

Where the DUA approved the claimant for benefits based on her weekly responses regarding her capability for work, availability for work, and work search, a subsequent determination of disqualification more than a year after the weeks at issue is barred under G.L. c. 151A, § 71.

**Board of Review
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Issue ID: 0018 8929 07

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Eric M. P. Walsh, a review examiner of the Department of Unemployment Assistance (DUA), which concluded that the claimant is denied benefits from June 21, 2015 through August 22, 2015, and overpaid benefits for that period of time. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant filed a claim for unemployment benefits with the DUA, and the claim was determined to be effective April 19, 2015. She subsequently received unemployment benefits on that claim. On September 22, 2016, the DUA sent the claimant a Notice of Disqualification, which informed her that she was ineligible to receive benefits from June 21, 2015, through August 22, 2015. The Notice also informed her that she was overpaid \$2,673.00 in benefits. 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 determination that the claimant is subject to disqualification.

Benefits were denied after the review examiner determined that the claimant had not conducted an active work search for the period in question and, thus, was disqualified, under G.L. c. 151A, § 24(b). 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 upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the claimant is ineligible to receive benefits from June 21, 2015, through August 22, 2015, and thus is overpaid unemployment benefits, is supported by substantial and credible evidence and is free from error of law, where the determination giving rise to the overpayment was issued in September of 2016.

Findings of Fact

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

1. The effective date of claim is April 19, 2015.

2. The claimant works for a food service contractor to schools and she experiences frequent layoffs when school is not in session.
3. On June 16, 2016, the DUA investigated the claimant's work search activity for the time period of June 21, 2015, to August 22, 2015.
4. The claimant stated that she looked for work, but that she will not provide any documents.
5. Between September 13, 2016, [and] September 22, 2016, the claimant created a work search document indicating three activities per week for the time period in question.
6. The claimant created the document at that time because she earlier explained to a DUA representative that she no longer had her work search log from that time period as she did not think she had to keep it. The DUA representative allegedly instructed the claimant to "do [her] best" and "send in something."
7. All weeks suggested that she used a "newspaper" and "networking." The third activity listed gave the name of an employer or another activity like "Craigslist." The activities were a guess on the claimant's part.

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 and deems them to be supported by substantial and credible evidence. As discussed more fully below, we conclude that the agency improperly issued the September 22, 2016, determination¹ regarding the claimant's eligibility for benefits, because that determination was barred under the provisions of G.L. c. 151A, § 71. Therefore, the claimant is not responsible for repaying any money to the DUA.

At the outset, we note that, on its face, there is nothing legally incorrect about the review examiner's decision under G.L. c. 151A, § 24(b). As noted by the review examiner, under that section of law, in order to receive unemployment benefits, a claimant must show that she is able to work, available for work, and actively seeking work in each week she requests benefits. We agree with the review examiner that the claimant did not present substantial and credible evidence of her work search for the period from June 21, 2015, through August 22, 2015.

¹ The September 22, 2016, Notice of Disqualification is not referred to specifically in the review examiner's findings. However, it is included in the record as Exhibit # 2.

Nonetheless, our decision in this matter does not turn on an analysis of G.L. c. 151A, § 24(b). Rather, it turns on whether the agency had the authority to issue the September 22, 2016, determination at all. G.L. c. 151A, § 71, provides, in relevant part, as follows:

The commissioner may reconsider a determination whenever he finds that (1) an error has occurred in connection therewith; or (2) wages of the claimant pertinent to such determination but not considered in connection therewith have been newly discovered; or (3) benefits have been allowed or denied or the amount of benefits fixed on the basis of misrepresentation of fact; provided, however, that with respect to (1) and (2) no such redetermination shall be made after one year from the date of the original determination; and provided, further, that with respect to (3) no such redetermination shall be made after four years from the date of the original determination

Put most simply, this section of law gives the DUA the authority to reconsider an original determination within one year, if the reason for the reconsideration relates to an error or to newly discovered wages. If the reason for the reconsideration is due to a misrepresentation of fact which occurred in connection with the original determination, then the agency has four years to issue a new determination regarding eligibility.

The review examiner did not consider this provision in his decision. However, we can find nothing in the record which indicates that a misrepresentation of fact led to an incorrect original determination in this case. The review examiner did not enter into the record any documentation or information which would lead us to conclude that the claimant misrepresented her status to the agency during the summer of 2015. Exhibit # 1 shows that the claimant reported to the agency that she was looking for work beginning June 21, 2015. No other documentation suggests that this was not true. Therefore, we are confident that no fault on the claimant's part led to the overpayment.

In this case, the claimant had to certify each week that she was able, available, and actively seeking work in order to obtain her unemployment benefits. The agency was determining each week whether she was eligible for benefits. Because the DUA found the claimant to be eligible for benefits and subsequently paid her based upon her weekly certifications, the DUA is deemed to have determined her eligible for each week at issue. Pursuant to G.L. c. 151A, § 71, it had one year from each week to issue a redetermination as to the whether she was able, available for, and actively seeking, work. As to the weeks at issue here, it did not.

We, therefore, conclude as a matter of law that the review examiner's conclusion that the claimant was not eligible for benefits from June 21, 2015, through August 22, 2015, and that she is overpaid unemployment benefits is not free from error of law, because the agency was time barred, in September of 2016, from re-determining her eligibility for benefits, under G.L. c. 151A, § 24(b).

The review examiner's decision is reversed. The September 22, 2016, determination should not have been issued and was improper. The claimant is not responsible for repaying any money to the DUA.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 28, 2017



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

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