

0016 7937 34 (Mar. 9, 2016) – Where a claimant’s household average monthly income is exceeded by the household’s ordinary and necessary living expenses, he is granted a waiver, pursuant to G.L. c. 151A, § 69(c). Income for this purpose does not include non-liquid assets.

Board of Review
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Issue ID: 0016 7937 34
Claimant ID: 1369560

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny a waiver of recovery of overpaid unemployment benefits in the amount of \$3,990. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant requested a waiver of recovery of overpaid benefits on August 14, 2015, which was denied in a determination issued on August 19, 2015. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by the claimant, the review examiner affirmed the agency’s initial determination and denied the waiver in a decision rendered on January 22, 2016.

The review examiner denied the waiver on the grounds that recovery of the overpaid benefits would neither defeat the purpose of benefits otherwise authorized nor be against equity or good conscience, pursuant to G.L. c. 151A, § 69(c), and 430 CMR 6.03. After considering the recorded testimony and evidence from the hearing, the review examiner’s decision, and the claimant’s appeal, we accepted the claimant’s application for review. Our decision is based on our review of the entire record.

The issue before the Board is whether the review examiner’s decision to deny the waiver of recovery of \$3,990.00, because recovery would not defeat the purposes of benefits otherwise authorized or be against equity and good conscience, was based on substantial and credible evidence and free from error of law.

Findings of Fact

The review examiner’s findings of fact are set forth below in their entirety:

1. The erroneous overpayment of benefits occurred as the result of a July 30, 2015, determination finding the claimant ineligible for benefits. The claimant did not appeal and the determination became final.

2. The claimant [] lives with his wife and two school aged children. They share income and household expenses.
3. In early 2015 the claimant reached settlement for Chapter 13 bankruptcy.
4. The claimant is employed as an estimator. He earns \$5,210 each month.
5. The claimant's wife works as a part-time teacher's aide. She earns take-home pay of approximately \$290 per week, or \$1,257 each month.
6. The claimant's home his appraised for \$179,000.
7. The claimant's other assets are as follows:

Time Share \$11,000
1996 Dodge LHS \$2,000
2009 Dodge Nitro \$4,000
2005 Harley Davidson motorcycle \$2,500
Claimant and spouse 401Ks \$9,700
Bank Accounts \$100
Common Stock \$500

8. The claimant's income and assets total: \$215,267.
9. The claimant's monthly expenses are as follows:

Mortgage \$859
Food \$1,000
Utilities (includes oil, electric and telecom) \$1,050
Clothing \$100
Work related travel \$400
Real Estate Taxes \$175
Home Insurance \$78
Non-Reimbursed Medical Expense \$200
Other (personal hygiene, household) \$200
Invest. prop. mortgage & utilities \$244
Payroll Taxes and Deductions \$1,740
Health Insurance \$170
Auto Insurance \$150
Life Insurance \$50
Car payment \$371
Bankruptcy settlement payment \$353

Total \$7,140

10. The claimant and his wife owe \$121,207 on their home mortgage. They owe \$9,000 on an automobile loan. They owe \$6,300 on their bankruptcy.
11. The claimant's expenses and liabilities total: \$143,647.
12. The claimant used his unemployment benefits, now determined to be overpaid, to pay ordinary living monthly bills and expenses.
13. The claimant did not give up any right to other rights or benefits when he collected unemployment benefits.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact, except for the total amount of the claimant's monthly expenses as found in Finding of Fact # 9. We modify that amount, as indicated below. As to the remaining findings of fact, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant has not carried his burden to show that he is eligible for the waiver.

The claimant's eligibility for a waiver is governed by G. L. c. 151A, § 69(c), which provides, in relevant part, as follows:

The commissioner may waive recovery of an overpayment made to any individual, who, in the judgment of the commissioner, is without fault and where, in the judgment of the commissioner such recovery would defeat the purpose of benefits otherwise authorized or would be against equity and good conscience.

Under G. L. c. 151A, § 69(c), if the claimant received an overpayment of unemployment benefits without fault, it is his burden to establish either that the recovery of such benefits would defeat the purpose of benefits otherwise authorized or would be against equity and good conscience. Following the hearing, the review examiner concluded that the claimant had not established either circumstance.

As to fault, the review examiner made no findings of fact. However, the record does not contain any documentation which would indicate that the DUA found the overpayment to be due to the claimant's fault. In addition, the initial determination denying the waiver does not indicate that basis for denial is that the overpayment was due to the claimant's fault. Since there is no substantial and credible evidence in the record to conclude that the overpayment was due to the claimant's fault, we conclude that it was not.

Since the claimant was not at fault for the overpayment, we consider first whether or not the recovery of the overpaid benefits would "defeat the purpose of benefits otherwise authorized," or, in other words, whether the recovery would deprive the claimant of income required for

ordinary and necessary living expenses. In undertaking this consideration, we first look to 430 CMR 6.03, which provides, in relevant part, as follows:

Ordinary and necessary living expenses include, but shall not be limited to:

- (a) fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, accident and health insurance, taxes, and work-related transportation expenses;
- (b) medical and hospitalization expenses;
- (c) expenses for the support of others for whom the individual is legally responsible;
- (d) other miscellaneous expenses which may reasonably be considered as part of an individual's necessary and ordinary living expenses.

Based on the review examiner's findings of fact, the claimant had ordinary and necessary living expenses of \$5,166.00 per month. The claimant has the following monthly expenses: \$859.00 for his mortgage, \$1,050.00 for utilities,¹ \$1,000.00 for food, \$100.00 for clothing, \$400.00 for travel, \$175.00 for real estate taxes, \$200.00 for out-of-pocket medical expenses, \$200.00 for miscellaneous household items, \$448.00 for insurance (including auto, health, life, and home), \$371.00 for a car payment, and \$353.00 for a bankruptcy settlement payment.

We decline to include in the above figure the \$244.00 monthly expense for the claimant's investment property. We do not believe that expenses for an investment property fall into any category listed in 430 CMR 6.03. The above expenses cover the claimant's and his family's necessary and ordinary living expenses, including those relating to maintaining his primary home. The investment property is not a necessary expense.

As to income, the review examiner found that the claimant earns \$5,210.00 gross each month. His payroll deductions amount to \$1,740.00. This gives him a net income of \$3,470.00. The review examiner also found that the claimant's wife, who shares in the household income and expenses, has "take-home pay" each month of \$1,257.00. We interpret this to be a net income figure. Thus, the household has a combined monthly income of \$4,727.00 per month.

In denying the waiver, the review examiner took into account all of the claimant's assets, including the value of his home, each spouse's 401(k) account, and the value of the investment property. We decline to include most of the assets noted in Findings of Fact # 6 and # 7 in our calculation of whether the claimant has sufficient income and resources to meet his ordinary and necessary living expenses. To the extent that these assets are not liquid, the claimant would not

¹ The review examiner found that the claimant's total utilities, including electric, cable, oil, cell phones, and trash bags amounted to \$1,050.00 per month. The claimant testified to this total. The specific figures that he then gave when breaking down the total amounted to \$760.00, including \$155.00 for electric, \$200.00 for cable, \$150.00 for oil, \$215.00 for cell phones, and \$40.00 for trash bags. We have accepted the inflated amount, however, because the claimant did testify to it, and the review examiner generally accepted the claimant's testimony. We also note that the approximately \$300.00 difference between the figures does not affect our ultimate decision.

be able to access them on a monthly basis; for example, to pay a bill or purchase food for his family.² This is especially true of his home value, the value of the 401(k) accounts (early withdrawal is subject to significant penalties), and the value of the vehicles that the claimant and his wife use to get to work.

As can be seen from our above discussion, the ordinary and necessary living expenses exceed the claimant's monthly household liquid income. This is true, even if we use a reduced utility figure, *see* Note # 1, and add in the \$100.00 from the claimant's bank account. Requiring the claimant to pay back monies to the DUA could deprive him of money he needs to live. We, therefore, conclude as a matter of law that the review examiner's decision was based on an error of law and is not supported by substantial and credible evidence, because, given his financial situation, recovery of the overpaid benefits would defeat the purpose of benefits otherwise authorized.

The review examiner's decision is reversed. The claimant is allowed a waiver of recovery of the overpaid benefits.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 9, 2016



Paul T. Fitzgerald, Esq.
Chairman



Judith M. Neumann, Esq.
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

² Per DUA regulations, the question is not whether the claimant could cobble together sufficient funds to pay back the total amount of the overpayment. The question is whether "recovery of the overpayment would deprive the overpaid claimant, or individuals dependent on the claimant, of income required for ordinary and necessary living expenses." 430 CMR 6.03 (defining "defeat the purposes of benefits otherwise authorized"). Thus, our inquiry focuses first on whether the claimant had enough money to meet his ordinary and necessary living expenses, and, if so, only then on whether recovery would affect the ability to pay for such expenses.

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

SF/rh