

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	DATE: September 7, 1993
Department of Health and)	
Human Services,)	
- v. -)	Docket No. C-92-154
Alexandra E. Orfanos,)	Decision No. CR284
Defendant.)	

DECISION

This case arises out of an administrative complaint made pursuant to the Program Fraud Civil Remedies Act of 1986 (PFCRA or Act), 31 U.S.C. §§ 3801 - 3812 (1988); and its implementing regulation, 45 C.F.R. Part 79.

The reviewing official of the Department of Health & Human Services (HHS or the Department) served the complaint on Defendant, Alexandra E. Orfanos, on August 18, 1992, proposing that penalties of \$170,000 and assessments of \$26,800 be imposed upon her for defrauding the Department by filing false claims.

Defendant filed a general answer and a request for an extension to file a more specific answer. HHS did not object to Defendant's request. On October 22, 1992, Defendant filed a more specific answer to the complaint. Defendant's answer was deemed to be a request for a hearing. 45 C.F.R. § 79.9(a).

HHS contends that from October 1, 1986 through August 31, 1989, 34 Social Security widow's benefits checks amounting to \$13,400 were issued to Defendant's mother, who was then deceased. Defendant forged her mother's endorsement, countersigned the checks in her own name, and then either cashed the checks or deposited them into her checking account. The Department contends that, by so doing, Defendant made, presented, or submitted 34 claims which she knew or had reason to know were false,

fictitious, or fraudulent, and, thus, in violation of 31 U.S.C. § 3802(a)(1)(A).

Defendant timely requested a hearing before an administrative law judge. I held a prehearing conference with the parties on November 5, 1992. At this conference, Defendant admitted that she did convert the checks, as HHS alleged, misappropriating the monies intended for her mother. On February 24, 1993, I conducted an in-person hearing in Washington, D.C.

The parties subsequently filed posthearing briefs. The Department filed a reply brief also.

I have carefully considered the evidence, the parties' arguments, and the applicable law and regulations. I conclude that Defendant presented or caused to be presented 34 Social Security checks with a face value of \$13,400, on which she had forged endorsements and kept the proceeds for her own benefit, in violation of 31 U.S.C. § 3802(a)(1)(A). I conclude also that Defendant knew or had reason to know that her negotiating such checks -- each of which constituted a separate claim -- was false, fictitious, and fraudulent, in violation of 31 U.S.C. § 3802(a)(1)(A). A substantial number of aggravating factors are present which justify the maximum penalties and assessments under PFCRA. I have therefore determined that penalties of \$170,000 and assessments of \$26,800, for a total of \$196,800, are reasonable and appropriate.

ISSUE

The sole contested issue in this case is what penalties and assessments are reasonable and appropriate.

LAW

PFCRA and its implementing regulation authorize the imposition of civil penalties and assessments in administrative proceedings against persons making false claims or statements to the Department or its agents.

PFCRA imposes civil liability upon:

Any person who makes, presents, or submits, or causes to be made, presented, or submitted, a claim that the person knows or has reason to know is false, fictitious, or fraudulent. . . .

31 U.S.C. § 3802(a)(1)(A).

A "claim" under PFCRA includes, among other things, "any request, demand, or submission made to an authority for . . . money (including money representing grants, loans, insurance, or benefits). . . ." 31 U.S.C. § 3801(a)(3)(A); 45 C.F.R. § 79.2. The Act further states that each individual request or demand for money constitutes a separate claim. 31 U.S.C. § 3801(b)(1); 45 C.F.R. § 79.3(a)(2) (emphasis added).

The Act declares that "knows or has reason to know" means that with respect to a claim or statement a person:

1. has actual knowledge that the claim or statement is false, fictitious, or fraudulent;
2. acts in deliberate ignorance of the truth or falsity of the claim or statement; or
3. acts in reckless disregard of the truth or falsity of the claim or statement.

However, no proof of specific intent to defraud is required.

31 U.S.C. § 3801(a)(5) (paraphrase).

Once liability has been established under the statute (as previously noted, Defendant does not dispute her liability), penalties and assessments must be determined. See Joseph R. Graves, Jr., DAB CR162 (1991). PFCRA provides that a person found to have violated the statute may be subject to a penalty of not more than \$5000 for each claim and to an assessment, in lieu of damages sustained by the government because of such claim(s), of not more than twice the amount of each claim. 31 U.S.C. § 3802(a)(1); see also 45 C.F.R. §§ 79.3(a)(1)(iv), 79.3(a)(5). Aggravating and mitigating factors are considered when assessing the penalty. 45 C.F.R. § 79.31(a). Among the factors enumerated in the regulations are:

1. the number of false, fictitious, or fraudulent claims;
2. the period of time over which false, fictitious, or fraudulent claims were made;
3. the degree of a defendant's culpability;

4. the value of the government's actual loss as a result of a defendant's misconduct, including foreseeable consequential damages and the costs of investigation;
5. the potential impact of the misconduct upon public confidence in the management of government programs and operations, including particularly the impact on the intended beneficiaries of such programs;
6. whether a defendant has engaged in a pattern of the same or similar misconduct;
7. whether a defendant attempted to conceal the misconduct; and
8. the need to deter a defendant and others from engaging in the same or similar misconduct.

45 C.F.R. §§ 79.31(b)(1), (2), (3), (5), (7), (8), (9), (16) (paraphrase).

The regulations state also that "ordinarily double damages and a significant civil penalty should be imposed." 45 C.F.R. § 79.31(a).

The Department has the burden of proving Defendant's liability and the existence of any aggravating factors by a preponderance of the evidence. 45 C.F.R. § 79.30(b). The Defendant must prove any affirmative defenses and any mitigating factors by a preponderance of the evidence. 45 C.F.R. § 79.30(c).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On August 18, 1992, HHS issued a complaint against Defendant (Alexandra E. Orfanos), pursuant to PFCRA, alleging that she had defrauded Social Security by submitting false claims. HHS sought \$196,800 in penalties and assessments.
2. Mary Economou was Defendant's mother. Stipulation (Stip).
3. Ms. Economou began receiving Social Security widow's benefits when her husband died in 1962. Stip.
4. Defendant knew that the reason Ms. Economou was receiving Social Security widow's benefits was that Ms.

Economou's husband had died in 1962. Transcript (Tr.) at 53, 97; HHS Exhibit (Ex.) 19 at 20; HHS Ex. 24 at 2.

5. In approximately 1967, Ms. Economou went to live with her daughter, Defendant, and her son-in-law at their residence. Stip.

6. Defendant assumed responsibility for handling Ms. Economou's Social Security widow's benefits checks. Ms. Economou endorsed the checks which were then countersigned by Defendant. Defendant either deposited the checks directly into her personal account or cashed the checks and gave the cash to Ms. Economou. Stip.

7. Ms. Economou died on December 10, 1970. Stip.

8. An individual's eligibility for Social Security widow's benefits terminates upon such individual's death. Stip.

9. Defendant knew that the Social Security Administration (SSA) would terminate her late mother's Social Security checks when it learned that her mother was deceased. Tr. at 35 - 36, 98 - 111.

10. Defendant did not notify SSA when her mother died, or at any time thereafter, until 1989. Tr. at 99, 111.

11. Defendant testified she believed that, after her mother died, she -- Defendant -- had a right to keep the checks, in part because she had helped support her mother. Tr. at 98, 110.

12. Defendant testified that she "did not feel obligated" to contact SSA to stop the disbursement of the Social Security checks. Tr. at 111.

13. Defendant admitted using the improperly converted funds for her own personal benefit and denied that she was acting to safeguard the funds for the government to reclaim at a later time. Tr. at 110 - 113.

14. SSA continued to disburse monthly checks for widow's benefits to Mary Economou from January 1, 1971 up to and including September 1, 1989. Stip.

15. Defendant endorsed these checks in the name of Mary Economou, countersigned them in her own name, and either cashed them or deposited them into her (Defendant's) account. Stip.

16. From January 1, 1971 through October 31, 1986, Defendant received 190 Social Security checks, made payable to Mary Economou, amounting to \$47,367.20. Tr. at 101 - 102, 110 - 113; HHS Ex. 1; HHS Ex. 19 at 25; HHS Ex. 24 at 2.

17. From November 1, 1986 through August 31, 1989, Defendant received 34 Social Security checks, made payable to Mary Economou, amounting to \$13,400.00. Tr. at 98, 112; HHS Exs. 2 - 6; HHS Ex. 19 at 32 - 33; HHS Ex. 24 at 2.

18. Each of the Social Security checks on which Defendant forged her deceased mother's name carried the express warning: "Forgery of endorsements on Treasury checks is a Federal crime. Maximum penalty is a \$10,000 fine and 10 years imprisonment." Tr. at 114 - 116; HHS Exs. 2 - 5.

19. At no time prior to or following the death of Mary Economou was Defendant eligible for Social Security payments based upon her mother's benefits. See Stip.

20. In 1989, SSA initiated the Centenarian program, which required SSA field representatives to pay in-person visits to certain very elderly recipients of benefits for the purpose of checking on such individuals' current status. Tr. at 22 - 25; Stip.

21. On August 16, 1989, SSA wrote to Ms. Economou at Defendant's address, announcing that a representative would visit her. Tr. at 25; HHS Ex. 9; Stip.

22. On August 23, 1989, a field representative of SSA attempted to visit Ms. Economou but found nobody at home. The field representative left her business card and a note indicating that she had visited and asked that someone call her because she needed to see Ms. Economou. Tr. at 26 - 27; Stip.

23. On August 23, 1989, Defendant telephoned SSA and told a different field representative that Ms. Economou was "away." The representative took notes of the call. Tr. at 32.

24. On August 24, 1989, the field representative in Finding 22 returned Defendant's call. Defendant told the field representative that her mother was still away. Tr. at 29 - 31, 42; HHS Ex. 10.

25. On September 1, 1989, the field representative in Finding 22 telephoned Defendant again and Defendant

stated that her mother was out of the country. Tr. at 31 - 32, 51 - 53; HHS Ex. 10.

26. On or about September 8, 1989, SSA received a letter, written by Defendant, returning the September 1989 Social Security check and stating that Ms. Economou had died in 1970. HHS Ex. 7; Stip.

27. Defendant worked in a technical capacity in the banking industry for more than 20 years, until she retired at age 76; she was trained in finance, accounting, and banking law. Tr. at 75.

28. Defendant is not under psychological or psychiatric care, is not taking psychotropic medications, and, at the hearing, was calm and rational in her responses. No reasonable basis for doubting her competence has been shown. Tr. at 132, 135.

29. As a result of Defendant's conversion of 224 Social Security checks, Defendant improperly received a total of \$60,767.20 from January 1971 through and including August 1989.

30. Defendant submitted 34 claims which she knew or had reason to know were false, fictitious, or fraudulent under PFCRA when she negotiated the last 34 misappropriated checks. 31 U.S.C. § 3802(a)(1)(A).

31. The first 190 checks, which Defendant had also unlawfully obtained and negotiated, predated PFCRA and she is not liable for those actions under PFCRA.

32. As separate and distinct requests for payment of benefits, each of the 34 Social Security checks converted by Defendant constitutes a "claim" under PFCRA.

33. By forging her deceased mother's name to the Social Security checks each month for 19 years, Defendant was representing to the government that her mother was still alive and, thus, entitled to Social Security benefits.

34. Defendant, consequently, "knew or had reason to know" that her conversion of the Social Security checks was fraudulent.

35. Based on the facts known to Defendant and her knowledge of banking law, her claim that she "was naive enough to think" that she was entitled to her deceased mother's Social Security benefits -- and that, presumably, she had the right to commit forgery -- is not credible. Tr. at 110.

36. It is an aggravating circumstance that Defendant forged 224 checks.
37. It is an aggravating circumstance that Defendant engaged in improper activity over a period of approximately 19 years.
38. It is an aggravating factor that Defendant's culpability with respect to her misconduct was substantial -- i.e., she was under no coercion or compulsion; she was entirely free to choose whether or not to steal. Stip.; Tr. at 102 - 125; D. Posthearing Brief at 2 - 10.
39. It is an aggravating factor that Defendant attempted to conceal her fraud by lying to the SSA field representatives. Findings 23 - 25.
40. It is an aggravating circumstance that Defendant caused the government substantial financial loss: \$60,767.20 in checks wrongfully obtained by Defendant (this is the total of all misappropriated checks since 1971); \$124,025.23 in forfeited accrued interest to the Social Security Trust Fund; and \$24,715.53 in investigative expenses; for a total actual loss of \$209,507.96. Tr. at 39, 69, 77 - 80, 98, 101 - 102, 110 - 113; HHS Exs. 1 - 6; HHS Ex. 19 at 25 - 26, 32 - 33; HHS Ex. 20; HHS Ex. 22; HHS Ex. 24 at 2.
41. Another aggravating factor is that the nature and ease of duplicating Defendant's offenses make it necessary to impose penalties which will have a deterrent effect.
42. Defendant is the sole owner of her residence and an adjacent undeveloped lot. Tr. at 76, 91, 106, 119; HHS Ex. 8 at 3; HHS Ex. 16; HHS Ex. 17 at 3 - 4; HHS Ex. 19 at 12 - 13, 45 - 46; HHS Ex. 24 at 3.
43. The current assessed value of the residential parcel is \$360,631 and the value of the adjacent 4,025 square foot undeveloped commercial lot is \$59,490, for a total assessment of \$420,121. Tr. at 76 - 77; HHS Ex. 17 at 2 - 4.
44. Defendant's lots are not subject to any liens, mortgages, or other encumbrances. Tr. at 106; HHS Ex. 16; HHS Ex. 19 at 12; HHS Ex. 24 at 3.
45. Defendant also possesses a money market investment account with a balance of approximately \$18,000 - \$20,000

and a life insurance policy valued at \$21,600. Tr. at 77, 108, 120 - 121; HHS Ex. 8 at 3; HHS Ex. 15 at 2.

46. Defendant receives a monthly corporate pension and full Social Security retirement benefits in the amount of approximately \$1200, providing her a combined monthly income of approximately \$1800. Tr. at 77, 107; HHS Ex. 15 at 2; HHS Ex. 19 at 17 - 18.

47. Defendant has not shown that her financial circumstances are so poor that the imposition of penalties of \$170,000 and assessments of \$26,800 would be unreasonable, inhumane, or inappropriate.

48. Double damages and significant penalties are justified here because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted. 45 C.F.R. § 79.31(a).

49. The aggravating factors justify imposition of the maximum penalties and assessments.

DEFENDANT'S POSITION

In prehearing statements and in testimony, Defendant did not contest liability. Defendant admitted that she did convert the checks, as the Department claimed. However, on the issue of the amount of penalties and assessments, Defendant raises several arguments. She asserts that: (1) she did not intend to defraud Social Security; (2) she acted as she did because she "did not understand what the checks were about or what she was entitled to;" and (3) when she was confronted by investigators in 1989, she was forthright and nondeceptive.

Under these circumstances, Defendant contends that, although she "owes the government money," the penalties being sought by the Department are disproportionate and harsh, especially in light of her limited income and modest circumstances. Tr. at 15 - 17. She insists that she did not conceal her actions, but, instead, attempted, through the years, to stop the checks. Answer at 2.

Defendant makes four arguments in her posthearing brief. First, Defendant promptly contacted SSA when she received the SSA notice. Furthermore, Defendant wrote a letter to SSA on September 8, 1989 notifying SSA of the death of her mother and returning the most recent check. Second, Defendant's mother wanted her (Defendant) to have the checks to defray the costs of supporting the mother. Tr.

at 98. When her mother died and the checks kept coming, Defendant "just didn't know what to do. . . ." She thought "they would notify me" if the checks should stop. Tr. at 99. Third, Defendant is not a wealthy woman. In fact, her son contributes monthly to her support. According to Mr. Orfanos (the son), Defendant is under great stress, which may be undermining her health. Tr. at 132. Her primary financial asset is the home in which she has lived for years. She also has substantial indebtedness compared to her income. Fourth, as to penalties and assessments, Defendant reiterated that the sums demanded by the government are excessive, arbitrary, and unusual and ignore the principle that penalties should be reasonably and rationally related to the facts of each case. There are also, she insists, mitigating factors present: Defendant's misconduct did not have a negative impact on public health, nor did it undermine confidence in the government; Defendant has no criminal or civil convictions and has led a generally exemplary life; and she did not attempt to conceal her actions nor obstruct the investigation.

In conclusion, Defendant asks that the penalties be no more than \$20,000 and the assessments no more than \$26,800 (which includes restitution of \$13,400); for a total of \$46,800.

DISCUSSION

I. Defendant is liable for making 34 false claims in violation of PFCRA.

In order to be liable under PFCRA, Defendant first must have made or submitted false, fraudulent, or fictitious claims to the government. As was noted in the summary of this law, supra, the term "claim" includes requests for benefits. Thus, collecting Social Security benefits through fraudulent activity would result in civil liability under the Act.

In the present case, Defendant's liability has been expressly admitted. She acknowledged that she "converted" -- i.e., unlawfully took for her own use -- Social Security benefit checks meant for another person. Specifically, there is no dispute that Defendant presented 34 false claims, as defined by PFCRA, by forging signatures and fraudulently negotiating her deceased mother's Social Security checks. Since they involved separate and distinct requests for payment, Defendant's negotiation of each of the 34 checks constitutes a fraudulent claim.

To find a violation of PFCRA, it is further required that Defendant knew or had reason to know that the transactions in question were, in fact, false or fraudulent. There can be no doubt as to the false and fraudulent nature of Defendant's actions herein, or the fact that she knew of their dishonesty.

First, Defendant's negotiating of the benefit checks clearly reveals a fraudulent scheme. The Social Security checks converted by Defendant were falsified. The checks were for widow's benefits and each was payable to Defendant's deceased mother, Mary Economou. Ms. Economou had become eligible for widow's benefits as a result of her husband's death. Her eligibility for the benefits ceased upon her death. At no time following her mother's death was Defendant entitled to her deceased mother's benefits. That Defendant knew that her cashing these checks and keeping the proceeds was not legitimate is obvious from the care she took to pretend to SSA and to the bank that her mother was still alive. This was exemplified by the numerous forgeries in which she signed her mother's name to endorse the checks despite the explicit warning that forgery of endorsements on Treasury checks is a federal crime.

Defendant asserted that she "was naive enough to think" that she was entitled to her deceased mother's Social Security benefits, suggesting that she had merely made a mistake. Tr. at 110. However, the evidence indicates that Defendant did not make a naive mistake but, rather, adopted a systematic policy not to reveal her mother's death or to inquire of Social Security about the effects thereof. Her training in law and banking, especially, makes it impossible for one to believe that Defendant could have thought that forging another person's name, in order to cash and convert to one's own use checks made out to that other individual, was justified. Put another way, if Defendant had an honest belief that she was entitled to Social Security payments derived from her mother's benefits, she could have applied for such monies. Furthermore, if, as she suggested, she had been genuinely confused about the correct thing to have done when her mother passed away, she still had no justification for cashing the checks. She could easily have protected any legitimate interest that she might have had, while guarding herself against being accused of theft, by simply holding the checks until the matter was clarified. Based on the above, I cannot conclude that the Defendant was a passive or confused spectator who merely allowed the checks to keep on arriving. Rather, all of her actions suggest that, even though she knew she was acting improperly, she actively sought to keep the

checks arriving and to make SSA believe that their rightful recipient was getting them.

Thus, I conclude that each time Defendant cashed one of the Social Security checks payable to Mary Economou by forging her late mother's signature, and took the proceeds for her own purposes, she was making a separate claim upon the government, which claim she knew or had reason to know was fictitious and fraudulent.

II. The aggravating factors justify the imposition of the maximum penalties and assessments.

The factors to be considered when calculating the penalties and assessments to impose are set forth at 45 C.F.R. § 79.31. The regulation provides the general guidance that "[b]ecause of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages [in the form of assessments] and a significant civil penalty should be imposed." 45 C.F.R. § 79.31(a).

PFCRA provides that a civil penalty not exceeding \$5000 may be imposed for each claim and that an assessment (which is in lieu of damages sustained by the government), which may not be more than twice the amount of the claim, may also be imposed. 31 U.S.C. § 3802(a)(1); 45 C.F.R. §§ 79.3(a)(1)(iv), 79.3(a)(5). Aggravating and mitigating factors are considered when deciding the penalties and assessments. 45 C.F.R. § 79.31(a).

In this case, there are a number of aggravating factors present. These are the number of crimes and the duration of the criminal conduct, the size of the loss to the government, the effect of the offenses upon the Department's ability to carry out its mission, and the need for deterrence. These aggravating and mitigating factors are reviewed below.

First, Defendant's actions in converting the checks represent a lengthy pattern of misconduct. For purposes of assessing the gravity of the misconduct only, I shall take into account all of the checks forged by Defendant, starting from the death of her mother, even though the earlier forgeries predate PFCRA and Defendant is not, therefore, liable under that law. This is not a retroactive application of the law. But cf. Griffon v. United States Dept. of Health, 802 F.2d 146 (5th Cir. 1986). Even though Defendant is not liable under PFCRA for these 190 checks, Defendant could have been liable

for conversion of these 190 checks under the False Claims Act, (31 U.S.C. §§ 3729 - 3731 (1988)). Thus, because Defendant could have been both criminally and civilly liable under the False Claims Act, her conversion of these 190 checks can be used to establish a pattern of behavior. Moreover, considering her entire related history appears justified in light of the emphasis placed by the regulations on patterns of misconduct. 45 C.F.R. § 79.31. The 190 Social Security checks which predate PFCRA amply demonstrate that Defendant engaged in a continuous pattern of fraud and deceit for sixteen years. Defendant's method of converting these 190 Social Security checks was identical to that used for the 34 claims actionable under PFCRA. Defendant forged Mary Economou's name on each of the 190 Social Security checks issued after her mother's death, countersigned the checks in her own name, and then either cashed or deposited each of the checks into her checking account. Tr. at 101 - 102, 112; HHS Ex. 19 at 26; HHS Ex. 24 at 2. Defendant then used the funds for her own personal benefit. Tr. at 89, 101 - 102, 110 - 113; HHS Ex. 24 at 2.

Second, the Department suffered extensive financial damage. The Department's financial loss resulting from Defendant's misconduct is \$209,507.96, which is made up of the following: \$60,767.20, representing the face value of all 224 Social Security checks converted by Defendant; \$124,025.23, representing interest which would have accrued to the Social Security Trust Fund; and \$24,715.53, representing investigative costs.

I conclude that certain other aggravating factors set forth in the regulation are also applicable to the present case. Defendant made a very substantial number of false claims (224) over a considerable period of time (approximately 19 years), thereby demonstrating a pattern of systematic dishonesty. Two other relevant aggravating factors are that Defendant concealed her misconduct, by means of the forgeries and by lying to SSA field representatives, and that there is a need to deter others from committing the same misconduct. Defendant's conversion of public monies was absurdly easy to accomplish, and there are undoubtedly many similarly situated people who could do the same thing; therefore, the appropriate remedy should be somewhat exemplary in nature.

The mitigating factors cited by Defendant are much less persuasive. Her allegations that she did not attempt to conceal her actions, or obstruct the investigation, are disproved by her initial attempt to convince the SSA

field representatives that her mother was travelling or otherwise away from home. Her contentions that she had no prior convictions, and should be credited with having led a generally upstanding life, are misleading, inasmuch as she was engaged in her continuing pattern of fraud for many years; she just had not yet been caught. However, her contention is correct that HHS did not succeed in showing that her misconduct had a negative effect upon public confidence in Social Security.

Defendant offered no evidence whatever to support the contention that she had ever notified SSA that her mother had died -- that is, until she was contacted pursuant to the Centenarian program. Even then, her first reaction was to attempt concealment by telling the SSA field representative that her mother was "away". By contrast, the Department was able to show that the SSA records revealed no contacts by Defendant.

Lastly, the evidence relating to Defendant's financial status does not indicate that she would be pauperized or otherwise cruelly treated by being subjected to the maximum penalties and assessments provided by PFCRA. The penalties and assessments of \$196,800 are less than half her assets of approximately \$460,000, and would not affect her income of approximately \$1800 per month.

CONCLUSION

I conclude that, because of the nature and severity of Defendant's misconduct, and the damages sustained by the government, the maximum penalties and assessments are warranted. I have therefore determined that penalties of \$170,000 (34 claims times \$5000 for each claim), and assessments of \$26,800 (two times \$13,400, the amount of the claims), for a total of \$196,800, are reasonable and appropriate.

/s/

Joseph K. Riotto
Administrative Law Judge