

Although the claimant's psychological issues did not affect whether she was at fault for an overpayment of unemployment benefits, she genuinely had a misunderstanding regarding whether she needed to report to the DUA that she had obtained an on call job in her benefit year. The claimant's daughter, who was reasonably assisting the claimant with filing her unemployment claim and weekly certifications, did not learn of the new job (and earnings) until later, thus causing an overpayment. The overpayment was due to misunderstanding and error, not due to an intent to withhold relevant information from the DUA.

**Board of Review
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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), which concluded that an overpayment of unemployment benefits was due to the claimant's fault. Fault was attributed to the claimant pursuant to G.L. c. 151A, § 69(a), and 430 CMR 4.23.

The claimant separated from employment and filed a claim for unemployment benefits with the DUA, effective December 28, 2014, which was approved. Subsequently, the DUA issued a Notice of Disqualification concluding that the claimant was overpaid benefits on that claim. The present case arises from a separate DUA determination, a Notice of Fault and Fraud Finding, issued on May 20, 2016, in which the agency imposed a one-time penalty assessment of 15% of the overpayment amount, a separate 12% interest penalty on any remaining balance of overpaid benefits, and a compensable week disqualification. The claimant appealed this May 20, 2016, determination to the DUA hearings department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on December 15, 2016. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On April 13, 2018, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence concerning the psychological history of the claimant and the scope of the claimant's daughter's involvement in her weekly certifications. The claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether the review examiner's original decision, which concluded that the claimant was at fault for the overpayment on her claim, is supported by substantial and

credible evidence in the record, where the review examiner has now made findings showing that the claimant's daughter certified for benefits on the claimant's behalf, even after the claimant started working on call again, but that the claimant did not understand that she needed to report her earnings from her on call job to the DUA.

After reviewing the entire record, including the testimony from both hearings, the documentary evidence, the District Court's Order, and the consolidated findings of fact, we reverse the review examiner's decision.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessments, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant filed her 2015-01 claim for unemployment benefits on January 5, 2015. It was effective December 28, 2014. She was determined to have a benefit rate of \$613 on this claim and an earnings disregard of \$204.33.
2. For each of the bi-weekly pay periods from March 22, 2016 to July 25, 2016 the claimant worked and was paid at least \$415.99.
3. For each of the weeks from the week ending March 30, 2015, the claimant was paid an unemployment benefit of \$562. \$101 was withheld from this amount for taxes, for a total benefit of \$663.00. No deductions were made for partial earnings. No benefits were denied due to her not meeting the requirements under the law to be considered to be in either total or partial unemployment.
4. On May 20, 2016, DUA issued a Notice of Fault and Fraud Finding stating that under Section 69(a) & 25(j), the claimant was disqualified from receiving benefits for the next 8 weeks, starting with her next eligible week. The notice also indicated that the claimant was subject to a one-time penalty assessment equal to 15% of the total amount of the overpayment and that any unpaid balance would accrue interest at an annual rate of 12%.
5. The claimant spoke to her daughter, [Daughter Name], hereafter referred to [as] "B," by phone in December, 2014, and asked her [sic] take care of her unemployment benefit claim for her. B already knew her social security number and other basic identifying information. The claimant provided her with her most recent employment information.
6. B filed the claimant's 2014-01 claim for unemployment benefits on January 5, 2015, by telephone. It was effective December 28, 2014. Her benefit rate on this claim was \$613 and she had a \$50 dependency allowance.
7. On January 5, 2018 [sic], a DUA staff person assisted B in submitted [sic] a request for benefits for the claimant for the week ending January 3, 2015.

8. The claimant's primary language is Haitian Creole. She can read English but her vocabulary is very limited. She can write in English using simple language. She can speak English well enough to work as a Nurse but is insecure communicating in English as she feels her ability to communication [sic] is "impacted" by a limited vocabulary.
9. The claimant's daughter's primary language is English. Her Haitian Creole is not fluent. She expected to be taking care of most of the claimant's interactions with DUA for her. She therefore indicated that English was the claimant's primary language so that she herself would be able to communicate with DUA well.
10. When she lived in Haiti, the claimant was the equivalent of a Licensed Practical Nurse (LPN). Around 1997, the claimant began working in the United States as a Certified Nursing Assistant (CNA). Her employer provided the CNA training and certification.
11. The claimant took Licensed Practical Nursing classes at First Choice College in New Hampshire and received a degree in Licensed Practical Nursing. She was part of a Haitian Creole study group who helped her to deal with the language barrier. In 2010, this school lost its license.
12. The claimant failed her LPN licensing test the first two times she took it. The test was in English. Before her third attempt at the test, she took a review class with a Haitian Creole teacher. He helped her learn all the necessary terms in English. Following this class, she passed the test and got her LPN license, which became effective February 2011. The [claimant's] current license is in effect until September 10, 2019. The claimant licensed [sic] to practice in Massachusetts.
13. As a LPN, the claimant is authorized to dispense medications. The doctors and the pharmacy write out the instructions for giving the medications in English. If the claimant is unable to understand directions regarding a medication, she asks another nurse to help her.
14. The only training or certification the claimant has received, other than for Practical nursing, since 2011 is a CPR training every 2 years.
15. It is unknown the exact dates that claimant started and ended her employment with the employers listed below as the claimant does not have a clear memory of her dates of employment. Based on filing by the employers, the claimant:
 - a. worked as a LPN for [Employer A] during the 4th quarter of 2014, she separated before the end of the year but her last paycheck was issued during the 1st week of 2015.

- i. 546 hours during the 4th quarter of 2014 for which she was paid \$16,950.24.
 - ii. She was paid \$2371.40 during the first quarter of 2015 for last 35 hours of work in 2014.
- b. worked 40 hours as an on call LPN for [Employer B] during the 4th quarter of 2014 and was paid \$631.
- c. worked 55 hours as an on call LPN for 265 [Employer C] during the 1st quarter of 2015 and was paid \$1,444.75.
- d. worked 33 hours as an on call LPN for [Employer D] during the 1st quarter of 2015 and was paid \$891.
- e. worked an on call LPN for 932 [Employer E] (also known as [X]) during the 2nd and 3rd quarters of 2015.
 - i. 191 hours during the 2nd quarter and was paid \$10,451.78.
 - ii. 148 hours during the 3rd quarter and was paid \$4,426.24.
- f. worked 480 hours as an on call LPN for [Employer F] during the 2nd and 3rd quarters of 2015.
 - i. 480 during the 2nd quarter and was paid \$2,900.24.
 - ii. 480 during the 3rd quarter and was paid \$1,485.96.
- g. worked 68 hours as an on call LPN for [Employer G] during the 3rd quarter of 2015 and was paid \$1,748.15.
- h. worked as an on call LPN for [Employer H] during the 3rd and 4th quarter of 2015.
 - i. 1 hour during the 3rd quarter and was paid \$468.
 - ii. 8 hours during the 4th quarter and was paid \$3,321.50.
- i. worked as an on call LPN for [Employer I] during the 3rd and 4th quarters of 2015.
 - i. 93 hours during the 3rd quarter of 2015 and was paid \$2,631.41
 - ii. 320 hours during the 4th quarter of 2015 and was paid \$9,471.18
- j. Worked as an on call 0 [sic] hours as a LPN for [Employer J] during the 3rd quarter of 2015 and was paid \$2202.50.
- k. worked as an on call LPN for [Employer K] during the 4th quarter of 2015 and all 4 quarters of 2016.

- i. 167 hours during the 4th quarter of 2015 and was paid \$5,795.82.
- ii. 264 hours during the 1st quarter of 2016 and was paid \$8,200.19.
- iii. 106 hours during the 2nd quarter of 2016 and was paid \$3,158.79.
- iv. 408 hours during the 3rd quarter of 2016 and was paid \$13,063.57.
- v. 345 hours during the 4th quarter of 2016 and was paid \$12,049.56.

l. worked as an on call LPN for [Employer L] during the 4th quarter of 2015 and 1st quarter of 2016.

- i. 39 hours during the 4th quarter of 2015 and was paid \$981.75.
- ii. 68 hours during the 1st quarter of 2016 and was paid \$1,751.43.

m. worked 26 hours as an on call LPN for [Employer M] during the 1st quarter of 2016 and was paid \$733.01.

n. worked as an on call LPN for [Employer N] during the 1st, 2nd and 3rd quarters of 2016.

- i. worked 307 hours during the 1st quarter of 2016 and was paid \$9,058.88.
- ii. worked 357 hours during the 2nd quarter of 2016 and was paid \$10,402.38.
- iii. worked 16 hours during the 3rd quarter of 2016 and was paid \$677.88.

o. worked 5 hours as an on call LPN for [Employer O] during the 2nd quarter of 2016 and was paid \$149.88.

p. worked as an on call LPN for [Employer P] during the 2nd and 3rd quarters of 2016.

- i. 172 hours during the 2nd quarter of 2016 and was paid \$5,271.25.
- ii. 160 hours during the 3rd quarter of 2016 and was paid \$5,106.13.

q. worked 0 [sic] hours as an LPN for [Employer Q] during the 2nd quarter of 2016 and was paid \$146.25.

r. worked 7 hours as an LPN for [Employer R] during the 2nd quarter of 2016 and was paid \$182.

s. worked 7 hours as [an] on call LPN for [Employer S] during the 2nd quarter of 2016 and was paid \$182.

t. worked 65 hours as an on call LPN for [Employer T] during the 3rd quarter of 2016 and was paid \$1,806.

u. worked 21 hours as an on call LPN for [Employer U] during the 1st quarter of 2017 and was paid \$630.

v. worked as an on call LPN for [Employer V] during the 1st and 2nd quarters of 2017.

- i. 162 during the 1st quarter of 2017 and was paid \$5,208.
- ii. 95 hours during the 2nd quarter of 2017 and was paid \$3,040.

w. worked 80 hours as an on call LPN for [Employer W] during the 1st quarter of 2017 and was paid \$2,443.69.

x. worked as an on call LPN for [Employer X] during the 1st, 2nd and 4th quarter of 2017.

- i. 48 hours during the 1st quarter of 2017 and was paid \$1,392.
- ii. 7 hours during the 2nd quarter of 2017 and was paid \$210.
- iii. 16 hours during the 4th quarter of 2017 and was paid \$465.

y. worked 80 hours as an on call LPN for [Employer Y] during the 2nd quarter of 2017 and was paid \$1,016.

z. worked 221 hours as an on call LPN for [Employer Z] during the 3rd quarter of 2017 and was paid \$8,342.62.

aa. worked as an on call LPN for [Employer AA] during the 2nd and 3rd quarter of 2017 and was paid \$1,102.50.

- i. 0 [sic] hours during the 2nd quarter of 2017 and was paid \$1,102.50.
- ii. 162 [sic] during the 3rd quarter of 2017 and was paid \$5,696.25

bb. worked 120 hours as an on call LPN for [Employer BB], during the 2nd quarter of 2017 and was paid \$1,950.75.

cc. worked as an on call LPN for [Employer CC] during the 4th quarter of 2017 and 1st quarter of 2018.

- i. 186 hours during the 4th quarter of 2017 and was paid \$3,265.88.
- ii. 944 hours during the 1st quarter of 2018 and was paid \$14,028.47.

dd. worked 535 hours as an on call LPN for [Employer DD] during the 4th quarter of 2017 and was paid \$18,285.92.

ee. worked 10 hours as an on call LPN for [Employer G] during 1st quarter of 2018 and was paid \$281.96.

ff. worked 11 hours as an on call LPN 11 hours for [Employer EE] during the 1st quarter of 2018 and was paid \$308.

- gg. worked 113 hours as an on call LPN for [Employer FF] during the 1st quarter of 2018 and was paid \$3,592.50.
- hh. worked 9 hours as an on call LPN for [Employer GG] during the 1st quarter of 2018 and was paid \$263.50.
16. Based on her pay stubs the claimant attended paid orientation for [Employer E] (also known as [X]):
- a. 80 hours in the pay period ending April 4, 2015 for which she was paid \$2,017 gross.
 - b. 61.75 hours in the pay period ending April 18, 2015 for which she was paid \$1,660.46 gross
 - c. 54.62 hours in the pay period ending April 18, 2015 for which she was paid \$1,414.11 gross
 - d. 16 hours in the pay period ending June 27, 2015 for which she was paid \$414.24 gross
17. Based on her pay stubs, the claimant was paid a \$200 staffing bonus May 22, 2015.
18. Based on her pay stubs, the claimant worked for [X]:
- a. 44.35 hours in the pay period ending May 16, 2015 for which she was paid \$1,153.02 gross
 - b. 15.47 hours in the pay period ending May 30, 2015 for which she was paid \$415.99 gross
 - c. 27.45 hours in the pay period ending June 27, 2015 for which she was paid \$748.82 gross
 - d. 33.84 hours in the pay period ending July 11, 2015 for which she was paid \$903.26 gross
 - e. 33.26 hours in the pay period ending July 25, 2015 for which she was paid \$902.19 gross.
19. The claimant sometimes received pay for orientations long after she actually attended the orientation.
20. The claimant's husband filed an unemployment claim for her, which was effective January 31, 2010. He did this for her because the claimant was not comfortable with computers or technology and was not comfortable dealing

- with American Institutions in English. He also generally discouraged her from taking control of her own financial affairs. It is unknown what method of filing her husband used to file this claim. The claimant was determined to be monetarily ineligible on this claim.
21. One of the claimant's relatives filed an unemployment claim for the claimant that was effective July 21, 2013 and thereafter, either requested benefits on her behalf or assisted her in requesting such benefits. She again did not do this herself because she was not comfortable using technology or dealing with American Institutions in English. The claimant does not remember the details so it is unknown whether this was done online or by telephone and how much the claimant was involved, if at all.
 22. The benefits for the claimant's 2013 claim went to a debit card.
 23. When the claimant appealed the initial determination and gave testimony at the initial hearing, she did not inform the DUA that B had had certified for benefits for her because no one specifically asked her that question. It did not occur to her that it would be important for DUA to know that she had not been certifying her claim herself.
 24. The claimant stopped certifying for benefits while there was still a balance of \$12,126 on her claim. She also did not realize that she had been collecting benefits for 30 weeks, since B was certifying her claim and the first payment she received was a payment of \$8,430 in a single check covering January 10, 2015 through April 18, 2015. After she received this check, the rest of the payments were directly deposited into her account so she was not directly aware of them, since her children took care of her banking for her. These were the reasons she indicated on her appeal of the initial determination that she did not receive all of the unemployment benefits at issue in this matter.
 25. The claimant did not have a debit card for her UI benefits on her 2015-01 claim.
 26. In March of 2015, the claimant went to the [City A] DUA office, where she spoke to a male, Haitian, staff person (name is unknown) to ask what she was supposed to do in regards to the on call job she had started which provided her with part time hours. Her understanding of the response given [sic] was that if the job was on call, rather than full time and/or permanent, she could continue to claim unemployment benefits. He told her that the money was there to pay her for the weeks that she did not work. It is unknown what the specific days she came into the office. The claimant returned one or two more times to verify the information after friends and/or family told her that the information she received did not sound right to them. She was told by the DUA staff person that it was her choice whether the [sic] claim the benefits that were available in her account.

27. A determination on the claimant's eligibility for benefits had not been made as of March 2015 and the [claimant] had not yet received any benefits. It is common for DUA staff to inform [claimants] that they should continue to claim benefits even if they have not yet been approved to receive unemployment benefits.
28. The claimant did not tell B about her part time job because it was not steady employment so she did not think of it as a real job. It was also difficult for her to communicate with B as B frequently chose not to accept her calls.
29. B took complete responsibility for certifying the weekly claims for benefits on behalf of her mother because her mother continued to be uncomfortable with technology and with dealing with American Institutions in English. However, attending to this responsibility was a very low priority for B. She occasionally missed filing for a week and would take care of it the following week. If her mother asked about her claim and it had not been made, the claimant [sic] would lie to her rather than risk "getting in trouble" with her mother.
30. B certified her mother's weekly claims using the online system.
31. The claimant was never present, or on the phone with B, when B was certifying the weekly claims for benefits. B never asked the claimant if she had worked in a particular week or if she had been able, available and actively seeking work during a week before certifying for her mother that she had not worked and was able, available and actively seeking work. She did not want to take the time to talk with her mother. She instead assumed that her mother had not found employment and was able, available and actively seeking work based on what she knew of her mother's actions the prior times she was collecting unemployment benefits, her work ethic, and sense of family responsibility. She was also generally aware that her sister was helping the claimant with job applications. Because she was immature and preoccupied with her own life issues, she did not consider that certifying for benefits on her mother's behalf without actually checking that the information she was providing was true and accurate was irresponsible and could result in her certifying on her mother's behalf that false statements were true.
32. The claimant never certified for benefits herself.
33. The claimant was aware that B was filing weekly certification for her from March 2015 to August 2015. She did not know what answers B was supplying to DUA through her certifications.
34. B did not stop certifying for benefits on her mother's behalf in the spring of 2015. She continued to certify on behalf of her mother though August 5, 2015, when she certified for the week ending August 1, 2015. The information provided on her November 3, 2017 affidavit was incorrect. The claimant's attorney created the affidavit after communicating with B by phone and/or

online, and B signed it without reading it carefully. She assumed it was accurate.

35. The claimant did ask B to help her open the 2015-01 claim. B took care of everything involved in both filing the claim and [certifying] for benefits. She filed the claim by telephone with her mother, in her mother's home. She used tax forms like W2 to get the necessary information.
36. The claimant did not ask B to certify her claims for her; B just did it for her, as this was the kind of thing she and her sibling usually took care of for the claimant.
37. The claimant [sic] certified for benefits on behalf of the claimant online every week from March 22, 2015, through August 5, 2015. Occasionally, she forgot a week and would file for the missed week the following week. She would lie to her mother if she asked whether she had filed during a week that B had forgotten and filed late.
38. The claimant was not present when B certified her benefits because B was not living at home. She was living at her college.
39. B did not ask the claimant if she had worked during the week at issue; if she was capable of and available for work that week; and what work search activities she had performed. She felt she knew what her [mother] was doing from talking to her once or twice a month and from speaking to her sister a few times a month.
40. The last time B certified on behalf of the claimant was August 5, 2015 when she certified for the week ending August 1, 2015.
41. The claimant spoke to her son in late July 2015 about how a DUA staff person had told her that she could collect unemployment benefits while working and that she was doing so. Her son told her that he did not think she had gotten the right information from this staff person and that she should stop requesting benefits.
42. The claimant contacted the B in early August 2015 and told her to stop claiming unemployment benefits for her. When B went home for a visit later that month she became aware that her mother was working and had been working for some time. B realized that she had been providing false information to DUA on behalf of her mother. She did not tell her mother that she had done so because she did not want to get in trouble with her. She attempted to call DUA, on her mother's behalf, to find out if it was possible to correct the information, she had provided but she encountered long wait times. She was too busy to wait to speak to someone. She did not encourage her mother find out herself if a correction could be made because this would have

- required her to tell her mother that she had [provided] false information to DUA in her mother's name and she did not want to tell her this.
43. B was living at [Address A] in June, July and August of 2015 with two roommates.
 44. B did not explain to anyone else how to assist the claimant in certifying for benefits.
 45. B has no clear memory of helping the claimant with any claims prior to the 2014-01 claim. She believes she might have helped her certify by phone once on a prior claim.
 46. Before and after December 28, 2015, B and her siblings have taken responsibility for helping the claimant with life management tasks such as paying bills online, getting a gym membership and anything that required the use of a computer or other technology.
 47. Prior to meeting with [A] Ed.D., the claimant had spoken to her primary physician about the issues in her life and how the [sic] seemed to be effecting her life in a negative manner. Her doctor recommended she take medication but she declined to take a prescription. She did not seek any other help or treatment until meeting with Dr. [A] because she thought it was [sic] reflect badly on her reputation to be known as someone who had a mental health problem.
 48. When the claimant sought assistance from [Law firm name] in January 2017, a legal advocate at [Law firm name], who was trained as but not working as a social worker, spoke with her. This legal assistant noted things in the claimant's speech that were consistent with a person who is a very concrete thinker who would interpret questions in a very literal manner. She suggested to one of the attorneys that the claimant be referred for an evaluation. This suggestion was accepted and the claimant was asked if she would speak to a doctor. She agreed to do so.
 49. The claimant met with Dr. [A] on May 10, 2017 and June 7, 2017 to determine whether and, if so, in what ways she might have a mental health diagnosis and, if so, whether there was any connection between her diagnosis and her not reporting that she was working and collecting wages while receiving unemployment benefits. The assessment procedures consisted of two clinical interviews with the claimant, a test of Nonverbal intelligence, a Wide Range Achievement test – Reading, Reading Comprehension and Arithmetic sub-tests, Wisconsin Card Sorting Test, Rey Osterriith Complex Figure Test, and the Rey fifteen Item test. An interpreter facilitated the evaluation.

50. Dr. [A] found that the claimant presented as an alert, anxious, depressed woman whose performance in the evaluation revealed:
- a. Intellectual ability estimated to be at the Extremely Low range, estimated IQ 67;
 - b. Reading, Comprehension and Arithmetic achievement in the 2nd to 3rd grade level;
 - c. Impairment in visual organization abilities and evidence of possible visual motor development delay;
 - d. Problem solving abilities significantly impaired with an inability to utilize feedback to determine a card-sorting pattern;
 - e. Symptoms consistent with Major Depressive Disorder and Post Traumatic Stress Disorder;
 - f. No evidence of suboptimal effort or attempts to do poorly on tests.
51. Dr. [A] also concluded in summary that the claimant is “a woman with Intellectual Disability who likely had depressive episodes since childhood. Her cognitive limitations and depression likely were factors in her remaining in a physically and emotionally abusive relationship, which in turn, led to the development of PTSD. Depression and PTSD will negatively impact on cognitive functioning in the areas of attentional functions, memory and processing speed and for [the claimant], likely made it even more difficult for her to problem solve and deal with challenges of daily living.”
52. Dr. [A] diagnosed the claimant to have Recurrent Depressive Disorder, current episode moderate, Post Traumatic Stress Disorder, and Intellectual Disability, mild. She found that the claimant met the diagnostic criteria for Depressive Disorder, Post Traumatic Stress Disorder and Intellectual Disability.
53. Dr. [A] concluded that there was very likely a connection between the claimant’s diagnosis of Intellectual Disability, Depression and PTSD and her not reporting that she was working and collecting wages while receiving unemployment benefits.
54. Since meeting with Dr. [A], the claimant has not sought treatment for depressive disorder, post-traumatic disorder or any other non-physical disability. In her culture, it is unusual to seek psychiatric treatment and to do so creates a negative stigma. Instead of seeking medical attention, people tend to rely on the support of their community when they are under emotional duress. After speaking with Dr. [A], the claimant joined a gym. At work, she found people to talk to which helped her to process her feelings. She was

- invited to attend a church and has found the process of praying and fasting to be very therapeutic.
55. The claimant lost her job with [Employer A] (not [Employer HH]) at the end of 2014, after working there for approximately a year. Her house burnt down in June, 2014, and she divorced her husband in September, 2014. These events caused the claimant to suffer severe depression for approximately a year.
 56. The claimant filed her 2014-01 claim for unemployment benefits shortly after losing her job with [Employer A]. She did not receive any benefits until April 2015. The claimant therefore found and accepted on-call work from a number of employers (see fact above) until she was able to find more steady employment. It is unknown exactly when she first found new employment.
 57. The claimant's depression was not so severe as to prevent her from being able to accept work when is as [sic] offered to her, then go to a job, and perform the duties of a nurse.
 58. During the December 28, 2014, claim, no one had legal authority to manage the claimant's finances.
 59. The claim was not approved until April, 2015. The claimant therefore did not receive any benefits until a check for \$8,430 was issued to her on April 29, 2015.
 60. In 2014, B was attending her sophomore year of college at UMASS Amherst. She was taking five classes and working 25 hours a week. She was being stalked on campus and therefore felt the need to find off campus housing.
 61. B was very involved in her own life in 2015. She was 19 years old and attending school full time while working 25 hours a week to have money to pay her rent. She was also concerned about her safety given her stalker. She only spoke to her mother once or twice a month and usually chose not to answer the phone when her mother called because she did not have the energy or desire to deal with her mother's issues on top of her own. She spoke more frequently with her sister, who lived with their mother, but they did not usually discuss their mother.

Credibility Assessment:

1. B's testimony regarding the claimant asking her to file her unemployment claim for her, B taking care of everything related the claim from that point on, and B answering the certification questions based on assumptions rather than asking her mother for the answers was found to be credible. This is in part because of B's openness during her testimony regarding her own failure to treat the process with due respect and integrity due to immaturity and self-absorption. She testified to having given the process very little priority due to

her own life issues and to not thinking about how her failure to treat the process with proper attention could result in serious problems for her mother. In addition, the claimant's representative provided for the record a Newspaper article discussing how children of immigrants often assume responsibility for helping their parents navigate American Institutions. The claimant's representative also provided a copy of B's lease, which helped establish that B was living at college and not with her mother during the time she was certify the claims for her.

2. B testified that she filed the claimant [sic] for her mother online. This was not credible as the event log indicates that a staff person [filed] the claim. This would be consistent with filing the claim by phone with assistance from the staff person. It is assumed that this false testimony was due to a failure of memory rather than an intentional lie as there would be no particular benefit to the lie.
3. B's testimony that she stopped filing for the claimant late in the summer of 2015 is not credible as the last date that anyone claimed benefits for the claimant was August 5, 2015, which was not late in the summer. This is again assumed to have been an error of memory rather than an intentional lie.
4. B's testimony that she signed the affidavit, created by the claimant's attorney, without reading it carefully to see if all the facts were correct was found to be credible as it was [sic] consistent with the rest of her testimony regarding being too busy with her own life to pay proper care to the help her mother needed from her.
5. The claimant's testimony regarding her daughter filing her claim and then certifying for benefits for her was also found to be credible, given that the testimony was supported by that of her daughter. It is noted that if B were the person certify [sic] the claims each week, the claimant would not have known that certify [sic] consisted of answering a number of questions. Without this knowledge, the review examiners questions as to why she answered "no" to the question about whether she was working during the week in question would not have made sense. The claimant also may not have thought it was relevant whether she certified the claims or her daughter did so for her and therefore did not volunteer this information.
6. The record does not support Dr. [A]'s finding that the claimant had an intellectual disability, which made her unable to certify for unemployment benefits on her own. The claimant passed the test required to get her nursing license despite the fact that it was given in English, which is not her native language. Even if she had to take it three times before she passed, the ability to pass such a test is not consistent with a person who Intellectual ability is on a 2nd to 4th grade level. A person who can pass this test is intellectually capable of certifying a claim for unemployment benefits.

7. The record does contain evidence and testimony to support a finding that the claimant suffers from depression and post-traumatic stress disorder. The record does not indicate that these symptoms were so severe, between March 22, 2015 and August 5, 2015, as to make the claimant unable to certify for unemployment benefits on her own given [sic]. She was able during this time to work as a Licensed Practical Nurse, which is much more involved than answering seven yes/no question in English by telephone or computer. If the claimant was able to learn the terms necessary to pass the Licensed Practical Nursing exam, she could have learned what each of the 7 certification questions were in order to answer them on a weekly basis.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. We note that the year noted in Consolidated Finding of Fact # 2 is incorrect. The time period at issue here is in 2015, not 2016. Also, the first year noted in Finding of Fact # 7 should be 2015 and not 2018. In addition, Consolidated Finding of Fact # 37 begins, "The claimant certified for benefits on behalf of the claimant online every week" In the context of the other findings, it is clear that the review examiner's first reference to "the claimant" should have been to "B," the claimant's daughter. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we reject the review examiner's legal conclusion that the claimant is at fault for the overpayment.

The review examiner issued her decision pursuant to the following provisions under G.L. c. 151A, § 69:

(a) The department may recover . . . any amounts paid to an individual through error, . . . If any individual fails to pay when due any amount paid to said individual because of such individual's *failure knowingly to furnish accurate information concerning any material fact*, including amounts of remuneration received, as provided in subsection (c) of section twenty-four, such overdue amounts shall carry interest at a per annum rate provided by subsection (a) of section fifteen from the due date until paid. The total amount of interest assessed shall not exceed fifty percent of the total amount due.

...

(e) At the time the department determines that an erroneous payment from the Unemployment Compensation Fund was made to an individual due to the individual's *misrepresentation of a material fact or failure to disclose a material fact that the individual knew, or reasonably should have known, was material*, the individual shall be assessed a penalty equal to 15 per cent of the amount of the erroneous payment

(Emphasis added.)

The DUA regulations at 430 CMR 4.23, define the phrase “failure knowingly to furnish accurate information” in G.L. c. 151A, § 69(a), to mean that the overpayment resulted from information which the individual knew, or should have known, to be incorrect, or a failure to furnish information which she knew, or should have known, to be material.

This matter is now before the Board after the District Court remanded it for further consideration of two topics. The court was concerned with how the claimant’s psychological history may have affected her ability to properly certify for benefits, and the court wanted the Board to obtain further information regarding what involvement the claimant’s daughter had in certifying for benefits for the claimant.

As to the claimant’s psychological history, the review examiner made extensive inquiry and consolidated findings about a history of depression and the examination of the claimant by a licensed psychologist retained by the claimant’s attorney. *See Consolidated Findings of Fact ## 47–55.* Although the review examiner found that the psychologist “concluded that there was very likely a connection between the claimant’s diagnosis . . . and her not reporting that she was working and collecting wages while receiving unemployment benefits,” *see Consolidated Finding of Fact # 53*, the review examiner did not herself find this to be true. Indeed, in her credibility assessment, the review examiner specifically rejected the idea that the claimant’s mental health issues or various diagnoses meant that the claimant could not certify for benefits on her own. The credibility assessment takes into account the psychologist’s report, as well as all of the other evidence in the record regarding the claimant’s work history and English-language proficiency. We believe that the credibility assessment is supported and reasonable in relation to the full record before the review examiner. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). Therefore, although the claimant may have suffered from symptoms of depression and may have some other mental health diagnoses, these issues did not directly affect whether she could accurately report her earnings to the DUA or properly certify for benefits.

As to the daughter’s involvement with the certifications on the claimant’s claim, the review examiner made extensive findings about why, how, and when the daughter certified on behalf of the claimant. *See Consolidated Findings of Fact ## 5–7, 9, 29–40, and 42–46.* As an initial observation, we note that, given that the claimant had never filed a claim for herself before, her lack of comfort with “American Institutions,” *see Consolidated Findings of Fact ## 20–21*, and the general help her children provide to her when circumstances require the use of a computer or technology, *see Consolidated Finding of Fact # 46*, it is understandable why the claimant sought out assistance with filing her unemployment claim and her weekly certifications. However, simply because someone else filed the claim and the certifications, this does not mean that the claimant is totally free of any responsibility or obligation to correctly report information to the DUA. In this case, the claimant’s daughter essentially acted for her. Thus, if the claimant knew she was supposed to give the DUA certain information and intentionally did not provide it to her daughter (so that the daughter could then give it to the DUA), she would still be at fault for the overpayment, even if she was not doing the physical certifications. On the other hand, the

claimant will not be at fault for the overpayment, if there was a misunderstanding regarding what she was supposed to do to certify for benefits.

As to whether the claimant intentionally did not supply information, which she knew that she should have provided to the DUA, Consolidated Finding of Fact # 26 is critical. The review examiner found that the claimant spoke with a DUA representative in March of 2015 regarding a new on call job she had obtained. Through the conversation, she understood that she was to continue to certify for benefits, as the job was simply on call, rather than full-time. The representative told the claimant that it was the claimant's choice whether to claim benefits, but they were available to her. From this finding, it is not clear that the claimant actually understood that she needed to report all of her earnings each week. Reporting any and all work may seem obvious, especially in light of the questions asked on the weekly certifications; however, the review examiner specifically found that the claimant did not tell her daughter about the on call job, because "it was not steady employment so she did not think of it as a real job." Consolidated Finding of Fact # 28. This understanding appears to flow from the information she was given from the DUA representative. It is an incorrect understanding, to be sure. However, if this is actually what the claimant was thinking, then her failure to report her earnings to the DUA (via her daughter) was not fraudulent. Because the claimant misunderstood what information she needed to provide to the DUA, we cannot conclude that she intentionally withheld relevant information, or that the overpayment was directly due to her fault, as defined by statute and regulation.

The problem, of course, was compounded by the fact that the claimant's daughter did not have regular contact with the claimant, *see* Consolidated Findings of Fact # 28, she assumed a lot of information which eventually turned out to be incorrect, *see* Consolidated Finding of Fact # 31, and, admittedly, was not overly concerned with properly certifying the claim for her mother. *See* Consolidated Finding of Fact # 61 and Credibility Assessment Paragraph 1. Both the claimant and her daughter should have been more diligent, and both should have made more of an effort to supply correct information to the DUA. However, on the supported findings before the Board, we cannot conclude that the overpayment resulted from information which the claimant knew, or should have known, to be incorrect or material.¹

We, therefore, conclude as a matter of law that the review examiner's decision that the claimant was at fault pursuant to G.L. c. 151A, § 69, for the overpayment on her claim, effective December 28, 2014, is not supported by substantial and credible evidence and free from error of law, because the review examiner's consolidated findings of fact show that the claimant did not understand what she needed to report to the DUA when she obtained a new on call job, and, thus, she did not give correct information to her daughter, who was certifying for benefits on the claimant's behalf.

¹ We think our holding here is specific to the facts before us. Our holding should not be interpreted as a declaration that a claimant will be relieved of a fault finding any time that claimant has another person certify for benefits for them. The unique circumstances of this case allow for such a result, but, as we have noted in the decision, a claimant may still be held to be at fault for an overpayment even if someone else was certifying for them. Similarly, a psychological disorder may show that an overpayment was not due to a claimant's fault; however, as is the case here, a diagnosis on its own does not require such a conclusion or result. All of the relevant circumstances in any given matter must be considered.

The review examiner's decision is reversed. The claimant remains obligated to return any overpaid benefits to the DUA. However, the claimant is not required to pay interest on any overdue amount, is not subject to a 15% penalty, and is not subject to a compensable week disqualification.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 24, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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

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