring on the phone that he provided Respondent and she could answer if she chose to. Tr. 257-59, 282-83. He explained that he gave her a phone that was billed to him with all the other phones he used for his homes and offices. Tr. 284-85. He testified that he never paid Respondent but gifted her about $12,000 per year, which he understood to be the Internal Revenue Service limit at the time. Tr. 262-63, 277. He agreed that the "Michelle Vale" listed on the website (SSA Ex. 13 at 58) was his sister, Michelle Valent, but he

testified that he had nothing to do with creating or maintaining the website. Tr. 264-64. He testified that War Era Veterans Alliance was not his company and he had nothing to do with paying staff, but he did not deny that he may have stated to SA Krieg that one War Era Veterans Alliance employee may have been paid in cash and that he would ensure that they were being paid legally in the future. Tr. 268-69. He testified that he was told by an SSA representative that it was permissible to give his sister money. Tr. 270. When asked about whether he gave his sister $400 per week or $12,000 per year, which would have been less than $400 per week, he testified that he may have been referring to giving Respondent $400 one week but he could not recall with certainty. Tr. 271-73, 278-79.

Respondent testified that she did not work for War Era Veterans Alliance and that she only trained one person on how to operate the telephones. She testified that she was given a phone to use at home by War Era Veterans Alliance but it was so she could reach the McCauley's. She testified that she only answered as War Era Veterans Alliance when told to do so by Marianne McCauley. She testified that she did record the stories of some veterans that called. She denied that Mark McCauley gave her money but testified that he did pay some of her bills. She admitted that she did airport runs for the McCauley's. Tr. 206-52.

c. Analysis

The SSA IG proposes to impose a CMP of $100,000 for the 41 months from September 209 through January 2013, during which Respondent failed to report that she worked for War Era Veterans Alliance. The SSA IG

also proposes an assessment in lieu of damages in the amount of $68,547, the amount of DIB and CIB payments Respondent and her child allegedly received during the pertinent period. I conclude that there is no basis to impose either a CMP or an assessment.

A beneficiary entitled to cash benefits for a period of disability, such as Respondent, is required to promptly notify SSA when his or her condition improves; when he or she returns to work; when he or she increases the amount of work performed; or when earnings increase. 20 C.F.R. § 404.1588(a). The term "work" as used in 20 C.F.R. § 404.1588(a) is not specifically defined in either the Act or the regulations. According to 20 C.F.R. § 404.1571:

> The work, without regard to legality, that you have done during any period in which you believe you are disabled may show that you are able to work at the substantial gainful activity level. If you are able to engage in substantial gainful activity, we will find that you are not disabled. . . . Even if the work you have done was not substantial gainful activity, it may show that you are able to do more work than you actually did. We will consider all of the medical and vocational evidence in your file to decide whether or not you have the ability to engage in substantial gainful activity.

This regulation 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. Therefore, the regulation supports an interpretation that all work activity should be reported – 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. Tr. 364. However, 20 C.F.R. § 404.1572 creates potential confusion about whether all work activity need be reported. The regulation defines "substantial gainful activity" as work activity that is both substantial and gainful. "Substantial work activity" is defined as significant physical or mental activity. "Gainful work activity" is work of the kind that is usually done for pay or profit whether or not there is pay or profit. 20 C.F.R. § 404.1572(a) – (b). However, the regulatory language suggests that not all work activity need be reported, even if it rises to the level of substantial gainful activity. The regulation states that, generally, hobbies, activities of daily living, household tasks, club activities, school attendance, and social programs are not considered substantial gainful activity. 20 C.F.R. § 404.1572(c); Social Security Ruling 83-33: *Titles II and XVI: Determining Whether Work Is Substantial Gainful Activity –Employees.* The evidence does not show that Respondent was actually informed about what activities amounted to work within the meaning of the regulation for which reporting was required by 20 C.F.R. § 404.1588(a). Respondent argues 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. P. Br. 2-4. However, the broad reading of the regulation 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.

Respondent's argument is that she did no work for War Era Veterans Alliance. Respondent's argument is not persuasive. Respondent and Mark McCauley admitted in testimony that Respondent answered the phone for War Era Veterans Alliance and she did some scheduling, at least occasionally. Therefore, I conclude that Respondent did engage in some work activity for the benefit of War Era Veterans Alliance. The preponderance of the evidence does not show whether Respondent was actually paid for her work or that she only received gifts from her brother, Mark McCauley unrelated to work at War Era Veterans Alliance. The evidence also does not show that Respondent's work rose to the level of "substantial gainful activity;" or when and how frequently gainful work activity was actually performed. It is not necessary to resolve these specific fact issues given the decision in this case.

Pursuant to section 1129(a)(1)(C) of the Act and 20 C.F.R. § 498.102(a), the SSA IG may impose a CMP and an assessment in lieu of damages against anyone, if the following elements are satisfied:

(1) The person:
(a) omits from a statement or representation a **material fact** or otherwise withholds disclosure of a **material fact**
(b) for use in determining
(i) an initial or a continuing right to DIB benefits, or

(ii) the amount of those benefits; and

(2) The person knows or should know the fact is **material** to the determination of
(a) any initial or continuing right to, or
(b) the amount of monthly benefits; and

(3) The person knows, or should know, that
(a) the statement or representation with such omission is false or misleading, or
(b) the withholding of such disclosure of the **material fact** is misleading.

Act § 1129(a)(1)(C); 20 C.F.R. § 498.102(a). A material fact is a fact that the Commissioner may consider in evaluating whether an applicant is entitled to benefits or payments under the Act. Act § 1129(a)(2); 20 C.F.R. § 498.101. Generally, 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. 20 C.F.R. §§ 404.315-.321, 404.401(a), 404.1505, 404.1510, 404.1589-.1591. A statement of fact or an omitted fact is material under the Act and most federal statutes, if it "has the natural tendency to influence, or was capable of influencing the decision" of the Commissioner. *U.S. v. Miller*, 621 F.Supp.2d 323, at 331 (W.D. Va. 2009) *aff'd* 394 Fed. App'x 18 (4th Cir. 2010), *citing Kungys v. U.S.*, 485 U.S. 759, 770 (1988). Whether a statement of fact or omitted fact is material does not depend on whether the Commissioner was deceived or whether any decision would have been different. *U.S. v. Henderson*, 416 F.3d, 686, at 694 (8th Cir. 2005). Therefore, normally I 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.

Respondent benefits however from a provision of the Act not addressed by the SSA IG, specifically section 221(m) of the Act, which provides:

> (1) In any case where an individual entitled to disability insurance benefits under section 223 or to monthly insurance benefits under section 202 based on such individual's disability (as defined in section 223(d)) has received such benefits for at least 24 months—
>
> > (A) no continuing disability review conducted by the Commissioner may be scheduled for the individual solely as a result of the individual's work activity;
> >
> > **(B) no work activity engaged in by the individual may be used as evidence that the individual is no longer disabled;** and
> >
> > (C) no cessation of work activity by the individual may give rise to a presumption that the individual is unable to engage in work.
>
> (2) An individual to which paragraph (1) applies shall continue to be subject to—

> (A) continuing disability reviews on a regularly scheduled basis that is not triggered by work; and
>
> (B) 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.

Act § 221(m) (emphasis added). The foregoing section of the Act is implemented, at least in part, by 20 C.F.R. § 404.1590(i), 71 Fed. Reg. 66,840, 66,843-66,850 (Nov. 17, 2006).

Respondent was found disabled and entitled to DIB with an onset date of March 25, 2003 (SSA Ex. 12 at 1); which is more than six years before September 2009, the earliest date that the SSA IG alleges Respondent engaged in gainful work activity that she failed to report (SSA Ex. 4). Pursuant to section 221(m)(1)(B) of the Act, Congress prohibited the Commissioner from considering work activity of an individual entitled to DIB for at least 24 months, as evidence that the individual is no longer disabled. Because Congress prohibited consideration of Respondent's work activity as evidence that she was no longer disabled, her work activity is not a fact that the Commissioner may consider in evaluating whether Respondent continued to be entitled to benefits or payments under the Act. Therefore, Respondent's work activity is not material within the meaning section 1129(a)(2) of the Act and 20 C.F.R. § 498.101. Accordingly, Respondent's failure to report her work activity for War Era Veterans Alliance

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).[6]

III. Conclusion

For the foregoing reasons, I conclude that there is no basis for the imposition of a CMP or assessment in this case.

/s/
Keith W. Sickendick
Administrative Law Judge

STATEMENT OF APPEAL RIGHTS PURSUANT TO 20 C.F.R. § 498.221

> (a) Any party may appeal the decision of the ALJ to the DAB by filing a notice of appeal with the DAB within 30 days of the date of service of the initial decision. The DAB may extend the initial 30-day period for a period of time not to exceed 30 days if a party files with the DAB a request for an extension within the initial 30-day period and shows good cause.
>
> * * * *

[6] Section 221(m) of the Act does not relieve Respondent of her obligation to report work activity to the Commissioner pursuant to 20 C.F.R. § 404.1588(a). Section 221(m) also does not prevent the Commissioner from considering whether Respondent was no longer entitled to DIB because she engaged in substantial gainful activity.

(c) A notice of appeal will be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions, and identifying which finding of fact and conclusions of law the party is taking exception to. Any party may file a brief in opposition to exceptions, which may raise any relevant issue not addressed in the exceptions, within 30 days of receiving the notice of appeal and accompanying brief. The DAB may permit the parties to file reply briefs.
(d) There is no right to appear personally before the DAB, or to appeal to the DAB any interlocutory ruling by the ALJ.
(e) No party or person (except employees of the DAB) will communicate in any way with members of the DAB on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.
(f) The DAB will not consider any issue not raised in the parties's briefs, nor any issue in the briefs that could have been, but was not, raised before the ALJ.
(g) If any party demonstrates to the satisfaction of the DAB that additional evidence not presented at such hearing is relevant and material and that there were reasonable grounds for the failure to

> adduce such evidence at such hearing, the DAB may remand the matter to the ALJ for consideration of such additional evidence.
>
> * * * *
>
> (i) When the DAB reviews a case, it 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.(j) Within 60 days after the time for submission of briefs or, if permitted, reply briefs has expired, the DAB will issue to each party to the appeal and to the Commissioner a copy of the DAB's recommended decision and a statement describing the right of any respondent who is found liable to seek judicial review upon a final decision.

Respondent's request for review by the DAB automatically stays the effective date of this decision. 20 C.F.R. § 498.223.

APPENDIX G

OIG **Office *of the* Inspector General**
SOCIAL SECURITY ADMINISTRATION

WEB: OIG.SSA.GOV | FACEBOOK: OIGSSA |
TWITTER:@THESSAOIG | YOUTUBE: THESSAOIG
6401 SECURITY BOULEVARD |
BALTIMORE, MD 21235-0001

JUN 03 2013

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Ms. Michelle Valent
[redacted]

Dear Ms. Valent:

Pursuant to the authority delegated by the Commissioner to the Inspector General of the Social Security Administration (SSA), I am proposing to impose a penalty of $100,000 and an assessment in lieu of damages in the amount of $68,547 for a total civil monetary penalty of $168,547 against you. This action is authorized by section 1129 of the Social Security Act (Act), 42 U.S.C. § 1320a-8, as implemented by 20 C.F.R. § 498.100-224.

This proposal is based upon my determination that you withheld material information from SSA, which you knew or should have known, was false or misleading.

During the period from September 2009 through January 2013, you failed to report to SSA that you worked at the War Era Veterans Alliance, which is owned by your brother, Mark McCauley. In addition, during an April 2012 Continuing Disability Review (CDR), you falsely stated that you had not worked since 2004. You failed to report your work activity to facilitate the improper receipt of Title II Disability Insurance Benefits (DIB).

Section 1129 of the Act authorizes the imposition of civil monetary penalties of up to $5,000 for each false or misleading statement or representation of a material fact for use in determining an initial or continuing right to, or amount of, monthly insurance benefits under Title II or benefits or payments under Title XVI of the Act. Section 1129 of the Act also authorizes the imposition of an assessment in lieu of damages of up to twice the amount of benefits or payments paid as a result of the false or misleading statements and/or representations.

In addition, Section 1129 of the Act provides that in any month an individual withholds disclosure of a material fact, such omission is considered a false statement and/or misrepresentation. Therefore, your failure to report your work activity from September 2009 through January 2013 constitutes 41 separate omissions.

In determining the amount of the civil monetary penalty and assessment to be proposed against you, I have considered the following aggravating and mitigating factors, as specified in 20 C.F.R. § 498.106:

First, I have considered the nature of the material withholdings and the circumstances under which they occurred, and have determined that aggravating circumstances affect your case. During the period from September 2009 through January 2013, you failed to report that you worked as a customer service representative for the War Era Veterans Alliance while simultaneously collecting disability benefits. This company is owned by Mark McCauley, your brother, who paid you $400 per week. Additionally, on an April 20, 2012 SSA-795 *Statement of Claimant* and an SSA-821-BK *Work Activity Report,* you falsely stated that you had not worked since 2004. On April 30, 2012, an SSA claims representative contacted your place of employment and was told that you work there "every day from open to close" and that you are known as "Ms. Dependable" at work. Consequently, you improperly received $68,547 in DIB benefits that you were not entitled to receive.

Second, I have considered the degree of your culpability in this offense and concluded that it is substantial. I find that your actions were calculated to defraud SSA of benefits to 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.

Third, I have considered your history of prior offenses in connection with the Social Security Administration's programs. This is your first offense.

Fourth, I have considered your financial condition. Based on the information available to me, I believe that the imposition of a reduced civil monetary penalty and assessment will not affect your financial condition. On March 7, 2013, our office sent you an initial letter explaining that you could be subject to a civil action for false and/or misleading statements and/or omissions, and that you should contact our office to provide any additional information that you felt was important. You were informed that you could fill out a financial disclosure form and return it to my office if you wanted your ability to pay to be taken into consideration. On March 11, 2013, you signed for the certified letter at your residence. Although you had ample opportunity, you failed to provide my office with the financial disclosure form. However, as this is your first offense, I have reduced the penalty from a maximum penalty of $205,000 (41 omissions times $5,000) to $100,000. Additionally, I have reduced the assessment from a maximum assessment of $137,094 (two times the overpayment of $68,547) to $68,547. After considering the circumstances enumerated above, I have determined that a penalty of $100,000 and an assessment in lieu of damages in the amount of $68,547 would be appropriate.

I have considered whether in the interest of justice there are other factors that I should weigh prior to determining the appropriate civil monetary penalty

and assessment. I am unaware of any other such factors.

If you choose not to contest the proposed civil monetary penalty and assessment, you should submit a written statement accepting its imposition within 60 days of receipt of this notice, and forward a cashier's or certified check in the amount of $168,547 made payable to the "Social Security Administration" to the address listed below. **You may also contact my office to discuss the possibility of settlement terms that would permit smaller payments over time.**

Pursuant to section 1129(e)(1) of the Act, 42 U.S.C. § 1320a-8(e)(1), the civil monetary penalty and assessment may also be recovered by: (1) a civil action in the United States District Court; (2) reduction in the tax refund to which you are entitled as permitted under section 3720A of Title 31, United States Code; (3) decreasing any payment due you of monthly insurance benefits under Title II or payments under Title VIII or XVI of the Act; (4) authorities provided under the Debt Collection Act of 1982, as amended, to the extent applicable to your debt; (5) deducting the amount you owe from any amount owed to you by the United States; or (6) by any combination of the foregoing.

If you wish to contest this proposed civil monetary penalty and assessment, you have the right to a hearing before an Administrative Law Judge. 20 C.F.R. §§ 498.109 and 498.202. If you desire such a hearing, you must file a written request within 60 days of the date of receipt of this letter. Such a request must be accompanied by an answer to this letter that admits or

denies your liability and states any defense upon which you intend to rely. 20 C.F.R. § 498.202. The request should also state any reasons that you contend should result in a reduction or modification of the proposed civil monetary penalty and damages.

The procedures for requesting a hearing are set forth in 20 C.F.R. part 498, a copy of which is enclosed. If **you do not request a hearing within the 60-day period, the proposed civil monetary penalty and assessment will be imposed upon you. You will have no right to an administrative appeal after that time.**

A request for hearing should be made in writing to:

U.S. Department of Health and Human Services
Departmental Appeals Board, MS 6132
Civil Remedies Division
ATTN: Karen Robinson, Division Director
330 Independence Avenue, S.W.
Cohen Building, Room G-644
Washington, D.C. 20201

In addition, please make a copy of your request for a hearing before the Departmental Appeals Board and send it to:

Office of the Inspector General,
Social Security Administration
Office of the Counsel to the Inspector General
ATTN: Penny L. Collender, Esq.
26 Federal Plaza
Room 3737
New York, NY 10278

If your attorney would like to discuss this matter further, please call Penny Collender, Attorney, of my staff at (212) 264-1334.

Sincerely,

/s/B. Chad Bundgard
B. Chad Bungard
Counsel to the Inspector General

Enclosure

APPENDIX H

STATUTES and REGULATIONS

5 U.S.C. §553. Rule making

*****

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and

public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

*****

5 U.S.C. §554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this

title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

*****

5 U.S.C. §556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under

statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;

(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

(8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;

(9) dispose of procedural requests or similar matters;

(10) make or recommend decisions in accordance with section 557 of this title; and

(11) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In

rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

*****

5 U.S.C. §706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

*****

42 U.S.C. §421. Disability determinations

*****

(i) REVIEW OF DISABILITY CASES TO DETERMINE CONTINUING ELIGIBILITY; PERMANENT DISABILITY CASES; APPROPRIATE NUMBER OF CASES REVIEWED; REPORTING REQUIREMENTS

(1) In any case where an individual is or has been determined to be under a disability, the case shall be reviewed by the applicable State agency or the Commissioner of Social Security (as may be appropriate), for purposes of continuing eligibility, at least once every 3 years, subject to paragraph (2); except that where a finding has been made that such disability is permanent, such reviews shall be made at such times as the Commissioner of Social Security determines to be appropriate. Reviews of cases under the preceding sentence shall be in addition to, and shall not be considered as a substitute for, any other reviews which are required or provided for under or in the administration of this subchapter.

(2) The requirement of paragraph (1) that cases be reviewed at least every 3 years shall not apply to the extent that the Commissioner of Social Security

determines, on a State-by-State basis, that such requirement should be waived to insure that only the appropriate number of such cases are reviewed. The Commissioner of Social Security shall determine the appropriate number of cases to be reviewed in each State after consultation with the State agency performing such reviews, based upon the backlog of pending reviews, the projected number of new applications for disability insurance benefits, and the current and projected staffing levels of the State agency, but the Commissioner of Social Security shall provide for a waiver of such requirement only in the case of a State which makes a good faith effort to meet proper staffing requirements for the State agency and to process case reviews in a timely fashion. The Commissioner of Social Security shall report annually to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives with respect to the determinations made by the Commissioner of Social Security under the preceding sentence.

(3) The Commissioner of Social Security shall report annually to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives with respect to the number of reviews of continuing disability carried out under paragraph (1), the number of such reviews which result in an initial termination of benefits, the number of requests for reconsideration of such initial termination or for a hearing with respect to such termination under subsection (d), or both, and the number of such initial terminations

which are overturned as the result of a reconsideration or hearing.

(4) In any case in which the Commissioner of Social Security initiates a review under this subsection of the case of an individual who has been determined to be under a disability, the Commissioner of Social Security shall notify such individual of the nature of the review to be carried out, the possibility that such review could result in the termination of benefits, and the right of the individual to provide medical evidence with respect to such review.

(5) For suspension of reviews under this subsection in the case of an individual using a ticket to work and self-sufficiency, see section 1320b–19(i) of this title.

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(m) WORK ACTIVITY AS BASIS FOR REVIEW

(1) In any case where an individual entitled to disability insurance benefits under section 423 of this title or to monthly insurance benefits under section 402 of this title based on such individual's disability (as defined in section 423(d) of this title) has received such benefits for at least 24 months—

(A) no continuing disability review conducted by the Commissioner may be scheduled for the individual solely as a result of the individual's work activity;

(B) no work activity engaged in by the individual may be used as evidence that the individual is no longer disabled; and

(C) no cessation of work activity by the individual may give rise to a presumption that the individual is unable to engage in work.

(2) An individual to which paragraph (1) applies shall continue to be subject to—

(A) continuing disability reviews on a regularly scheduled basis that is not triggered by work; and

(B) termination of benefits under this subchapter in the event that the individual has earnings that exceed the level of earnings established by the Commissioner to represent substantial gainful activity.

42 U.S.C. §423. Disability insurance benefit payments

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(d) "DISABILITY" DEFINED

(1) The term "disability" means—

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or

(B) in the case of an individual who has attained the age of 55 and is blind (within the meaning of "blindness" as defined in section 416(i)(1) of this title), inability by reason of such blindness to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he has previously engaged with some regularity and over a substantial period of time.

(2) For purposes of paragraph (1)(A)—

(A) An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

(B) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Commissioner

of Social Security shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Commissioner of Social Security does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

(C) An individual shall not be considered to be disabled for purposes of this subchapter if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled.

(3) For purposes of this subsection, a "physical or mental impairment" is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

(4)

(A) The Commissioner of Social Security shall by regulations prescribe the criteria for determining when services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity. No individual who is blind shall be regarded as having demonstrated an ability to engage in substantial gainful activity on the basis of earnings that do not exceed an amount

equal to the exempt amount which would be applicable under section 403(f)(8) of this title, to individuals described in subparagraph (D) thereof, if section 102 of the Senior Citizens' Right to Work Act of 1996 had not been enacted. Notwithstanding the provisions of paragraph (2), an individual whose services or earnings meet such criteria shall, except for purposes of section 422(c) of this title, be found not to be disabled. In determining whether an individual is able to engage in substantial gainful activity by reason of his earnings, where his disability is sufficiently severe to result in a functional limitation requiring assistance in order for him to work, there shall be excluded from such earnings an amount equal to the cost (to such individual) of any attendant care services, medical devices, equipment, prostheses, and similar items and services (not including routine drugs or routine medical services unless such drugs or services are necessary for the control of the disabling condition) which are necessary (as determined by the Commissioner of Social Security in regulations) for that purpose, whether or not such assistance is also needed to enable him to carry out his normal daily functions; except that the amounts to be excluded shall be subject to such reasonable limits as the Commissioner of Social Security may prescribe.

(B) In determining under subparagraph (A) when services performed or earnings derived from services demonstrate an individual's ability

to engage in substantial gainful activity, the Commissioner of Social Security shall apply the criteria described in subparagraph (A) with respect to services performed by any individual without regard to the legality of such services.

(C)

(i) Subject to clause (ii), in determining when earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity, such earnings shall be presumed to have been earned—

(I) in making a determination of initial entitlement on the basis of disability, in the month in which the services were performed from which such earnings were derived; and

(II) in any other case, in the month in which such earnings were paid.

(ii) A presumption made under clause (I) shall not apply to a determination described in such clause if—

(I) the Commissioner can reasonably establish, based on evidence readily available at the time of such determination, that the earnings were earned in a different month than when paid; or

(II) in any case in which there is a determination that no benefit is payable

due to earnings, after the individual is notified of the presumption made and provided with an opportunity to submit additional information along with an explanation of what additional information is needed, the individual shows to the satisfaction of the Commissioner that such earnings were earned in another month.

(5)

(A) An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Commissioner of Social Security may require. An individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished under this paragraph (including statements of the individual or his physician as to the intensity and persistence of such pain or other symptoms which may reasonably be accepted as consistent with the medical signs and findings), would lead to a conclusion that

the individual is under a disability. Objective medical evidence of pain or other symptoms established by medically acceptable clinical or laboratory techniques (for example, deteriorating nerve or muscle tissue) must be considered in reaching a conclusion as to whether the individual is under a disability. Any non-Federal hospital, clinic, laboratory, or other provider of medical services, or physician not in the employ of the Federal Government, which supplies medical evidence required and requested by the Commissioner of Social Security under this paragraph shall be entitled to payment from the Commissioner of Social Security for the reasonable cost of providing such evidence.

(B) In making any determination with respect to whether an individual is under a disability or continues to be under a disability, the Commissioner of Social Security shall consider all evidence available in such individual's case record, and shall develop a complete medical history of at least the preceding twelve months for any case in which a determination is made that the individual is not under a disability. In making any determination the Commissioner of Social Security shall make every reasonable effort to obtain from the individual's treating physician (or other treating health care provider) all medical evidence, including diagnostic tests, necessary in order to properly make such determination, prior to evaluating

medical evidence obtained from any other source on a consultative basis.

42 U.S.C. §426. Entitlement to hospital insurance benefits

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(b) INDIVIDUALS UNDER 65 YEARS Every individual who—

(1) has not attained age 65, and

(2)

(A) is entitled to, and has for 24 calendar months been entitled to, (i) disability insurance benefits under section 423 of this title or (ii) child's insurance benefits under section 402(d) of this title by reason of a disability (as defined in section 423(d) of this title) or (iii) widow's insurance benefits under section 402(e) of this title or widower's insurance benefits under section 402(f) of this title by reason of a disability (as defined in section 423(d) of this title), or

(B) is, and has been for not less than 24 months, a disabled qualified railroad retirement beneficiary, within the meaning of section 231f(d) of title 45, or

(C)

(i) has filed an application, in conformity with regulations of the Secretary, for hospital insurance benefits under part A of

subchapter XVIII pursuant to this subparagraph, and

(ii) would meet the requirements of subparagraph (A) (as determined under the disability criteria, including reviews, applied under this subchapter), including the requirement that he has been entitled to the specified benefits for 24 months, if—

(I) medicare qualified government employment (as defined in section 410(p) of this title) were treated as employment (as defined in section 410(a) of this title) for purposes of this subchapter, and

(II) the filing of the application under clause (i) of this subparagraph were deemed to be the filing of an application for the disability-related benefits referred to in clause (i), (ii), or (iii) of subparagraph (A),

shall be entitled to hospital insurance benefits under part A of subchapter XVIII for each month beginning with the later of (I) July 1973 or (II) the twenty-fifth month of his entitlement or status as a qualified railroad retirement beneficiary described in paragraph (2), and ending (subject to the last sentence of this subsection) with the month following the month in which notice of termination of such entitlement to benefits or status as a qualified railroad retirement beneficiary described in paragraph (2) is mailed to him, or if earlier, with

the month before the month in which he attains age 65. In applying the previous sentence in the case of an individual described in paragraph (2)(C), the "twenty-fifth month of his entitlement" refers to the first month after the twenty-fourth month of entitlement to specified benefits referred to in paragraph (2)(C) and "notice of termination of such entitlement" refers to a notice that the individual would no longer be determined to be entitled to such specified benefits under the conditions described in that paragraph. For purposes of this subsection, an individual who has had a period of trial work which ended as provided in section 422(c)(4)(A) of this title, and whose entitlement to benefits or status as a qualified railroad retirement beneficiary as described in paragraph (2) has subsequently terminated, shall be deemed to be entitled to such benefits or to occupy such status (notwithstanding the termination of such entitlement or status) for the period of consecutive months throughout all of which the physical or mental impairment, on which such entitlement or status was based, continues, and throughout all of which such individual would have been entitled to monthly insurance benefits under this subchapter or as a qualified railroad retirement beneficiary had such individual been unable to engage in substantial gainful activity, but not in excess of 78 such months. In determining when an individual's entitlement or status terminates for purposes of the preceding sentence, the term "36 months" in the second sentence of section 423(a)(1) of this title, in

section 402(d)(1)(G)(i) of this title, in the last sentence of section 402(e)(1) of this title, and in the last sentence of section 402(f)(1) of this title shall be applied as though it read "15 months".

(c) CONDITIONS For purposes of subsection (a)—

(1) entitlement of an individual to hospital insurance benefits for a month shall consist of entitlement to have payment made under, and subject to the limitations in, part A of subchapter XVIII on his behalf for inpatient hospital services, post-hospital extended care services, and home health services (as such terms are defined in part E of subchapter XVIII) furnished him in the United States (or outside the United States in the case of inpatient hospital services furnished under the conditions described in section 1395f(f) of this title) during such month; except that (A) no such payment may be made for post-hospital extended care services furnished before January 1967, and (B) no such payment may be made for post-hospital extended care services unless the discharge from the hospital required to qualify such services for payment under part A of subchapter XVIII occurred (i) after June 30, 1966, or on or after the first day of the month in which he attains age 65, whichever is later, or (ii) if he was entitled to hospital insurance benefits pursuant to subsection (b), at a time when he was so entitled; and

(2) an individual shall be deemed entitled to monthly insurance benefits under section 402 or section 423 of this title, or to be a qualified railroad retirement beneficiary, for the month in which he

died if he would have been entitled to such benefits, or would have been a qualified railroad retirement beneficiary, for such month had he died in the next month.

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42 U.S.C. §1320a–8. Civil monetary penalties and assessments for subchapters II, VIII and XVI

(a) FALSE STATEMENTS OR REPRESENTATIONS OF MATERIAL FACT; PROCEEDINGS TO EXCLUDE; WRONGFUL CONVERSIONS BY REPRESENTATIVE PAYEES

(1) Any person (including an organization, agency, or other entity) who—

(A) makes, or causes to be made, a statement or representation of a material fact, for use in determining any initial or continuing right to or the amount of monthly insurance benefits under subchapter II or benefits or payments under subchapter VIII or XVI, that the person knows or should know is false or misleading,

(B) makes such a statement or representation for such use with knowing disregard for the truth, or

(C) omits from a statement or representation for such use, or otherwise withholds disclosure of, a fact which the person knows or should know is material to the determination of any initial or continuing right to or the amount of monthly insurance benefits under subchapter II or benefits or payments under subchapter VIII or XVI, if the person knows, or should know, that the statement

or representation with such omission is false or misleading or that the withholding of such disclosure is misleading,

shall be subject to, in addition to any other penalties that may be prescribed by law, a civil money penalty of not more than $5,000 for each such statement or representation or each receipt of such benefits or payments while withholding disclosure of such fact, except that in the case of such a person who receives a fee or other income for services performed in connection with any such determination (including a claimant representative, translator, or current or former employee of the Social Security Administration) or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination, the amount of such penalty shall be not more than $7,500. Such person also shall be subject to an assessment, in lieu of damages sustained by the United States because of such statement or representation or because of such withholding of disclosure of a material fact, of not more than twice the amount of benefits or payments paid as a result of such a statement or representation or such a withholding of disclosure. In addition, the Commissioner of Social Security may make a determination in the same proceeding to recommend that the Secretary exclude, as provided in section 1320a–7 of this title, such a person who is a medical provider or physician from participation in the programs under subchapter XVIII.

(2) For purposes of this section, a material fact is one which the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under subchapter II or subchapter VIII, or eligible for benefits or payments under subchapter XVI.

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(b) INITIATION OF PROCEEDINGS; HEARING; SANCTIONS

(1) The Commissioner of Social Security may initiate a proceeding to determine whether to impose a civil money penalty or assessment, or whether to recommend exclusion under subsection (a) only as authorized by the Attorney General pursuant to procedures agreed upon by the Commissioner of Social Security and the Attorney General. The Commissioner of Social Security may not initiate an action under this section with respect to any violation described in subsection (a) later than 6 years after the date the violation was committed. The Commissioner of Social Security may initiate an action under this section by serving notice of the action in any manner authorized by Rule 4 of the Federal Rules of Civil Procedure.

(2) The Commissioner of Social Security shall not make a determination adverse to any person under this section until the person has been given written notice and an opportunity for the determination to be made on the record after a hearing at which the person is entitled to be represented by counsel, to

present witnesses, and to cross-examine witnesses against the person.

(3) In a proceeding under this section which—

(A) is against a person who has been convicted (whether upon a verdict after trial or upon a plea of guilty or nolo contendere) of a Federal or State crime; and

(B) involves the same transaction as in the criminal action; the person is estopped from denying the essential elements of the criminal offense.

(4) The official conducting a hearing under this section may sanction a person, including any party or attorney, for failing to comply with an order or procedure, for failing to defend an action, or for such other misconduct as would interfere with the speedy, orderly, or fair conduct of the hearing. Such sanction shall reasonably relate to the severity and nature of the failure or misconduct. Such sanction may include—

(A) in the case of refusal to provide or permit discovery, drawing negative factual inference or treating such refusal as an admission by deeming the matter, or certain facts, to be established;

(B) prohibiting a party from introducing certain evidence or otherwise supporting a particular claim or defense;

(C) striking pleadings, in whole or in part;

(D) staying the proceedings;

(E) dismissal of the action;

(F) entering a default judgment;

(G) ordering the party or attorney to pay attorneys' fees and other costs caused by the failure or misconduct; and

(H) refusing to consider any motion or other action which is not filed in a timely manner.

(c) AMOUNT OR SCOPE OF PENALTIES, ASSESSMENTS, OR EXCLUSIONS In determining pursuant to subsection (a) the amount or scope of any penalty or assessment, or whether to recommend an exclusion, the Commissioner of Social Security shall take into account—

(1) the nature of the statements, representations, or actions referred to in subsection (a) and the circumstances under which they occurred;

(2) the degree of culpability, history of prior offenses, and financial condition of the person committing the offense; and

(3) such other matters as justice may require.

(d) JUDICIAL REVIEW

(1) Any person adversely affected by a determination of the Commissioner of Social Security under this section may obtain a review of such determination in the United States Court of Appeals for the circuit in which the person resides, or in which the statement or representation

referred to in subsection (a) was made, by filing in such court (within 60 days following the date the person is notified of the Commissioner's determination) a written petition requesting that the determination be modified or set aside. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commissioner of Social Security, and thereupon the Commissioner of Social Security shall file in the court the record in the proceeding as provided in section 2112 of title 28. Upon such filing, the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have the power to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, remanding for further consideration, or setting aside, in whole or in part, the determination of the Commissioner of Social Security and enforcing the same to the extent that such order is affirmed or modified. No objection that has not been urged before the Commissioner of Social Security shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

(2) The findings of the Commissioner of Social Security with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive in the review described in paragraph (1). If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and

that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commissioner of Social Security, the court may order such additional evidence to be taken before the Commissioner of Social Security and to be made a part of the record. The Commissioner of Social Security may modify such findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and the Commissioner of Social Security shall file with the court such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole shall be conclusive, and the Commissioner's recommendations, if any, for the modification or setting aside of the Commissioner's original order.

(3) Upon the filing of the record and the Commissioner's original or modified order with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of title 28.

(e) COMPROMISE OF MONEY PENALTIES AND ASSESSMENTS; RECOVERY; USE OF FUNDS RECOVERED

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(2) Amounts recovered under this section shall be recovered by the Commissioner of Social Security and shall be disposed of as follows:

(A) In the case of amounts recovered arising out of a determination relating to subchapter II, the

amounts shall be transferred to the Managing Trustee of the Federal Old-Age and Survivors Insurance Trust Fund or the Federal Disability Insurance Trust Fund, as determined appropriate by the Commissioner of Social Security, and such amounts shall be deposited by the Managing Trustee into such Trust Fund.

(B) In the case of any other amounts recovered under this section, the amounts shall be deposited by the Commissioner of Social Security into the general fund of the Treasury as miscellaneous receipts.

(f) FINALITY OF DETERMINATION RESPECTING PENALTY, ASSESSMENT, OR EXCLUSION

A determination pursuant to subsection (a) by the Commissioner of Social Security to impose a penalty or assessment, or to recommend an exclusion shall be final upon the expiration of the 60-day period referred to in subsection (d). Matters that were raised or that could have been raised in a hearing before the Commissioner of Social Security or in an appeal pursuant to subsection (d) may not be raised as a defense to a civil action by the United States to collect a penalty or assessment imposed under this section.

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(i) DELEGATION OF AUTHORITY

(1) The provisions of subsections (d) and (e) of section 405 of this title shall apply with respect to this section to the same extent as they are applicable with respect to subchapter II. The

Commissioner of Social Security may delegate the authority granted by section 405(d) of this title (as made applicable to this section) to the Inspector General for purposes of any investigation under this section.

(2) The Commissioner of Social Security may delegate authority granted under this section to the Inspector General.

20 C.F.R. §404.1505 Basic definition of disability.

(a) The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. To meet this definition, you must have a severe impairment(s) that makes you unable to do your past relevant work (*see* §404.1560(b)) or any other substantial gainful work that exists in the national economy. If your severe impairment(s) does not meet or medically equal a listing in appendix 1, we will assess your residual functional capacity as provided in §§404.1520(e) and 404.1545. (*See* §§404.1520(g)(2) and 404.1562 for an exception to this rule.) We will use this residual functional capacity assessment to determine if you can do your past relevant work. If we find that you cannot do your past relevant work, we will use the same residual functional capacity assessment and your vocational factors of age, education, and work experience to determine if you can do other work. (*See*§404.1520(h) for an exception to this rule.) We will use this definition of disability if you are applying for a period of disability, or disability

insurance benefits as a disabled worker, or child's insurance benefits based on disability before age 22 or, with respect to disability benefits payable for months after December 1990, as a widow, widower, or surviving divorced spouse.

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20 C.F.R. §404.1510 Meaning of substantial gainful activity.

Substantial gainful activity means work that—

(a) Involves doing significant and productive physical or mental duties; and

(b) Is done (or intended) for pay or profit.

(See §404.1572 for further details about what we mean by substantial gainful activity.)

SUBSTANTIAL GAINFUL ACTIVITY

20 C.F.R. §404.1571 General.

The work, without regard to legality, that you have done during any period in which you believe you are disabled may show that you are able to work at the substantial gainful activity level. If you are able to engage in substantial gainful activity, we will find that you are not disabled. (We explain the rules for persons who are statutorily blind in §404.1584.) Even if the work you have done was not substantial gainful activity, it may show that you are able to do more work than you actually did. We will consider all of the medical and vocational evidence in your file to decide

whether or not you have the ability to engage in substantial gainful activity.

20 C.F.R. §404.1572 What we mean by substantial gainful activity.

Substantial gainful activity is work activity that is both substantial and gainful:

(a) *Substantial work activity*. Substantial work activity is work activity that involves doing significant physical or mental activities. Your work may be substantial even if it is done on a part-time basis or if you do less, get paid less, or have less responsibility than when you worked before.

(b) *Gainful work activity*. Gainful work activity is work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized.

(c) *Some other activities*. Generally, we do not consider activities like taking care of yourself, household tasks, hobbies, therapy, school attendance, club activities, or social programs to be substantial gainful activity.

20 C.F.R. §404.1573 General information about work activity.

(a) *The nature of your work*. If your duties require use of your experience, skills, supervision and responsibilities, or contribute substantially to the operation of a business, this tends to show that you have the ability to work at the substantial gainful activity level.

(b) *How well you perform.* We consider how well you do your work when we determine whether or not you are doing substantial gainful activity. If you do your work satisfactorily, this may show that you are working at the substantial gainful activity level. If you are unable, because of your impairments, to do ordinary or simple tasks satisfactorily without more supervision or assistance than is usually given other people doing similar work, this may show that you are not working at the substantial gainful activity level. If you are doing work that involves minimal duties that make little or no demands on you and that are of little or no use to your employer, or to the operation of a business if you are self-employed, this does not show that you are working at the substantial gainful activity level.

(c) *If your work is done under special conditions.* The work you are doing may be done under special conditions that take into account your impairment, such as work done in a sheltered workshop or as a patient in a hospital. If your work is done under special conditions, we may find that it does not show that you have the ability to do substantial gainful activity. Also, if you are forced to stop or reduce your work because of the removal of special conditions that were related to your impairment and essential to your work, we may find that your work does not show that you are able to do substantial gainful activity. However, work done under special conditions may show that you have the necessary skills and ability to work at the substantial gainful activity level. Examples of the special conditions that may relate to your

impairment include, but are not limited to, situations in which—

(1) You required and received special assistance from other employees in performing your work;

(2) You were allowed to work irregular hours or take frequent rest periods;

(3) You were provided with special equipment or were assigned work especially suited to your impairment;

(4) You were able to work only because of specially arranged circumstances, for example, other persons helped you prepare for or get to and from your work;

(5) You were permitted to work at a lower standard of productivity or efficiency than other employees; or

(6) You were given the opportunity to work despite your impairment because of family relationship, past association with your employer, or your employer's concern for your welfare.

(d) *If you are self-employed.* Supervisory, managerial, advisory or other significant personal services that you perform as a self-employed individual may show that you are able to do substantial gainful activity.

(e) *Time spent in work.* While the time you spend in work is important, we will not decide whether or not you are doing substantial gainful activity only on that basis. We will still evaluate the work to decide whether it is substantial and gainful regardless of whether you spend more time or less time at the job than workers

who are not impaired and who are doing similar work as a regular means of their livelihood.

20 C.F.R. §404.1574 Evaluation guides if you are an employee.

(a) We use several guides to decide whether the work you have done shows that you are able to do substantial gainful activity. If you are working or have worked as an employee, we will use the provisions in paragraphs (a) through (d) of this section that are relevant to your work activity. We will use these provisions whenever they are appropriate, whether in connection with your application for disability benefits (when we make an initial determination on your application and throughout any appeals you may request), after you have become entitled to a period of disability or to disability benefits, or both.

(1) *Your earnings may show you have done substantial gainful activity.* Generally, in evaluating your work activity for substantial gainful activity purposes, our primary consideration will be the earnings you derive from the work activity. We will use your earnings to determine whether you have done substantial gainful activity unless we have information from you, your employer, or others that shows that we should not count all of your earnings. The amount of your earnings from work you have done (regardless of whether it is unsheltered or sheltered work) may show that you have engaged in substantial gainful activity. Generally, if you worked for substantial earnings, we will find that you are able to do substantial gainful activity. However, the fact that your earnings were not substantial will not necessarily show that you are not

able to do substantial gainful activity. We generally consider work that you are forced to stop or to reduce below the substantial gainful activity level after a short time because of your impairment to be an unsuccessful work attempt. Your earnings from an unsuccessful work attempt will not show that you are able to do substantial gainful activity. We will use the criteria in paragraph (c) of this section to determine if the work you did was an unsuccessful work attempt.

(2) *We consider only the amounts you earn.* When we decide whether your earnings show that you have done substantial gainful activity, we do not consider any income that is not directly related to your productivity. When your earnings exceed the reasonable value of the work you perform, we consider only that part of your pay which you actually earn. If your earnings are being subsidized, we do not consider the amount of the subsidy when we determine if your earnings show that you have done substantial gainful activity. We consider your work to be subsidized if the true value of your work, when compared with the same or similar work done by unimpaired persons, is less than the actual amount of earnings paid to you for your work. For example, when a person with a serious impairment does simple tasks under close and continuous supervision, our determination of whether that person has done substantial gainful activity will not be based only on the amount of the wages paid. We will first determine whether the person received a subsidy; that is, we will determine whether the person was being paid more than the reasonable value of the actual services performed. We will then subtract the value of the subsidy from the person's gross earnings to

determine the earnings we will use to determine if he or she has done substantial gainful activity.

(3) *If you are working in a sheltered or special environment.* If you are working in a sheltered workshop, you may or may not be earning the amounts you are being paid. The fact that the sheltered workshop or similar facility is operating at a loss or is receiving some charitable contributions or governmental aid does not establish that you are not earning all you are being paid. Since persons in military service being treated for severe impairments usually continue to receive full pay, we evaluate work activity in a therapy program or while on limited duty by comparing it with similar work in the civilian work force or on the basis of reasonable worth of the work, rather than on the actual amount of the earnings.

(b) *Earnings guidelines*—(1) *General.* If you are an employee, we first consider the criteria in paragraph (a) of this section and §404.1576, and then the guides in paragraphs (b)(2) and (3) of this section. When we review your earnings to determine if you have been performing substantial gainful activity, we will subtract the value of any subsidized earnings (see paragraph (a)(2) of this section) and the reasonable cost of any impairment-related work expenses from your gross earnings (see §404.1576). The resulting amount is the amount we use to determine if you have done substantial gainful activity. We will generally average your earnings for comparison with the earnings guidelines in paragraphs (b)(2) and (3) of this section. See §404.1574a for our rules on averaging earnings.

(2) *Earnings that will ordinarily show that you have engaged in substantial gainful activity.* We will consider that your earnings from your work activity as an employee (including earnings from work in a sheltered workshop or a comparable facility especially set up for severely impaired persons) show that you engaged in substantial gainful activity if:

(i) *Before January 1, 2001,* they averaged more than the amount(s) in Table 1 of this section for the time(s) in which you worked.

(ii) *Beginning January 1,* 2001, and each year thereafter, they average more than the larger of:

(A) The amount for the previous year, or

(B) An amount adjusted for national wage growth, calculated by multiplying $700 by the ratio of the national average wage index for the year 2 calendar years before the year for which the amount is being calculated to the national average wage index for the year 1998. We will then round the resulting amount to the next higher multiple of $10 where such amount is a multiple of $5 but not of $10 and to the nearest multiple of $10 in any other case.

TABLE 1

For months:	Your monthly earnings averaged more than:
In calendar years before 1976	$200
In calendar year 1976	230
In calendar year 1977	240
In calendar year 1978	260
In calendar year 1979	280
In calendar years 1980-1989	300
January 1990-June 1999	500
July 1999-December 2000	700

(3) *Earnings that will ordinarily show that you have not engaged in substantial gainful activity*— (i) *General.* If your average monthly earnings are equal to or less than the amount(s) determined under paragraph (b)(2) of this section for the year(s) in which you work, we will generally consider that the earnings from your work as an employee (including earnings from work in a sheltered workshop or comparable facility) will show that you have not engaged in substantial gainful activity. We will generally not consider other information in addition to your earnings except in the circumstances described in paragraph (b)(3)(ii) of this section.

(ii) *When we will consider other information in addition to your earnings.* We will generally consider other information in addition to your earnings if there is evidence indicating that you may be engaging in

substantial gainful activity or that you are in a position to control when earnings are paid to you or the amount of wages paid to you (for example, if you are working for a small corporation owned by a relative). (See paragraph (b)(3)(iii) of this section for when we do not apply this rule.) Examples of other information we may consider include, whether—

(A) Your work is comparable to that of unimpaired people in your community who are doing the same or similar occupations as their means of livelihood, taking into account the time, energy, skill, and responsibility involved in the work; and

(B) Your work, although significantly less than that done by unimpaired people, is clearly worth the amounts shown in paragraph (b)(2) of this section, according to pay scales in your community.

(iii) *Special rule for considering earnings alone when evaluating the work you do after you have received social security disability benefits for at least 24 months.* Notwithstanding paragraph (b)(3)(ii) of this section, we will not consider other information in addition to your earnings to evaluate the work you are doing or have done if—

(A) At the time you do the work, you are entitled to social security disability benefits and you have received such benefits for at least 24 months (see paragraph (b)(3)(iv) of this section); and

(B) We are evaluating that work to consider whether you have engaged in substantial gainful activity or demonstrated the ability to engage in substantial gainful activity for the purpose of

determining whether your disability has ceased because of your work activity (see §§404.1592a(a)(1) and (3)(ii) and 404.1594(d)(5) and (f)(1)).

(iv) *When we consider you to have received social security disability benefits for at least 24 months.* For purposes of paragraph (b)(3)(iii) of this section, social security disability benefits means disability insurance benefits for a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability. We consider you to have received such benefits for at least 24 months beginning with the first day of the first month following the 24th month for which you actually received social security disability benefits that you were due or constructively received such benefits. The 24 months do not have to be consecutive. We will consider you to have constructively received a benefit for a month for purposes of the 24-month requirement if you were otherwise due a social security disability benefit for that month and your monthly benefit was withheld to recover an overpayment. Any months for which you were entitled to benefits but for which you did not actually or constructively receive a benefit payment will not be counted for the 24-month requirement. If you also receive supplemental security income payments based on disability or blindness under title XVI of the Social Security Act, months for which you received only supplemental security income payments will not be counted for the 24-month requirement.

20 C.F.R. §404.1574a When and how we will average your earnings.

(a) If your work as an employee or as a self-employed person was continuous without significant change in work patterns or earnings, and there has been no change in the substantial gainful activity earnings levels, we will average your earnings over the entire period of work requiring evaluation to determine if you have done substantial gainful activity. See §404.1592a for information on the reentitlement period.

(b) If you work over a period of time during which the substantial gainful activity earnings levels change, we will average your earnings separately for each period in which a different substantial gainful activity earnings level applies.

(c) If there is a significant change in your work pattern or earnings during the period of work requiring evaluation, we will average your earnings over each separate period of work to determine if any of your work efforts were substantial gainful activity.

(d) We will not average your earnings in determining whether benefits should be paid for any month(s) during or after the reentitlement period that occurs after the month disability has been determined to have ceased because of the performance of substantial gainful activity. See §404.1592a for information on the reentitlement period. The following examples illustrate what we mean by a significant change in the work pattern of an employee and when we will average and will not average earnings.

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20 C.F.R. §404.1588 Your responsibility to tell us of events that may change your disability status.

(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.

(b) *Our responsibility when you report your work to us.* When you or your representative report changes in your work activity to us under paragraphs (a)(2), (a)(3), and (a)(4) of this section, we will issue a receipt to you or your representative at least until a centralized computer file that records the information that you give us and the date that you make your report is in place. Once the centralized computer file is in place, we will continue to issue receipts to you or your representative if you request us to do so.

20 C.F.R. §404.1589 We may conduct a review to find out whether you continue to be disabled.

After we find that you are disabled, we must evaluate your impairment(s) from time to time to determine if you are still eligible for disability cash benefits. We call this evaluation a continuing disability review. We may begin a continuing disability review for any number of reasons including your failure to follow the provisions of the Social Security Act or these

regulations. When we begin such a review, we will notify you that we are reviewing your eligibility for disability benefits, why we are reviewing your eligibility, that in medical reviews the medical improvement review standard will apply, that our review could result in the termination of your benefits, and that you have the right to submit medical and other evidence for our consideration during the continuing disability review. In doing a medical review, we will develop a complete medical history of at least the preceding 12 months in any case in which a determination is made that you are no longer under a disability. If this review shows that we should stop payment of your benefits, we will notify you in writing and give you an opportunity to appeal. In §404.1590 we describe those events that may prompt us to review whether you continue to be disabled.

20 C.F.R. §404.1590 When and how often we will conduct a continuing disability review.

(a) *General.* We conduct continuing disability reviews to determine whether or not you continue to meet the disability requirements of the law. Payment of cash benefits or a period of disability ends if the medical or other evidence shows that you are not disabled as determined under the standards set out in section 223(f) of the Social Security Act. In paragraphs (b) through (g) of this section, we explain when and how often we conduct continuing disability reviews for most individuals. In paragraph (h) of this section, we explain special rules for some individuals who are participating in the Ticket to Work program. In

paragraph (i) of this section, we explain special rules for some individuals who work.

(b) *When we will conduct a continuing disability review.* Except as provided in paragraphs (h) and (i) of this section, we will start a continuing disability review if—

(1) You have been scheduled for a medical improvement expected diary review;

(2) You have been scheduled for a periodic review (medical improvement possible or medical improvement not expected) in accordance with the provisions of paragraph (d) of this section;

(3) We need a current medical or other report to see if your disability continues. (This could happen when, for example, an advance in medical technology, such as improved treatment for Alzheimer's disease or a change in vocational therapy or technology raises a disability issue.);

(4) You return to work and successfully complete a period of trial work;

(5) Substantial earnings are reported to your wage record;

(6) You tell us that—

(i) You have recovered from your disability; or

(ii) You have returned to work;

(7) Your State Vocational Rehabilitation Agency tells us that—

(i) The services have been completed; or

(ii) You are now working; or

(iii) You are able to work;

(8) Someone in a position to know of your physical or mental condition tells us any of the following, and it appears that the report could be substantially correct:

(i) You are not disabled; or

(ii) You are not following prescribed treatment; or

(iii) You have returned to work; or

(iv) You are failing to follow the provisions of the Social Security Act or these regulations;

(9) Evidence we receive raises a question as to whether your disability continues; or

(10) You have been scheduled for a vocational reexamination diary review.

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(i) *If you are working and have received social security disability benefits for at least 24 months*—(1) *General.* Notwithstanding the provisions in paragraphs (b)(4), (b)(5), (b)(6)(ii), (b)(7)(ii), and (b)(8)(iii) of this section, we will not start a continuing disability review based solely on your work activity if—

(i) You are currently entitled to disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability; and

(ii) You have received such benefits for at least 24 months (see paragraph (i)(2) of this section).

(2) *The 24-month requirement.* (i) The months for which you have actually received disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability that you were due, or for which you have constructively received such benefits, will count for the 24-month requirement under paragraph (i)(1)(ii) of this section, regardless of whether the months were consecutive. We will consider you to have constructively received a benefit for a month for purposes of the 24-month requirement if you were otherwise due a social security disability benefit for that month and your monthly benefit was withheld to recover an overpayment. Any month for which you were entitled to benefits but for which you did not actually or constructively receive a benefit payment will not be counted for the 24-month requirement. Months for which your social security disability benefits are continued under §404.1597a pending reconsideration and/or a hearing before an administrative law judge on a medical cessation determination will not be counted for the 24-month requirement. If you also receive supplemental security income payments based on disability or blindness under title XVI of the Social Security Act, months for which you received only supplemental security income payments will not be counted for the 24-month requirement.

(ii) In determining whether paragraph (i)(1) of this section applies, we consider whether you have received

disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability for at least 24 months as of the date on which we start a continuing disability review. For purposes of this provision, the date on which we start a continuing disability review is the date on the notice we send you that tells you that we are beginning to review your disability case.

(3) *When we may start a continuing disability review even if you have received social security disability benefits for at least 24 months.* Even if you meet the requirements of paragraph (i)(1) of this section, we may still start a continuing disability review for a reason(s) other than your work activity. We may start a continuing disability review if we have scheduled you for a periodic review of your continuing disability, we need a current medical or other report to see if your disability continues, we receive evidence which raises a question as to whether your disability continues, or you fail to follow the provisions of the Social Security Act or these regulations. For example, we will start a continuing disability review when you have been scheduled for a medical improvement expected diary review, and we may start a continuing disability review if you failed to report your work to us.

(4) *Reviews to determine whether the work you have done shows that you are able to do substantial gainful activity.* Paragraph (i)(1) of this section does not apply to reviews we conduct using the rules in §§404.1571-404.1576 to determine whether the work you have done

shows that you are able to do substantial gainful activity and are, therefore, no longer disabled.

(5) *Erroneous start of the continuing disability review.* If we start a continuing disability review based solely on your work activity that results in a medical cessation determination, we will vacate the medical cessation determination if—

(i) You provide us evidence that establishes that you met the requirements of paragraph (i)(1) of this section as of the date of the start of your continuing disability review and that the start of the review was erroneous; and

(ii) We receive the evidence within 12 months of the date of the notice of the initial determination of medical cessation.

20 C.F.R. §404.1594 How we will determine whether your disability continues or ends.

(a) *General.* There is a statutory requirement that, if you are entitled to disability benefits, your continued entitlement to such benefits must be reviewed periodically. If you are entitled to disability benefits as a disabled worker or as a person disabled since childhood, or, for monthly benefits payable for months after December 1990, as a disabled widow, widower, or surviving divorced spouse, there are a number of factors we consider in deciding whether your disability continues. We must determine if there has been any medical improvement in your impairment(s) and, if so, whether this medical improvement is related to your ability to work. If your impairment(s) has not medically improved we must consider whether one or more of the

exceptions to medical improvement applies. If medical improvement related to your ability to work has not occurred and no exception applies, your benefits will continue. Even where medical improvement related to your ability to work has occurred or an exception applies, in most cases (see paragraph (e) of this section for exceptions), we must also show that you are currently able to engage in substantial gainful activity before we can find that you are no longer disabled.

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(5) *Ability to engage in substantial gainful activity*. In most instances, we must show that you are able to engage in substantial gainful activity before your benefits are stopped. When doing this, we will consider all your current impairments not just that impairment(s) present at the time of the most recent favorable determination. If we cannot determine that you are still disabled based on medical considerations alone (as discussed in §§404.1525 and 404.1526), we will use the new symptoms, signs and laboratory findings to make an objective assessment of your functional capacity to do basic work activities or residual functional capacity and we will consider your vocational factors. See §§404.1545 through 404.1569.

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(i) *If you work during your current period of entitlement based on disability or during certain other periods.*

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(2) If you are currently entitled to disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability under title II of the Social Security Act, and at the time we are making a determination on your case you have received such benefits for at least 24 months, we will not consider the activities you perform in the work you are doing or have done during your current period of entitlement based on disability if they support a finding that your disability has ended. (We will use the rules in §404.1590(i)(2) to determine whether the 24-month requirement is met.) However, we will consider the activities you do in that work if they support a finding that your disability continues or they do not conflict with a finding that your disability continues. We will not presume that you are still disabled if you stop working.

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20 C.F.R. §498.100 Basis and purpose.

(a) *Basis.* This part implements sections 1129 and 1140 of the Social Security Act (42 U.S.C. 1320a-8 and 1320b-10).

(b) *Purpose.* This part provides for the imposition of civil monetary penalties and assessments, as applicable, against persons who—

(1) Make or cause to be made false statements or representations or omissions or otherwise withhold disclosure of a material fact for use in determining any right to or amount of benefits under title II or benefits

or payments under title VIII or title XVI of the Social Security Act;

(2) Convert any payment, or any part of a payment, received under title II, title VIII, or title XVI of the Social Security Act for the use and benefit of another individual, while acting in the capacity of a representative payee for that individual, to a use that such person knew or should have known was other than for the use and benefit of such other individual; or

(3) Misuse certain Social Security program words, letters, symbols, and emblems; or

(4) With limited exceptions, charge a fee for a product or service that is available from SSA free of charge without including a written notice stating the product or service is available from SSA free of charge.

20 C.F.R. §498.101 Definitions.

As used in this part:

Agency means the Social Security Administration.

Assessment means the amount described in §498.104, and includes the plural of that term.

Commissioner means the Commissioner of Social Security or his or her designees.

Department means the U.S. Department of Health and Human Services.

General Counsel means the General Counsel of the Social Security Administration or his or her designees.

Inspector General means the Inspector General of the Social Security Administration or his or her designees.

Material fact means a fact which the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under title II or eligible for benefits or payments under title VIII or title XVI of the Social Security Act.

Otherwise withhold disclosure means the failure to come forward to notify the SSA of a material fact when such person knew or should have known that the withheld fact was material and that such withholding was misleading for purposes of determining eligibility or Social Security benefit amount for that person or another person.

Penalty means the amount described in §498.103 and includes the plural of that term.

Person means an individual, organization, agency, or other entity.

Respondent means the person upon whom the Commissioner or the Inspector General has imposed, or intends to impose, a penalty and assessment, as applicable.

Secretary means the Secretary of the U.S. Department of Health and Human Services or his or her designees.

SSA means the Social Security Administration.

SSI means Supplemental Security Income.

20 C.F.R. §498.102 Basis for civil monetary penalties and assessments.

(a) The Office of the Inspector General may impose a penalty and assessment, as applicable, against any person who it determines in accordance with this part—

(1) Has made, or caused to be made, a statement or representation of a material fact for use in determining any initial or continuing right to or amount of:

(i) Monthly insurance benefits under title II of the Social Security Act; or

(ii) Benefits or payments under title VIII or title XVI of the Social Security Act; and

(2)(i) Knew, or should have known, that the statement or representation was false or misleading, or

(ii) Made such statement with knowing disregard for the truth; or

(3) Omitted from a statement or representation, or otherwise withheld disclosure of, a material fact for use in determining any initial or continuing right to or amount of benefits or payments, which the person knew or should have known was material for such use and that such omission or withholding was false or misleading.

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20 C.F.R. §498.103 Amount of penalty.

(a) Under §498.102(a), the Office of the Inspector General may impose a penalty of not more than $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. §498.104 Amount of assessment.

A person subject to a penalty determined under §498.102(a) may be subject, in addition, to an assessment of not more than twice the amount of benefits or payments paid under title II, title VIII or title XVI of the Social Security Act as a result of the statement, representation, omission, or withheld disclosure of a material fact which was the basis for the penalty. A representative payee subject to a penalty determined under §498.102(b) may be subject, in addition, to an assessment of not more than twice the amount of benefits or payments received by the representative payee for the use and benefit of another individual and converted to a use other than for the use and benefit of such other individual. 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, as referred to in §498.102(a) and (b).

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20 C.F.R. §498.106 Determinations regarding the amount or scope of penalties and assessments.

(a) In determining the amount or scope of any penalty and assessment, as applicable, in accordance with §498.103(a) and (b) and 498.104, the Office of the Inspector General will take into account:

(1) The nature of the statements, representations, or actions referred to in §498.102(a) and (b) 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 financial condition of the person committing the offense; and

(5) Such other matters as justice may require.

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20 C.F.R. §498.109 Notice of proposed determination.

(a) If the Office of the Inspector General seeks to impose a penalty and assessment, as applicable, it will serve written notice of the intent to take such action. The notice will include:

(1) Reference to the statutory basis for the proposed penalty and assessment, as applicable;

(2) A description of the false statements, representations, other actions (as described in

§498.102(a) and (b)), and incidents, as applicable, with respect to which the penalty and assessment, as applicable, are proposed;

(3) The amount of the proposed penalty and assessment, as applicable;

(4) Any circumstances described in §498.106 that were considered when determining the amount of the proposed penalty and assessment, as applicable; and

(5) Instructions for responding to the notice, including

(i) A specific statement of respondent's right to a hearing; and

(ii) A statement that failure to request a hearing within 60 days permits the imposition of the proposed penalty and assessment, as applicable, without right of appeal.

(b) Any person upon whom the Office of the Inspector General has proposed the imposition of a penalty and assessment, as applicable, may request a hearing on such proposed penalty and assessment.

(c) If the respondent fails to exercise the respondent's right to a hearing within the time permitted under this section, and does not demonstrate good cause for such failure before an administrative law judge, any penalty and assessment, as applicable, becomes final.

20 C.F.R. §498.110 Failure to request a hearing.

If the respondent does not request a hearing within the time prescribed by §498.109(a), the Office of the Inspector General may seek the proposed penalty and assessment, as applicable, or any less severe penalty and assessment. The Office of the Inspector General shall notify the respondent by certified mail, return receipt requested, of any penalty and assessment, as applicable, that has been imposed and of the means by which the respondent may satisfy the amount owed.

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20 C.F.R. §498.127 Judicial review.

Sections 1129 and 1140 of the Social Security Act authorize judicial review of any penalty and assessment, as applicable, that has become final. Judicial review may be sought by a respondent only in regard to a penalty and assessment, as applicable, with respect to which the respondent requested a hearing, unless the failure or neglect to urge such objection is excused by the court because of extraordinary circumstances.

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20 C.F.R. §498.201 Definitions.

As used in this part—

ALJ refers to an Administrative Law Judge of the Departmental Appeals Board.

Civil monetary penalty cases refer to all proceedings arising under any of the statutory bases for which the

Inspector General, Social Security Administration has been delegated authority to impose civil monetary penalties.

DAB refers to the Departmental Appeals Board of the U.S. Department of Health and Human Services.

20 C.F.R. §498.202 Hearing before an administrative law judge.

(a) A party sanctioned under any criteria specified in §§498.100 through 498.132 may request a hearing before an ALJ.

(b) In civil monetary penalty cases, the parties to a hearing will consist of the respondent and the Inspector General.

(c) The request for a hearing must be:

(1) In writing and signed by the respondent or by the respondent's attorney; and

(2) Filed within 60 days after the notice, provided in accordance with §498.109, is received by the respondent or upon a showing of good cause, the time permitted by an ALJ.

(d) The request for a hearing shall contain a statement as to the:

(1) Specific issues or findings of fact and conclusions of law in the notice letter with which the respondent disagrees; and

(2) Basis for the respondent's contention that the specific issues or findings and conclusions were incorrect.

(e) For purposes of this section, the date of receipt of the notice letter will be presumed to be five days after the date of such notice, unless there is a reasonable showing to the contrary.

(f) The ALJ shall dismiss a hearing request where:

(1) The respondent's hearing request is not filed in a timely manner and the respondent fails to demonstrate good cause for such failure;

(2) The respondent withdraws or abandons respondent's request for a hearing; or

(3) The respondent's hearing request fails to raise any issue which may properly be addressed in a hearing under this part.

20 C.F.R. §498.203 Rights of parties.

(a) Except as otherwise limited by this part, all parties may:

(1) Be accompanied, represented, and advised by an attorney;

(2) Participate in any conference held by the ALJ;

(3) Conduct discovery of documents as permitted by this part;

(4) Agree to stipulations of fact or law which will be made part of the record;

(5) Present evidence relevant to the issues at the hearing;

(6) Present and cross-examine witnesses;

(7) Present oral arguments at the hearing as permitted by the ALJ; and

(8) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

(b) Fees for any services performed on behalf of a party by an attorney are not subject to the provisions of section 206 of title II of the Social Security Act, which authorizes the Commissioner to specify or limit these fees.

20 C.F.R. §498.204 Authority of the administrative law judge.

(a) The ALJ will conduct a fair and impartial hearing, avoid delay, maintain order and assure that a record of the proceeding is made.

(b) The ALJ has the authority to:

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses at hearings and the production of documents at or in relation to hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of documentary discovery as permitted by this part;

(8) Regulate the course of the hearing and the conduct of representatives, parties, and witnesses;

(9) Examine witnesses;

(10) Receive, exclude, or limit evidence;

(11) Take official notice of facts;

(12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact; and

(13) Conduct any conference or argument in person, or by telephone upon agreement of the parties.

(c) The ALJ does not have the authority to:

(1) Find invalid or refuse to follow Federal statutes or regulations, or delegations of authority from the Commissioner;

(2) Enter an order in the nature of a directed verdict;

(3) Compel settlement negotiations;

(4) Enjoin any act of the Commissioner or the Inspector General; or

(5) Review 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. §498.205 Ex parte contacts.

No party or person (except employees of the ALJ's office) will communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

20 C.F.R. §498.206 Prehearing conferences.

(a) The ALJ will schedule at least one prehearing conference, and may schedule additional prehearing conferences as appropriate, upon reasonable notice to the parties.

(b) The ALJ may use prehearing conferences to address the following:

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(3) Stipulations and admissions of fact as to the contents and authenticity of documents and deadlines for challenges, if any, to the authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at a hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;

(6) Limitation of the number of witnesses;

(7) The time and place for the hearing and dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery of documents as permitted by this part;

(9) Such other matters as may tend to encourage the fair, just, and expeditious disposition of the proceedings; and

(10) Potential settlement of the case.

(c) The ALJ shall issue an order containing the matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

20 C.F.R. §498.207 Discovery.

(a) For the purpose of inspection and copying, a party may make a request to another party for production of documents which are relevant and material to the issues before the ALJ.

(b) Any form of discovery other than that permitted under paragraph (a) of this section, such as requests for admissions, written interrogatories and depositions, is not authorized.

(c) For the purpose of this section, the term documents includes information, reports, answers, records, accounts, papers, memos, notes and other data and documentary evidence. Nothing contained in this section will be interpreted to require the creation of a document, except that requested data stored in an

electronic data storage system will be produced in a form accessible to the requesting party.

(d)(1) A party who has been served with a request for production of documents may file a motion for a protective order. The motion for protective order shall describe the document or class of documents to be protected, specify which of the grounds in §498.207(d)(2) are being asserted, and explain how those grounds apply.

(2) The ALJ may grant a motion for a protective order if he or she finds that the discovery sought:

(i) Is unduly costly or burdensome;

(ii) Will unduly delay the proceeding; or

(iii) Seeks privileged information.

(3) The burden of showing that discovery should be allowed is on the party seeking discovery.

20 C.F.R. §498.208 Exchange of witness lists, witness statements and exhibits.

(a) At least 15 days before the hearing, the parties shall exchange:

(1) Witness lists;

(2) Copies of prior written statements of proposed witnesses; and

(3) Copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with §498.216.

(b)(1) Failure to comply with the requirements of paragraph (a) of this section may result in the exclusion of evidence or testimony upon the objection of the opposing party.

(2) When an objection is entered, the ALJ shall determine whether good cause justified the failure to timely exchange the information listed under paragraph (a) of this section. If good cause is not found, the ALJ shall exclude from the party's case-in-chief:

(i) The testimony of any witness whose name does not appear on the witness list; and

(ii) Any exhibit not provided to the opposing party as specified in paragraph (a) of this section.

(3) If the ALJ finds that good cause exists, the ALJ shall determine whether the admission of such evidence would cause substantial prejudice to the objecting party due to the failure to comply with paragraph (a) of this section. If the ALJ finds no substantial prejudice, the evidence may be admitted. If the ALJ finds substantial prejudice, the ALJ may exclude the evidence, or at his or her discretion, may postpone the hearing for such time as is necessary for the objecting party to prepare and respond to the evidence.

(c) Unless a party objects by the deadline set by the ALJ's prehearing order pursuant to §498.206 (b)(3) and (c), documents exchanged in accordance with paragraph (a) of this section will be deemed authentic for the purpose of admissibility at the hearing.

20 C.F.R. §498.209 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual, whose appearance and testimony are relevant and material to the presentation of a party's case at a hearing, may make a motion requesting the ALJ to issue a subpoena.

(b) A subpoena requiring the attendance of an individual may also require the individual (whether or not the individual is a party) to produce evidence at the hearing in accordance with §498.207.

(c) A party seeking a subpoena will file a written motion not less than 30 days before the date fixed for the hearing, unless otherwise allowed by the ALJ for good cause shown. Such request will:

(1) Specify any evidence to be produced;

(2) Designate the witness(es); and

(3) Describe the address and location with sufficient particularity to permit such witness(es) to be found.

(d) Within 20 days after the written motion requesting issuance of a subpoena is served, any party may file an opposition or other response.

(e) If the motion requesting issuance of a subpoena is granted, the party seeking the subpoena will serve the subpoena by delivery to the individual named, or by certified mail addressed to such individual at his or her last dwelling place or principal place of business.

(f) The subpoena will specify the time and place at which the witness is to appear and any evidence the witness is to produce.

(g) The individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within 10 days after service.

(h) When a subpoena is served by a respondent on a particular individual or particular office of the Office of the Inspector General, the OIG may comply by designating any of its representatives to appear and testify.

(i) In the case of contumacy by, or refusal to obey a subpoena duly served upon any person, the exclusive remedy is specified in section 205(e) of the Social Security Act (42 U.S.C. 405(e)).

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20 C.F.R. §498.215 The hearing and burden of proof.

(a) The ALJ will conduct a hearing on the record in order to determine whether the respondent should be found liable under this part.

(b) In civil monetary penalty cases under §§498.100 through 498.132:

(1) The respondent has the burden of going forward and the burden of persuasion with respect to affirmative defenses and any mitigating circumstances; and

(2) The Inspector General has the burden of going forward and the burden of persuasion with respect to all other issues.

(c) The burden of persuasion will be judged by a preponderance of the evidence.

(d) The hearing will be open to the public unless otherwise ordered by the ALJ for good cause.

(e)(1) A hearing under this part is not limited to specific items and information set forth in the notice letter to the respondent. Subject to the 15-day requirement under §498.208, additional items or information may be introduced by either party during its case-in-chief, unless such information or items are inadmissible under §498.217.

(2) After both parties have presented their cases, evidence may be admitted on rebuttal as to those issues presented in the case-in-chief, even if not previously exchanged in accordance with §498.208.

20 C.F.R. §498.216 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing will be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony (other than expert testimony) may be admitted in the form of a written statement. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner that allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing.

Prior written statements of witnesses proposed to testify at the hearing will be exchanged as provided in §498.208.

(c) The ALJ will exercise reasonable control over the mode and order of witness direct and cross examination and evidence presentation so as to:

(1) Make the examination and presentation effective for the ascertainment of the truth;

(2) Avoid repetition or needless waste of time; and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ may order witnesses excluded so that they cannot hear the testimony of other witnesses. This does not authorize exclusion of:

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity pro se or designated as the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual engaged in assisting the attorney for the Inspector General.

20 C.F.R. §498.217 Evidence.

(a) The ALJ will determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ will not be bound by the Federal Rules of Evidence, but may be guided by them in ruling on the admissibility of evidence.

(c) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(d) Although relevant, evidence must be excluded if it is privileged under Federal law, unless the privilege is waived by a party.

(e) Evidence concerning offers of compromise or settlement made in this action will be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(f)(1) Evidence of crimes, wrongs or acts other than those at issue in the instant case is admissible in order to show motive, opportunity, intent, knowledge, preparation, identity, lack of mistake, or existence of a scheme.

(2) Such evidence is admissible regardless of whether the crimes, wrongs or acts occurred during the statute of limitations period applicable to the acts which constitute the basis for liability in the case, and

regardless of whether they were referenced in the IG's notice sent in accordance with §498.109.

(g) The ALJ will permit the parties to introduce rebuttal witnesses and evidence as to those issues raised in the parties' case-in-chief.

(h) All documents and other evidence offered or taken for the record will be open to examination by all parties, unless otherwise ordered by the ALJ for good cause.

20 C.F.R. §498.218 The record.

(a) The hearing shall be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by any person, unless otherwise ordered by the ALJ for good cause.

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20 C.F.R. §498.220 Initial decision.

(a) The ALJ will issue an initial decision, based only on the record, which will contain findings of fact and conclusions of law.

(b) The ALJ may affirm, deny, increase, or reduce the penalties or assessments proposed by the Inspector General.

(c) The ALJ will issue the initial decision to all parties within 60 days after the time for submission of post-hearing briefs or reply briefs, if permitted, has expired. The decision will be accompanied by a statement describing the right of any party to file a notice of appeal with the DAB and instructions for how to file such appeal. If the ALJ cannot issue an initial decision within the 60 days, the ALJ will notify the parties of the reason for the delay and will set a new deadline.

(d) Unless an appeal or request for extension pursuant to §498.221(a) is filed with the DAB, the initial decision of the ALJ becomes final and binding on the parties 30 days after the ALJ serves the parties with a copy of the decision. If service is by mail, the date of service will be deemed to be five days from the date of mailing.

20 C.F.R. §498.221 Appeal to DAB.

(a) Any party may appeal the decision of the ALJ to the DAB by filing a notice of appeal with the DAB within 30 days of the date of service of the initial decision. The DAB may extend the initial 30-day period for a period of time not to exceed 30 days if a party files with the DAB a request for an extension within the initial 30-day period and shows good cause.

(b) If a party files a timely notice of appeal with the DAB, the ALJ will forward the record of the proceeding to the DAB.

(c) A notice of appeal will be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions, and

identifying which finding of fact and conclusions of law the party is taking exception to. Any party may file a brief in opposition to exceptions, which may raise any relevant issue not addressed in the exceptions, within 30 days of receiving the notice of appeal and accompanying brief. The DAB may permit the parties to file reply briefs.

(d) There is no right to appear personally before the DAB, or to appeal to the DAB any interlocutory ruling by the ALJ.

(e) No party or person (except employees of the DAB) will communicate in any way with members of the DAB on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

(f) The DAB 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.

(g) If any party demonstrates to the satisfaction of the DAB that additional evidence not presented at such hearing is relevant and material and that there were reasonable grounds for the failure to adduce such evidence at such hearing, the DAB may remand the matter to the ALJ for consideration of such additional evidence.

(h) The DAB may remand a case to an ALJ for further proceedings, or may issue a recommended decision to decline review or affirm, increase, reduce, or

reverse any penalty or assessment determined by the ALJ.

(i) When the DAB reviews a case, it 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.

(j) Within 60 days after the time for submission of briefs or, if permitted, reply briefs has expired, the DAB will issue to each party to the appeal and to the Commissioner a copy of the DAB's recommended decision and a statement describing the right of any respondent who is found liable to seek judicial review upon a final decision.

20 C.F.R. §498.222 Final decision of the Commissioner.

(a) Except with respect to any penalty or assessment remanded to the ALJ, the DAB's recommended decision, including a recommended decision to decline review of the initial decision, shall become the final decision of the Commissioner 60 days after the date on which the DAB serves the parties to the appeal and the Commissioner with a copy of the recommended decision, unless the Commissioner reverses or modifies the DAB's recommended decision within that 60-day period. If the Commissioner reverses or modifies the DAB's recommended decision, the Commissioner's decision is final and binding on the parties. In either event, a copy of the final decision will be served on the parties. If service is by mail, the date of service will be deemed to be five days from the date of mailing.

(b) There shall be no right to personally appear before or submit additional evidence, pleadings or briefs to the Commissioner.

(c)(1) Any petition for judicial review must be filed within 60 days after the parties are served with a copy of the final decision. If service is by mail, the date of service will be deemed to be five days from the date of mailing.

(2) In compliance with 28 U.S.C. 2112(a), a copy of any petition for judicial review filed in any U.S. Court of Appeals challenging a final action of the Commissioner will be sent by certified mail, return receipt requested, to the SSA General Counsel. The petition copy will be time-stamped by the clerk of the court when the original is filed with the court.

(3) If the SSA General Counsel receives two or more petitions within 10 days after the final decision is issued, the General Counsel will notify the U.S. Judicial Panel on Multidistrict Litigation of any petitions that were received within the 10-day period.

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42 C.F.R. §406.12 Individual under age 65 who is entitled to social security or railroad retirement disability benefits.

(a) ***Basic requirements.*** An individual under age 65 is entitled to hospital insurance benefits if, for 25 months, he or she has been -

(1) Entitled or deemed entitled to social security disability benefits as an insured individual, child, widow, or widower who is "under a disability" or

(2)A disabled qualified beneficiary certified under Section 7(d) of the Railroad Retirement Act.

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(d)*When entitlement begins and ends.*

(1) Entitlement to hospital insurance begins with the 25th month of an individual's entitlement or deemed entitlement to disability benefits. Although an individual is not entitled to disability benefits for the month in which he or she dies, for purposes of this paragraph the individual will be deemed to be entitled for the month of death.

(2) Except as provided in paragraph (e) of this section, entitlement to hospital insurance ends with the earliest of the following:

(i) The last day of the last month in which he or she was entitled or deemed entitled to disability benefits or was qualified as a disabled railroad retirement beneficiary, if he or she was notified of the termination of entitlement before that month.

(ii) The last day of the month following the month in which he or she is mailed a notice that his or her entitlement or deemed entitlement to disability benefits, or his or her status as a qualified disabled railroad retirement beneficiary, has ended.

(iii) The last day of the month before the month he or she attains age 65. (An individual who is entitled to social security or railroad retirement cash benefits for the month of attainment of age 65 is automatically entitled to hospital insurance under § 406.10.)

(iv) The day of death.

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