

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	
Social Security Administration,)	Date: October 9, 2007
Office of the Inspector General,)	
)	
Petitioner,)	
)	
- v. -)	Docket No. C-06-585
)	Decision No. CR1670
Janie Mason,)	
)	
Respondent.)	
_____)	

DECISION

I find that Respondent, Janie Mason, made false statements and/or representations of material facts to the Social Security Administration (SSA) regarding her physical impairments that she knew or should have known were false and/or misleading. The false statements and/or representations were made in connection with a Continuing Disability Review (CDR) used to determine Respondent's continuing right to disability benefits under title XVI in violation of section 1129 of the Social Security Act (Act). The Inspector General (I.G.) proposed a \$15,000 civil money penalty (CMP). However, I find that \$9,000 is reasonable in view of the facts and circumstances of this case.

I. Background

This case came before me pursuant to a request for hearing filed by Respondent dated June 13, 2006. On December 8, 2006, I held a prehearing conference to discuss with the parties the manner in which I proposed to dispose of this matter. As a result of the prehearing conference, I established a schedule for the parties to simultaneously exchange exhibit lists and proposed witnesses by January 26, 2007. Prehearing briefs were to be simultaneously filed by February 15, 2007.

On January 24, 2007, Petitioner filed a motion requesting an extension of time to file prehearing exchanges because the parties had reached a settlement, in principle, and additional time was needed to finalize and execute the agreement. I granted the motion and extended the deadline to February 2, 2007.

On February 23, 2007, Petitioner requested that I re-establish the briefing schedule inasmuch as the parties were unable to settle the case. In response, I established prehearing deadlines directing the parties to file the exchanges by May 18, 2007, and prehearing briefs by June 8, 2007. Petitioner timely submitted his witness and exhibit lists on May 18, 2007, and, on June 8, filed a brief in support of the I.G.'s decision to propose a \$15,000 CMP against Respondent.

As a result of Respondent's failure to comply with my order regarding pre-hearing submissions, I issued an order requiring Respondent to show cause no later than June 27, 2007, why her request for hearing should not be dismissed for abandonment. When no response was received by the date established in my order, I issued a dismissal dated July 19, 2007. Respondent sent a letter dated July 19, 2007, and received on August 7, which I deemed to be her response to my order to show cause. Although I found her letter to be unconvincing, in view of her *pro se* status, I reopened the case, and granted her 30 days to respond to Petitioner's submission of documentary evidence and pre-hearing brief.

On September 25, 2007, Respondent filed a brief in support of her contentions, but accompanied by no documentary evidence. Petitioner has proffered, and I have admitted into evidence, 18 exhibits identified as SSA Exhibit (Ex.) 1 through SSA Ex. 18, without objection.

After a review of Respondent's submission, I find that she has raised no matters that permit me to conclude that there are material issues of fact in controversy that would warrant an in person hearing. Unless the parties have raised a genuine issue of material fact, I may decide this case on summary judgment, without an evidentiary hearing. *Livingston Care Center*, DAB No. 1871 (2003); *Crestview Parke Care Center*, DAB No. 1836 (2002); *Everett Rehabilitation and Medical Center*, DAB No. 1628, at 3 (1997); *Carmel Convalescent Hospital*, DAB No. 1584, at 27 (1996); Fed. R. Civ. P. 56 (summary judgment is appropriate when there is no genuine issue as to any material fact and the proponent is entitled to judgment as a matter of law). Respondent's general denials, without addressing the facts upon which the I.G. relies for the imposition of sanctions, are insufficient to defeat the entry of summary judgment in this case.

For the reasons set forth below, I agree that Respondent Mason knowingly misrepresented material facts to SSA for its use in determining her eligibility for Supplemental Security Income (SSI) benefits, and I consider \$9,000 a reasonable penalty.

II. Applicable Law and Regulations

Section 1129(a)(1) of the Act provides that 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 . . . 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 . . . 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. 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 such 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.

42 U.S.C. § 1320a-8(a)(1). Section 1129(a)(2) defines “material fact” as “one which the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under title II” 42 U.S.C. § 1320a-8(a)(2).

The regulations implementing section 1129 are found at 20 C.F.R. Part 498. Echoing the statutory language, they authorize the I.G. to impose a penalty against any person who has made a statement or representation of a material fact for use in determining any initial or continuing right to or amount of title XVI benefits, and who knew, or should have known, that the statement or representation was false or misleading, *or* who omitted a material fact, *or* who made such a statement with “knowing disregard for the truth.” 20 C.F.R. § 498.102(a).

With respect to the amount of the penalty, the regulations reflect the statutory amounts: up to \$5,000 for each violation, and an assessment in lieu of damages of not more than twice the amount of benefits or payments paid as a result of the misrepresentation. 20 C.F.R. §§ 498.103(a), 498.104.

A hearing before an Administrative Law Judge (ALJ) is available to anyone sanctioned pursuant to Section 1129 of the Act. 42 C.F.R. § 498.202(a). The ALJ is specifically authorized to increase or reduce the penalties proposed by the I.G., taking into account the following factors: 1) the nature of the statements and misrepresentations 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. 20 C.F.R. §§ 498.106(a), 498.220.

III. Issues

The issues here are: 1) did Respondent Mason make, or cause to be made, to SSA a statement or representation of a material fact for use in determining her entitlement to SSI benefits, that she knew or should have known, was false or misleading, or did she omit a material fact or make such a statement with knowing disregard for the truth; and 2) if so, is the \$15,000 proposed penalty reasonable.¹

¹ 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 made as a result of the false and misleading statements and/or representations. However, an assessment is not appropriate in this case inasmuch as the misrepresentations were detected prior to the payments of any benefits to Petitioner. SSA Ex. 11, at 1, 2.

IV. Discussion

A. Respondent Mason made statements or representations to SSA that she knew or should have known were false or misleading.

After being involved in a motor vehicle accident in May 1999, Respondent applied for, and became entitled to, title XVI disability benefits in July 2002, due to a severe back impairment that prevented her from engaging in substantial gainful activity.

On July 10, 2005, the Leesville, Louisiana District Office initiated a medical CDR pursuant to 20 C.F.R. § 416.989 to determine whether Respondent continued to be disabled.

In connection with the CDR process, Respondent Janie Mason claimed in a Function Report (Form SSA-3373-BK) that she had difficulty getting her children into and out of a vehicle, getting groceries, paying bills due to hand cramping, lifting more than a few pounds, squatting, standing for prolonged periods, grasping, holding, writing, and using her hands at all for very long. SSA Ex. 2.

The Social Security's I.G. obtained a surveillance video on January 3, 2006, capturing Petitioner getting children in and out of a vehicle, carrying two gallons of milk in one hand while shopping, carrying a child two to three years of age for at least 15 minutes with no apparent difficulty, bending, squatting, and standing for prolonged periods. SSA Ex. 6. On December 22, 2005, she was also observed by a Cooperative Disability Investigation Unit (CDIU) Special Agent, operating a cash register and checking customers out at a Dollar General store. She required no assistance in the performance of the checkout clerk duties. SSA Ex. 5. The I.G. for SSA maintains that there is a basis for imposing a penalty against Respondent because, in the Function Report that she submitted in order to establish continued entitlement to SSI benefits, she made false and misleading statements and/or misrepresentations of material facts that she knew or should have known were false or misleading, in violation of section 1129 of the Act.

In her request for hearing, Respondent contends that she does, in fact, need help getting her children into and out of a vehicle. She added that when she grasps her children to pick them up, her hands go numb, she experiences horrible cramps in the shoulder blades, "as if she were carrying an elephant," and her back goes into spasms. She also stated that her hands always cramp, no matter what she grasps. This creates difficulty for her, even performing such tasks as paying bills. However, on January 3, 2006, Respondent was observed bending forward from the waist in order to secure the children in their car seats. She was also seen lifting the older of two children out of a vehicle, and carrying her into a

Wal-Mart store. Her male companion did not assist in securing the children, and it was he that carried the smaller child. Once inside the store, Respondent continued to carry the child for approximately 15 minutes, and even bent over to look at merchandise. According to the investigators' estimate, the child weighed about 25 to 35 pounds. After she placed the child in the shopping cart and separated from her companion, she remained at a counter for several minutes handling and manipulating cell phones. When Respondent left the Wal-Mart store, she was carrying the younger child, estimated to weigh about 13 to 15 pounds. SSA Ex. 6.

The investigators who made the above observations stated that during the time that Respondent was observed at Wal-Mart, she did not display any indication of distress or discomfort. Her gait and stride were unremarkable, and when she lifted the older child, she did not appear to be in any discomfort. Additionally, when she handled the cell phones there was no indication of fine motor skill difficulty. *Id.*

The question before me is whether Respondent Mason made false or misleading statements in violation of the Act and whether the proposed penalty is unreasonable. A disability claimant must accurately describe her functional abilities. It is up to SSA then, based on the information provided by the claimant, to determine whether she satisfies the criteria for a finding of disability. Thus, false statements or misrepresentations of someone's functional abilities is materially relevant to SSA's ability to make an accurate and appropriate determination. *See, SSA v. Koutsogiannis*, DAB CR1569 (2007), *aff'd*, DAB, A-07-81, (2007).

The statute defines a material fact as one 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 title XVI." Act, section 1129(a)(2). Regulations governing SSI eligibility (under title XVI of the Act) are found at 20 C.F.R. Part 416. An individual is disabled if unable to perform any "substantial gainful activity" because of a "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." 20 C.F.R. § 416.905(a).

To satisfy the basic definition of disability, the individual must have a severe impairment that makes him/her unable to perform his/her past relevant work or any other substantial gainful work. 20 C.F.R. § 416.905(a); 42 C.F.R. § 416.920. An individual who is severely limited in the ability to lift carry, ambulate, handle grasp, or manipulate objects, or bend, to the point of being unable to perform past relevant work or any other work existing in significant number in the National economy might be considered disabled and eligible for SSI disability benefits under SSA rules and regulations.

Respondent Mason's ability to walk, lift, carry, and grasp are material facts that the Secretary would consider in determining her eligibility for SSI (Title XVI) benefits. Thus, her ability to function at a higher level than she claimed is material to her eligibility for SSI benefits.

B. The I.G.'s proposed penalty against Respondent Mason is not reasonable.

The statute authorizes imposition of a CMP of "not more than \$5,000 for each such statement or representation," and an "assessment, in lieu of damages . . . of not more than twice the amount of benefits or payments paid as a result of such a statement or representation." Act, section 1129(a)(1); 20 C.F.R. §§ 498.103(a), 498.104.

In her effort to qualify for SSI benefits, Respondent Mason has made misrepresentations of her functional capacity. However, in recommending a CMP, the I.G. relies solely on her responses to questions from the November 2005 *Function Report - Adult*, which is in the record as SSA Ex. 2. The I.G. points specifically to Respondent Mason's assertions that she needed help putting her children into and getting out of a vehicle, and that she needs help getting groceries. He noted that she claimed an inability to lift more than a few pounds, and squat, bend or stand for more than a few seconds, and her representation that she could not grasp, hold, write or use her hands at all for very long. SSA Ex. 11.

I conclude that Respondent made three false or misleading statements. I find that Respondent's representation regarding the ability to place her children in a vehicle and getting them out, is in the same category as the representation that she could only lift and carry (that is, walk with) a few pounds. Thus, in terms of Respondent's ability to lift and carry, the I.G. has established the existence of one misrepresentation. The I.G. also properly determined that Respondent misrepresented her ability to grasp, hold, and handle objects. This was particularly made evident when she was observed handling purchases at a Dollar General store where she operated a cash register and checked out customers. She was able to do this for a prolonged period. Additionally, she was observed deftly handling and manipulating cell phones at a Wal-Mart mobile phone counter. I consider this to be the second misrepresentation. The record does not reflect that Respondent was observed bending or squatting for an extended period of time, but she was observed standing and walking for prolonged periods. I consider this the third misrepresentation.

As stated earlier, the I.G. proposes a CMP of \$15,000. In order to determine whether that amount is reasonable, I must apply the regulatory criteria. I am specifically authorized to affirm, deny, increase, or reduce the penalties proposed by the I.G. 20 C.F.R. § 498.220. In determining the appropriateness of the penalty, I must take into account: 1) the nature of the statements and representations 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. 20 C.F.R. § 498.106.

I have determined that a \$9,000 (or \$3,000 per misrepresentation) CMP is appropriate in this case. Respondent claims that she currently has no funds with which to pay the CMP and, notwithstanding her general lack of veracity, I have no reason to doubt that she is currently without funds. The nature of the statements and representations and the circumstances under which they were made, shows that Respondent made a deliberate attempt to misrepresent the degree to which her impairments adversely impact on her ability to engage in vocationally relevant activities. However, this case is not in the category of false or misleading statements or misrepresentations that warrant the maximum amount of monetary penalty.² Additionally, Respondent does not have a history of a prior offense. As a result, I have made a reduction in the penalty imposed consistent with the particular circumstances of this case.

V. Conclusion

Respondent Mason violated section 1129 of the Act when she knowingly misrepresented material facts to SSA for its use in determining her eligibility for title XVI benefits. I consider reasonable the imposition of a \$9,000 CMP.

/s/

Jose A. Anglada
Administrative Law Judge

² An example is a case where the I.G. proposed a CMP of \$12,000 against an applicant for disability insurance benefits, with a history of a prior offense, who created three functional assessment forms, forged the signatures of three health care providers, and presented these forms as evidence of disability, during the hearing process before an ALJ. *See SSA v. Bobbie Carol Smith*, DAB CR1650 (2007).