Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	
Social Security Administration, Office of the Inspector General,	
v.	DATE: June 20, 2007
Anthony Koutsogiannis,	Civil Remedies CR1569 App. Div. Docket No. A-07-81
Respondent.	

RECOMMENDED DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Mr. Anthony Koutsogiannis (Respondent) timely appealed a February 28, 2007 decision by Administrative Law Judge (ALJ) Steven T. Kessel. Anthony Koutsogiannis, DAB CR1569 (2007) (ALJ Decision). The ALJ upheld the determination of the Social Security Administration (SSA) that Mr. Koutsogiannis had made two false or misleading statements, and determined that the civil money penalty (CMP) of $10,000 and assessment of $95,218 proposed by SSA's Inspector General (I.G.) for the violation were reasonable.

The SSA determination arose under section 1129(a) of the Social Security Act (Act),[1] which authorizes the I.G. to impose civil money penalties and assessments against any person who makes a false or misleading statement of material fact that SSA might use in determining that person's initial or continuing right to disability benefits.

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

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

Applicable Legal Authority

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 II . . ., 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 . . ., 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 or 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 including “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 II benefits, and who knew, or should have known, that the statement or representation was false or misleading, or 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.

Before the ALJ, respondents have the burden of going forward and the burden of persuasion with respect to affirmative defenses and any mitigating circumstances. The I.G. bears the burden of going forward and the burden of persuasion with respect to all other issues. The burden of persuasion "will be judged by a preponderance of the evidence." 20 C.F.R. § 498.215(b) and (c).

Standard of Review

The regulations at 20 C.F.R. § 498.221(i) specify that the Departmental Appeal Board "will limit its review to whether the ALJ's initial decision is supported by substantial evidence on the whole record or contained an error of law." See also National Federation of Retired Persons, DAB No. 1885, at 16 (2003). Substantial evidence exists to support a factual finding "if a reasonable mind reviewing the evidence in the record as a whole could accept it as adequate to support his conclusion." Consolidated Edison v. NLRB, 305 U.S. 197, 229 (1938); see also Richardson v. Perales, 402 U.S. 389, 401 (1971). The Board may remand a case to the ALJ for further proceedings or may issue to the Commissioner of Social Security (the Commissioner) a recommended decision to decline review or affirm, increase, reduce, or reverse the penalty determined by the ALJ. 20 C.F.R. § 498.221(h).

Factual and Procedural Background[2]

Respondent suffers from multiple sclerosis and filed an application on December 17, 1996 seeking disability benefits. In that application, he stated that he "became unable to work because of [his] disabling condition on March 14, 1995" and that he was "still disabled." SSA Ex. 1. Respondent began receiving disability checks in January 1997. The payments included benefit amounts approved retroactively to July 1996, based on SSA acceptance of a disability onset date of January 8, 1996. SSA Ex. 10, at 4.

In 2000, SSA received a written statement claiming to be from a creditor of the Respondent and alleging information that Respondent "is working under the table at a business in the Fall River area by the name of Professional Image." SSA Ex. 3, at 1; ALJ Decision at 3. That allegation prompted SSA to send an inquiry dated March 14, 2000 to Respondent. That letter indicated that SSA "received information that you [Respondent] have been working at Professional Image in Fall River, MA. When you are receiving Social Security Disability benefits you are required by law to report any and all work." SSA. Ex. 3, at 2; ALJ Decision at 3. Respondent then completed and returned a Statement of Claimant, as requested, which was signed and dated March 17, 2000, and read as follows:

> Understanding that this statement is for the use of the Social Security Administration, I hereby certify that-
>
> > I am not working and have not worked since I have been receiving disability benefits. My parents have a business in the same building as Professional Image and I may go to visit my parents at their business from time to time...
> >
> > The phone # is the same as Professional Image because my parents do work for this business.
> >
> > Paul Castor is the owner of Professional Image.

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[2] The following facts are drawn from the record before the ALJ and the ALJ's decision and summarized here for the convenience of the reader, but should not be treated as new findings.

SSA Ex. 4, at 1; ALJ Decision at 4. SSA also received anonymous calls about Respondent in 2001. SSA Ex. 9; ALJ Decision at 6.

In a separate, administrative process, Respondent was notified by SSA on November 7, 2000, that his disability status was due for a review. Apparently, a medical cessation of benefits determination was made May 14, 2001 after Respondent failed to return any of the necessary forms or evidence. SSA Ex. 5, at 1. On May 22, 2001, Respondent requested reconsideration of the cessation of benefits. SSA Ex. 8; ALJ Decision at 6. In the course of that appeal, Respondent submitted a statement dated November 16, 2004 to SSA stating that he disagreed with the determination for the following reason: "I did not work at all since I have been on disability." SSA Ex. 15.

SSA alleged that the quoted parts of the March 17, 2000 claimant statement (2000 Statement) and the November 16, 2004 reconsideration request statement (2004 Statement) were false or misleading because Respondent actually engaged in work activities during the relevant times.

In support of the allegations, SSA relied in part on an I.G. investigation of Respondent begun in late 2001. See SSA Ex. 5 and Ex. 9, at 5. On two occasions in April 2002, an I.G. investigative agent, Agent Donnelly, visited both Professional Image and Mr. and Mrs. K's Custom Tailoring in an undercover capacity. SSA Ex. 12. The April 4, 2002 visit was covertly recorded. SSA Ex. 13. The agent posed as a customer seeking to have two pairs of pants altered and interacted with Respondent who was present at the store. The interactions included Respondent taking measurements, discussing specific alterations, calculating the cost of the tailoring services and providing a claim check for the pants. SSA Ex. 12, at 6; SSA Ex. 13; ALJ Decision at 4-5. In conversation, Respondent stated to the agent that he had been doing this full-time for four years and that the only days he does not work are Sundays but has been around the tailoring business for many years because of his family's business. SSA Ex. 12, at 6 and SSA Ex. 13. On April 11, 2002, Agent Donnelly returned to pick up the garments and again recorded the interactions. SSA Ex. 12, at 7 and SSA Ex. 14. The agent waited for Respondent to come in, about five minutes later, and tried on the pants. Id. The agent discussed the alterations with Respondent and Respondent's mother, who was in the family store on that date, and observed Respondent answering the business telephone. SSA Exs. 12 and 14; ALJ Decision at 5.

By letter dated October 26, 2005, I.G. advised Respondent that it had received information indicating that he may have made, or

caused to be made, false statements and/or misrepresentations of material fact to SSA, which he knew or should have known were false or misleading. SSA Ex. Ex. 16, at 5. The letter identified the 2000 and 2004 Statements "regarding your work activity while receiving disability benefits," advised that Respondent may have been erroneously paid disability insurance benefits based on those false statements, and notified Respondent that the I.G. would proceed against him under section 1129 of the Act. On February 24, 2006, the I.G. sent Respondent its notice of proposed determination to impose a penalty and assessment. SSA Ex. 16, at 8. The I.G. determined that Respondent in fact worked as a tailor during the period in which he received benefits. The I.G. also determined that Respondent worked part-time as an apprentice electrician in 1997.

In accordance with the procedures at 20 C.F.R. Part 498, Respondent timely appealed this determination, and the ALJ heard and decided this matter. The ALJ made two numbered findings of fact and conclusions of law (FFCL):

> 1. Respondent deliberately made false or misleading statements concerning his eligibility for disability benefits.
>
> 2. Civil money penalties of $10,000 and an assessment of $95,218 are reasonable.

ALJ Decision at 3 and 10.

Respondent only takes explicit exception to FFCL 1. Resp. Br. at 2. Nevertheless, since some of Respondent's arguments appear to address FFCL 2, we will consider Respondent as having also excepted to that finding. See id. at 22.

We do not follow the order of argument in Respondent's briefing but note here that we have fully considered all arguments raised on appeal and reviewed the full record in reaching our decision. To the extent that any contention is not explicitly addressed, we have concluded that the ALJ Decision adequately covered the issue.

Analysis

1. Substantial evidence supports the ALJ's Finding 1.

> A. We defer to the ALJ's assessment of the witnesses' credibility and to his evaluation of the weight to be given conflicting evidence.

Much of Respondent's argument on appeal amounts to simple disagreement with the ALJ's evaluation of the testimony and other evidence regarding Respondent's activities. In a number of areas, the ALJ simply disbelieved Respondent's version of events. As a preliminary matter, therefore, we point out that, in reviewing an ALJ decision after a hearing, we generally defer to the ALJ's assessments of witnesses' credibility unless clearly erroneous. The Board explained this standard as follows:

> Among the tasks normally undertaken by the ALJ is evaluating the credibility and persuasiveness of witness testimony. Absent clear error, we defer to the findings of the ALJ on weight and credibility of testimony. Koester Pavilion, DAB No. 1750, at 15 (2000). In making credibility evaluations of testimony, the ALJ may reasonably consider many factors, including "witness qualifications and experience, as well as self-interest." Community Skilled Nursing Centre, DAB No. 1987 (2005), aff'd sub nom., Community Skilled Nursing Ctr. v. Leavitt, No. 05-4193 (6th Cir. Feb. 23, 2006).

Madison Health Care, Inc., DAB No. 2049, at 7-8 (2006).

In this case, the ALJ required submission of direct testimony in writing in advance of the in-person hearing and then permitted the opposing party to cross-examine any adverse witness in person. Respondent submitted written direct testimony from himself, his wife, and five other witnesses, and also submitted a statement in lieu of testimony from an additional individual. Resp. Exs. 12-19. The I.G. submitted written direct testimony, statements or declarations from Ms. Carolyn Gries, an SSA claims representative; Agent Donnelly; Ms. Kathy Buller, I.G. Chief Counsel; Raymond Melanson, with whom Respondent did some electrical work; I.G. Special Agent Jeffrey Paula; and Kimberley Ledoux. SSA Exs. 10, 12, 16, and 18-20. At the November 27, 2006 hearing, Respondent, his wife, and three of his other witnesses appeared and were cross-examined. Ms. Gries and Mr. Donnelly appeared for the I.G. and were cross-examined.

Credibility is particularly pivotal to the outcome of this case. As will become clear in this decision, relatively few facts were actually in dispute. The basis for the imposition of the CMPs and assessment depends, however, not only on whether Respondent made two false statements but also on his state of mind, since the statute requires that he knew or should have known the statements to be false or misleading or made the statements with knowing disregard for the truth. Section 1129(a)(1) of the Act. Respondent contends that, in his mind, he did not know the statements to be false or misleading and did not knowingly disregard the truth. His central claims are that he meant to say only that he was not engaged in paid employment and that he referred to narrower time frames than SSA and the ALJ looked at. The ALJ made clear that he did not believe that Respondent was telling the truth about what he meant when Respondent submitted the two statements to SSA in an effort to continue his disability benefits, but rather that the ALJ believed that Respondent intentionally concealed information that he knew the SSA was seeking from him. See, e.g., ALJ Decision at 3-4. Overall, the ALJ reported that Respondent claimed convenient memory lapses about information adverse to him while demonstrating acute recall of potentially favorable information, that his testimony followed an "obvious pattern" that undermined "his assertions of honest intent," and that he was "simply not believable." Id. at 9-10. In so concluding, the ALJ had the benefit, which we lack, of observing the demeanor of Respondent at the hearing as Respondent's integrity was tested by cross-examination.

Also important to the resolution of this case was the direct conflict in testimony about the nature of the interactions between the undercover agent and the Respondent during the two visits the agent paid to Respondent's family's business. Respondent portrayed himself as merely visiting the business (so that his parents could ensure that he remained drug-free after having been treated for addiction) and as being polite to customers and making himself useful when he could. Resp. Ex. 12, at 11-14. The agent portrayed Respondent as holding himself out as an employee or agent of the business, both in his behavior and his statements, such as taking measurements and asserting that he himself performed the tailoring. SSA Ex. 12 at 2-8, 15-16. The covert audio recordings (which were made part of the record), while not always clearly audible, confirm much of the agent's account of the verbal interactions, but cannot provide definitive evidence of Respondent's actions during the conversations. SSA Exs. 13 and 14.

The ALJ expressly rejected Respondent's arguments that the agent was not credible. ALJ Decision at 5. The ALJ found that

Respondent's accusations that the agent exaggerated in his account of Respondent's behavior were based on misstatements by Respondent of the agent's actual testimony. Id. Further, the ALJ noted that Respondent's own admissions corroborated many aspects of the agent's testimony. Id. By contrast, the ALJ found Respondent's testimony to be "both self-serving and not credible." Id. In particular, the ALJ discounted Respondent's claim that Respondent was lying to the agent when he claimed at the store to have performed the work himself but was now telling the truth in claiming not to have done any work activities. Id. Respondent offers various explanations for assertions he made about his employment in this and other contexts, mostly coming down to the idea that pride led him to engage in braggadocio rather than to admit his disability. These arguments, however, undercut further any challenge to the ALJ's negative conclusions on credibility, putting Respondent as they do in the position of claiming that he was lying then but telling the truth now. Nothing obliged the ALJ to accept that Respondent would lie for pride but not for profit.

We thus find no clear error in the ALJ's credibility assessments and therefore accept them for purposes of our review.

In many other instances, Respondent basically asks us to take a different view of the weight of particular evidence than did the ALJ. It was essentially undisputed that Respondent spent time in his parents' store on a regular basis (although the number of days and hours per week at particular time periods was disputed).[3] Depending on the weight given to conflicting evidence, for example, the ALJ had to determine whether his visits were basically personal (with Respondent merely occasionally assisting with minor tasks when able out of family duty) or whether he regularly performed the tasks that would be expected of an employee in the store, such as tailoring, dealing with customers, answering the telephone, and so on.

We do not, on appeal, redo the work done by the ALJ in weighing evidence. It is, as the Board has frequently opined, the role of the ALJ to weigh evidence and make factual determinations in the first instance. See, e.g., Frank R. Pennington, M.D., DAB No. 1786 (2001). Our role is to consider whether the evidence which the ALJ credited suffices to support his conclusions when viewed in the context of the whole record, including any evidence that conflicts with those conclusions. Substantial evidence is a

[3] Agent Donnelly reported that Respondent said he worked as a full-time tailor six days a week, for example. SSA Ex. 12.

deferential appellate standard for reviewing the work of a finder of fact, which the Board has explained in prior cases as follows:

> The substantial evidence standard means "such evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1950), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). Substantial evidence on the whole record means that a decision may not be upheld based solely on the evidence "which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." Universal Camera, 340 U.S. at 487. Thus, the "substantiality of evidence must take into account whatever in the record fairly detracts from its weight." Universal Camera, 340 U.S. at 488. The reviewer does not retry the case de novo, but rather reviews the whole record before the initial decision-maker. See, e.g., Calhoun v. Bailar, 626 F.2d 145, 147 (9th Cir. 1980). . . .
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> We generally accord considerable deference to an ALJ's judgment when it depends on weighing the evidence presented and assessing the credibility of witnesses, since the ALJ has the best opportunity to observe the witnesses. See, e.g., The Hanlester Network, et al., DAB 1275, at 51 (1991). However, the ALJ's judgment must be supported by reliable, credible evidence in the record and inferences reasonably drawn from that evidence.

Barry D. Garfinkel, M.D., DAB No. 1572, at 5-6 (1996).

In the following sections, therefore, we consider whether the testimony and evidence credited by the ALJ meets this standard and whether any evidence tending to undercut the ALJ's conclusions was adequately addressed.

> B. Substantial evidence in the record supports the ALJ's finding that the 2000 Statement was false.

The ALJ concluded that the 2000 Statement was materially false, in asserting that Respondent was not working and had not been working since he had been receiving disability benefits and that he merely visited his parents "at their business from time to time." ALJ Decision at 4, quoting SSA Ex. 4. The ALJ concluded that Respondent was present at the business on a regular basis and performed activities in the nature of work, in that he

"showed suits to customers, answered the phone, measured customers for alterations, and wrote up sales receipts for them." ALJ Decision at 4.

Respondent objects that the agent's evidence did not establish that the agent actually observed the Respondent, for example, sitting at a sewing machine or holding a needle or making alterations. Resp. Br. at 12-13. A list of actions that Respondent did not take, no matter how lengthy, cannot undercut the evidence credited by the ALJ of what actions Respondent did take.

Respondent also argues that, in making the 2000 Statement, he understood the term "working" in a much narrower sense than that used by the ALJ in finding that the "'simple activities' that Respondent admits to having performed are precisely the types of activities that comprise work," and "involve both exertion and mental activity that are consistent with work activity." ALJ Decision at 6. Respondent argues that to him, work means "labor or activity that is one's accustomed means of livelihood, employment" and not "unremunerated activity" such as helping out at his family's store. Resp. Br. at 14 and n.8. Respondent claims that his interpretation of work is the "exact same context" in which SSA uses the term. Id. at 14.

A review of SSA's regulations and the documents which Respondent signed in applying for benefits undermines the narrow reading on which Respondent now relies to justify his 2000 Statement. For example, SSA regulations provide that --

> the work that you have done during any period in which you believe you are disabled may show that you are able to do 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**.

20 C.F.R. 404.1571 (1999)(emphasis added). Further, the regulations and statute are clear that any individual seeking a determination of initial or continuing eligibility must provide information sufficient for SSA to determine whether he is not only unable to do his previous work but he cannot engage in any other kind of substantial gainful work which exists in the national economy. Act, section 223(d)(1); 20 C.F.R. § 404.1571 - 1573. The application form instructed Respondent to notify SSA

not only if he went "to work whether as an employee or a self-employed person," but also if his medical condition improved such that he "would be able to work, even though [he had] not yet returned to work." SSA Ex. 1, at 2. Contrary to Respondent's claim that this language demonstrates that SSA used "work" only to mean paid employment, we read these instructions as reinforcing that a regained capacity to perform work activities must be reported whether or not it is demonstrated by actual paid employment. Cf. Resp. Br. at 15. In March 2000, SSA wrote to Respondent informing him that SSA had received information that Respondent was working at the clothing store with which his family business shared space (Professional Image) and reminded him that he was "required by law to report **any and all** work." SSA Ex. 3, at 2 (emphasis added).[4]

Clearly, Respondent knew when he responded with the 2000 Statement that SSA was not interested only in whether Respondent was actually employed as a full-time tailor,[5] but also in whether

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[4] Respondent also objects to the following assertion in the ALJ Decision relating to SSA's March 2000 letter:

> SSA requested Respondent to complete a statement concerning his work activity. SSA **explicitly** told Respondent that it wanted to know about any work activity he performed subsequent to his disability onset date.

ALJ Decision at 3-4 (emphasis added). Respondent points out that SSA did **not expressly** ask for information about **work activity**, as opposed to "work," and that it did not ask about work **subsequent to his disability onset date**, as opposed to subsequent to his receipt of disability benefits. Resp. Br. at 2-3. The SSA letter reminded Respondent that he was required by law "to report any and all work" while "receiving Social Security Disability benefits." SSA Ex. 3, at 2. We discuss in the text that the broad phrasing of "any and all work" undercuts Respondent's claim to have thought only paid employment was reportable. We note here that Respondent is correct that the ALJ erroneously referred to the "disability onset date" instead of the period in which Respondent received benefits. We find this to be harmless error, however, since we conclude that even using the most restrictive interpretation of the period when Respondent was receiving benefits, his two statements are still false.

[5] As the ALJ noted, Respondent told the agent that "he had worked as a tailor full time for four years but that he wanted to (continued...)

he was engaging in work activities that demonstrated a capacity to perform in any job. We find no legal basis for Respondent's assertion that he could honestly claim not to have been working so long as his activities lacked "the prerequisite element of remuneration."[6] Resp. Br. at 14.

Respondent also suggests that his more active involvement at his family's store did not occur until after March 2000, when he started spending more time there after he was rehabilitated from a bout of drug dependency. See, e.g., Resp. Br. at 8; Resp. Ex. 12, at 7-8.[7] He and his family suggest that the real reason he was at the store was for supervision and a sort of therapeutic benefit of being with relatives and making himself useful. Resp. Ex. 12, at 13; Resp. Ex. 13, at 5; Resp. Ex. 14, at 4-5.

This argument is unpersuasive. As the ALJ pointed out, Respondent agreed on cross-examination that he visited the family store "anywhere from four to seven days a week from three to eight hours" and, on a daily basis, he would answer the phone, measure customers, translate for his parents or do other tasks of the kind that Agent Donnelly observed. Tr. at 121-22. Respondent argues that he was not testifying to the time frame before March 2000, but his testimony does not contain any such time limit. Even accepting that the frequency of his attendance at the store increased over time, Respondent has certainly not established that he merely visited "from time to time" before

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[5](...continued)
be 'incognito.'" ALJ Decision at 5, citing SSA Ex. 12, at 5. Respondent seeks to benefit from this telling evidence against him by portraying the SSA position as requiring proof that Respondent was a full-time tailor. No such requirement exists.

[6] The ALJ pointed out that evidence of record could support an inference that Respondent did receive remuneration for his services at the family shop and the co-located clothing store, but declined to resolve the issue. ALJ Decision at 7, citing Tr. at 142-150. We agree that Respondent has not established that the receipt of payment was essential to whether his activities amounted to "working."

[7] We also note that Respondent's inpatient addiction treatment occurred during July 1999. Resp. Posthearing Br. at 18; Tr. 150; see also Resp. Ex. 10, at 5. Thus, even had we accepted that he began frequenting his family business on a near-daily basis only to be "baby-sat" after his rehabilitation, the record places that the time well before March 2000.

March 2000. His own direct testimony states that "I spend a lot of time at my parents' store, but I always spent a lot of time at the store." Resp. Ex. 12, at 11. He emphasizes that the family is close-knit, and that he was not paid for his assistance when he was at the store, but does not deny that he would always assist by taking orders, answering the phone, or doing other tasks. Id. at 11-12.

We conclude that the evidence relating to Respondent's active involvement in his family's business constituted substantial evidence that his 2000 Statement that he had not been working since he began receiving disability benefits was false.

The ALJ offered the following additional basis for his conclusion:

> The March 17, 2000 statement also is false in that it failed to disclose that Respondent worked in another capacity after the onset date of his disability. In 1996 or 1997 Respondent worked as an apprentice electrician for Raymond D. Melanson Electric, an electrical contractor. SSA Ex. 18, at 2-3. There is a dispute about the precise dates when Respondent performed this work. It is unnecessary, however, that I resolve that issue. It is apparent from Mr. Melanson's testimony that Respondent performed this work at some time after January 8, 1996, the date when Respondent first began qualifying for disability benefits payments. *Id*. at 3.

ALJ Decision at 6. Respondent challenges this basis on the ground that his assertion in the 2000 Statement was that he had not worked since he began **receiving** disability benefits. By this, he contends, he referred to the date that he first began to receive disability checks some time in January 1997. Resp. Br. at 16. Therefore, according to Respondent, the ALJ erred in failing to determine when Respondent worked for Mr. Melanson. Id. Respondent argues that the work with Mr. Melanson all occurred in 1996, before Respondent even applied for disability benefits. As the ALJ pointed out, the record contains evidence tending to show that the two months during which Respondent admittedly assisted Mr. Melanson were in 1997 rather than 1996. ALJ Decision at 6.

Even if we accept the assertion that Respondent meant his 2000 Statement to refer only to the time from January 1997 until March 20, 2000, as we have noted, there is sufficient evidence relating to Respondent's activities in his family's business to render the

statement untruthful. Therefore, although the unresolved conflict about the year in which Respondent worked for Mr. Melanson might have been material had it been the only work Respondent was alleged to have done from 1997 through March 2000, the ALJ's failure to resolve the issue is, at most, harmless error here.

We thus conclude that the ALJ's finding that "Respondent deliberately made false or misleading statements concerning his eligibility for disability benefits" is supported by substantial evidence on the record as a whole in relation to Respondent's 2000 Statement.

C. Substantial evidence in the record also supports the ALJ's finding that the 2004 Statement was false.

Respondent asserts that the ALJ erred in finding that the 2004 Statement was false for some of the same reasons that Respondent put forward in relation to the 2000 Statement and that we have rejected above. These reasons include Respondent's claim that his work with Mr. Melanson predated his receipt of disability benefits and his contentions that his activities at the family store did not constitute work.

The same explanations we gave for rejecting these contentions in regard to the 2000 Statement also apply here, but additional evidence reinforces the correctness of the ALJ's conclusion in regard to the 2004 Statement. Agent Donnelly's observations of Respondent in 2002, which the ALJ found credible, relate directly to the time period covered by the 2004 Statement. There can be no question that this statement includes the time after Respondent returned from drug treatment and admits spending substantial time daily at the family store. We agree with the ALJ that it is implausible that Respondent believed that "activities consisting of assisting in a tailor shop and clothing store, several days a week, for up to eight hours a day" would not be the sort of work activity likely to disqualify him from receiving further benefits. ALJ Decision at 7. Thus, even if Respondent's presence and involvement at the family store was at some point minimal enough to justify his considering it not work-related (which we do not accept as true), the level of presence and involvement to which he has admitted during the period covered by the 2004 Statement is far too substantial to be countered by such a cavil.

We thus conclude that the ALJ's finding that "Respondent deliberately made false or misleading statements concerning his eligibility for disability benefits" is supported by substantial

evidence on the record as a whole in relation to Respondent's 2004 Statement.

D. The ALJ did not fail to consider any evidence which could materially affect the outcome of the case.

i. Statements by witnesses for Respondent

Respondent also contends that the ALJ failed to consider the testimony of five of Respondent's witnesses. Resp. Br. at 6, n.4 (naming witnesses Karen Koutsogiannis, Lindsey Koutsogiannis, Mary Kyriakakis, Paul Castro, and Claudette Ledoux). The Board has held that ALJ "need not 'cite to everything in the record which supports'" his findings but "evidence that the ALJ does cite must support the findings made." DAB No. 1572, at 6, quoting Livingston, Reconsideration of DAB No. 1406, at 3. Thus, the ALJ need not discuss all the evidence that might be viewed as inconsistent with his conclusions but should not disregard directly conflicting evidence without some explanation. Id.

The ALJ indicated to the parties at the hearing that he had reviewed every exhibit, which included the written direct testimony of these witnesses. Tr. at 191. Clearly, then, the ALJ was well aware of this testimony. We therefore consider whether the testimony not mentioned in the ALJ Decision directly conflicts with the conclusions reached by the ALJ and, if so, whether some explanation exists for disregarding it.

We have reviewed the testimony cited, and we do not find that it conflicts directly with any material findings in the ALJ Decision. To a large extent, the testimony cited reflects opinion testimony of interested parties as to why they do not consider the activities that Respondent performed in his parents' store or at Professional Image to be "work." Cf. Resp. Br. at 8-12; Resp. Exs. 13-17. The ALJ found that Respondent consciously lied when he claimed in 2000 and 2004 to have done no work since being on disability benefits. ALJ Decision at 4. Clearly, the ALJ implicitly rejected the opinions of Respondent's family members as to what Respondent meant by "work." The witnesses asserted that nothing which they observed Respondent doing at the family shop or clothing store amounted to employment, but the ALJ expressly found credible Agent Donnelly's report of the activities which he observed Respondent perform. ALJ Decision at 6. Since the ALJ relied on the agent's observations, the ALJ did not err in choosing not to discuss whether Respondent's activities at the store as observed and reported by Respondent's witnesses constituted work or not – in either case, their

testimony could not negate the agent's observations credited by the ALJ about what the agent saw Respondent do and say.

Much of the rest of the testimony offered by these witnesses recounts the history of Respondent's health issues and their impact on his family and Respondent's close relationship with his parents. The ALJ made no findings that contradict those observations, since the ALJ focused only on whether Respondent misrepresented his work activity during the relevant time periods.

ii. Nature of multiple sclerosis

A substantial part of Respondent's brief on appeal, as well as many of the medical records which he submitted as exhibits, appear directed at establishing that he did indeed suffer from multiple sclerosis. It is not disputed that Respondent was diagnosed with, treated for, and suffered from multiple sclerosis. Nevertheless, Respondent objects that the ALJ "failed to grasp the nature of the disease." Resp. Br. at 19. The core reasoning that Respondent offers is that, because multiple sclerosis is a disease with "random" symptoms which come and go and vary unpredictably in severity, evidence that Respondent was able to perform work-related tasks on a given day does not establish that he was employable. Respondent, in briefing, testimony, and statements from his family, paints a somber picture of the impact that his disease and his subsequent long addiction to painkillers had on his own life and on his family. Resp. Br. at 5-12 and record citations therein.

Ultimately, however, we conclude that the ALJ did not err in failing to address Respondent's symptomatology in detail. The nature and severity of Respondent's illness or his addiction was simply not relevant to the issue before the ALJ of whether specific statements were false or misleading in violation of the Act. The falsity of the statements was not based on a finding that Respondent's work activities meant that he lied about having multiple sclerosis. The falsity was based on his denial that he performed such activities when directly questioned about reports of his working at the family business and the clothing store.

Had Respondent cooperated with SSA's inquiries by providing accurate information about his work activities, then SSA would have been able to determine whether or not those activities demonstrated a capacity for gainful employment. By concealing the extent of his work for his parents and for the clothing store, Respondent deprived SSA of the ability to evaluate those facts along with medical evidence to make that determination.

E. The ALJ's finding that the amount of assessment was reasonable is supported by substantial evidence.

The ALJ noted that the assessment amount equaled the total amount of benefits received by Respondent after March 2000 (and therefore as a result of his false statements) and that Respondent did not dispute the accuracy of the calculations. ALJ Decision at 10-11, n.5. As the ALJ pointed out, SSA could have imposed up to double that amount under the law. ALJ Decision at 10, citing Section 1129(a)(1); 20 C.F.R. §§ 498.103, 498.104.

The ALJ found that the amount of the assessment (as well as the imposition of the maximum CMP amounts) was justified by Respondent's high level of culpability and his history of other dishonest conduct in his dealings with SSA (besides the two statements at issue). ALJ Decision at 10-12. The ALJ then considered and rejected Respondent's argument that his financial condition called for a reduced assessment. Id. at 12.

Respondent takes exception to the ALJ's finding that Respondent failed to present a detailed picture of his financial status and failed to produce income tax returns for any years after 2004. Resp. Br. at 22. Respondent also asserts that, since the ALJ never resolved the question of whether Respondent received remuneration for his services, the ALJ could not properly have considered Respondent's financial condition. Id. Respondent further claims that, contrary to the ALJ's findings, he actually produced tax returns for the relevant years through calendar year 2005 and that the only return he did not produce was for calendar year 2006 which was not due until April 2007. Id.; Resp. Ex. 10. In addition, Respondent asserts that bank account statements which he produced represented "the only two banks where the Koutsogiannis ever had accounts." Resp. Br. at 22.

The regulations set out five factors to be considered in determining the amount of penalties and assessments, as follows:

(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(a).

We note that, since the I.G. sought only half of the assessment that could have been imposed, it is not at all clear that any showing of financial hardship which Respondent might now make would justify an even further reduction in the assessment. The ALJ explicitly considered all of the regulatory factors in reaching his conclusion that the assessment sought was warranted. ALJ Decision at 11. The ALJ found that Respondent's statements were intentionally designed to deceive SSA for the purpose of continuing to receive benefits after being notified that SSA had received information from third parties calling into question whether Respondent was working for either his family business, Professional Image or both. Id. The ALJ evaluated Respondent manifesting "a very high degree of culpability." Id. The ALJ noted that Respondent had a history of making false statements to SSA starting with his initial application for disability benefits. Id. at 11-12. Even if the work Respondent did for Melanson Electronics occurred in 1996 (and even if the 2000 Statement could be read as not referring to any period before January 1997), that work clearly occurred during the time period to which Respondent referred in his initial application in which he asserted that he had not worked because of disability since March 14, 1995. Id.[8]

As for the ALJ's conclusion that Respondent did not establish a detailed picture of his finances, this was not based entirely on the ALJ's finding that Respondent had not offered tax returns for years after 2004. It was, in addition, because Respondent offered as evidence incomplete information concerning his total resources. Respondent is correct that he did offer his 2005 tax return, but not all of the relevant attachments were supplied with his tax returns. For example, Respondent submitted Schedule A showing itemized deductions taken for tax year 2004 but not for 2003, even though Respondent claimed thousands of dollars more in itemized deductions in 2003. Resp. Ex. 10, at 25, 40. Thus, we conclude that the ALJ's error in stating that Respondent did not offer "income tax returns for years after 2004" was harmless. Since the burden was on Respondent to establish that the assessment would cause unreasonable financial hardship, the ALJ

[8] SSA did not bring any proceedings against Respondent based on the initial application (presumably because it was outside the six-year time limit set by section 1129(b)(1) of the Act). Respondent did not challenge the ALJ's authority to consider his statements in the initial application in evaluating Respondent's prior history.

did not err in making negative inferences about incomplete information about Respondent's income and assets. As the I.G. notes, Respondent and his wife are relatively young and have prospects of future earnings which the ALJ could also reasonably consider. Cf. SSA Br. at 14.

Substantial evidence thus supports the ALJ's conclusion that the amount of the assessment was reasonable.

Conclusion

For the reasons explained above, we recommend that the Commissioner affirm the penalty and assessment determined by the ALJ.

/s/
Judith A. Ballard

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan
Presiding Board Member