

Because the claimant is receiving a monthly pension payment from a plan that was wholly funded by his former base period employer, his weekly benefit amount must be reduced by the entire pension, pursuant to G.L. c. 151A, § 29(d)(6).

**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) to deduct his pension payment from his weekly unemployment benefit amount. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part.

The claimant filed a claim for unemployment benefits with the DUA on April 1, 2018. On June 23, 2018, the DUA issued a determination under G.L. c. 151A, § 29(d)(6), which stated that his weekly benefit rate would be reduced by one hundred percent of his employer funded retirement benefit. 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 benefits in a decision rendered on August 28, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant's pension was wholly funded by the union and, thus, would have to be deducted completely from his weekly benefit amount, as required under G.L. c. 151A, § 29(d)(6). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner on two occasions in order to obtain additional evidence pertaining to the claimant's pension contributions. The claimant attended the remand hearings. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant's entire pension payment had to be deducted from his weekly benefit amount, because it was wholly financed by his employer and managed by the claimant's union, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked for various employers as a Journeyman Electrician Union member from 1980 until March 31, 2018.
2. The claimant is a member of the IBEW Local [A] Union.
3. The following refers to Remand Exhibit #15 -16, a document entitled "Wage Rate Memorandum":
 - a. "Total Package" refers to the amount the union charges the employer per hour of the claimant's work. The employer was charged \$82.36 per hour for the claimant's work during the base period of the claim.
 - b. "Wage Rate" refers to the dollar amount the claimant is paid by the employer per hour. The claimant's hourly rate during the base period of his claim was \$47.13.
 - c. The difference between the total package hourly rate and the wage rate hourly rate are the numerous other payments made by the employer in addition to the wages paid to the claimant.
 - d. "HBP" refers to the dollar amount the employer paid towards the claimant's health insurance per each hour the claimant worked. The employer was charged \$13 per each hour the claimant worked towards his health insurance during the base period of the claim.
 - e. "PEN" refers to the dollar amount paid towards the claimant's pension per hour. During the base period of the claimant, the employer was charged \$10.03 per each hour the claimant worked for the claimant's pension.
4. All of the claimant's pay stubs show the claimant's gross pay, taxes, miscellaneous deductions, and net pay. The net pay is the gross pay minus taxes and miscellaneous deductions. For example, referring to Remand Exhibit #18, the claimant grossed \$1,182.72, had \$283.36 in taxes, \$23.04 in miscellaneous deductions, and net pay of \$876.32.
5. All of the claimant's pay stubs also show Employer Taxes and Fringes. The items that make up "Fringes" are listed. Included in that list is PEN, for payments made to the pension fund. For example, Remand Exhibit #18 shows the employer paid \$90.48 in taxes and \$981.42 in Fringes, including \$240.72 to the pension fund.
6. The pension was financed 100% by the employer during the base period of his claim.

7. The Union managed the pension funds during the base period of the claimant's claim.
8. The claimant filed for unemployment benefits and received an effective date of April 1, 2018.
9. The claimant's benefit rate was established at \$769 a week.
10. The claimant became eligible to receive his pension as of April 1, 2018.
11. The claimant's pension is paid monthly at a gross amount of \$4,215.96.
12. The average weekly benefit amount of the pension received by the claimant is approximately \$980.46 ($4,215.96/4.3$).
13. The claimant has continued to receive the pension from the Union.
14. On June 23, 2018, the claimant received a Notice of Disqualification, indicating that he was not entitled to unemployment benefits for the time period beginning April 22, 2018 and for an indefinite period of time thereafter until he meets the requirements of the Law.
15. The claimant appealed the disqualification.

Credibility Assessment:

The claimant argued the listing of the pension amount on his pay stub meant the claimant contributed that amount to the pension fund. However, a close examination of the documents submitted by the claimant does not support this view. The amount of the pension payment is never included in the claimant's gross pay. Rather than being a deduction from the gross pay, the pension amount is included in a separate column with other payments the employer made to the union. Remand Exhibit 15-16 is a wage rate memorandum issued by the union and a joint conference committee of the electrical construction industry. It shows the total cost to a business (Total Package) for each hour of a union employee's work. One of the columns shows the Wage Rate of the worker. Other columns show additional items, such as the pension. Once again, the pension amount is not part of the worker's wage. Rather, it is a separate amount paid by the employer to the union. It is concluded the claimant did not contribute to the pension and the pension was 100% financed by the employer.

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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact

except as follows. We reject the amounts listed in Consolidated Finding # 3 for the total package and wage rate paid by the employer during the claimant's base period. Since the claimant's claim is effective as of April 1, 2018, his base period is between April 1, 2017, and March 31, 2018. Remand Exhibits ## 15 and 16 show that, during the base period, the total package ranged from \$83.61 to \$85.86, and the wage rate ranged from \$48.33 to \$50.48. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented.

G.L. c. 151A, § 29(d)(6) mandates that a claimant's weekly benefit rate be reduced if he is receiving a pension under certain circumstances. Specifically, the statute provides, in relevant part, as follows:

(d) An individual in unemployment and otherwise eligible for benefits, who is receiving, has received, or will receive payments in the form of retirement benefits, any part of which was financed by a base period employer, shall be paid for each week of unemployment an amount computed as follows:

(6) Notwithstanding any of the foregoing provisions of this subsection, the amount of benefits otherwise payable to an individual for any week which begins in a period with respect to which such individual is receiving governmental or other pension . . . shall be reduced by an amount equal to the amount of such pension . . . which is reasonably attributable to such week; provided, further, that . . . such reduction shall apply only if a base period employer contributed to or maintained such pension . . . and . . . services of the individual for such employer during the base period affected eligibility for or increased the amount of such pension . . . and provided further, that if the individual contributed to such plan, the amount of benefits otherwise payable to such individual shall be reduced by fifty per cent of the amount of such pension

Pursuant to this statute, in order for the agency to apply a pension deduction, certain conditions must be met. The reduction applies only if the base period employer contributed to or maintains the pension, and the services performed by the claimant during the based period affected eligibility for or increased the amount of the pension.

The review examiner's initial decision noted that the claimant's pension was wholly funded by his union, and the union managed the pension and collected funds from the employer. Thus, he was subject to a pension deduction under the above-cited statute. Since the claimant testified that he alone contributed to his pension, we remanded the case on two occasions to give the claimant an opportunity to present documentary evidence to substantiate his assertion. After the remand hearings, the review examiner found that the claimant's pension was wholly financed by the employer. The review examiner made this finding after determining that the documentary evidence in the record, including Remand Exhibits ## 15, 16, and 18, supported the conclusion that the claimant did not make any contribution to his pension from his earnings. We note that, in total, after the initial hearing in this case, the claimant was given three opportunities over the course of several months to gather evidence to substantiate his assertions, but he continually failed to do so. In light of the totality of the evidence in the record, we find that the review

examiner's credibility determination to reject the claimant's testimony was reasonable in relation to the evidence presented, and, thus, we will not disturb it. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7 (1996).

As noted above, having the employer contribute to the pension is not the only requirement that must be met in order to deduct the pension from the claimant's weekly unemployment benefit. The other requirement is that the services performed by the claimant during the based period either affected his eligibility for or increased the amount of the pension. Although this second requirement was not explicitly discussed during the hearing, the record shows that the employer's contribution and the amount of the claimant's pension benefit were based upon the hours worked in each year and the number of years of service. *See Consolidated Finding # 3 and Remand Exhibits 9 and 20.* Therefore, we can reasonably infer that the claimant's work during the base period affected his eligibility for or increased the amount of his pension. Thus, the entire weight of the record supports the conclusion that the claimant should be subject to a pension deduction each week that he certified for benefits on the claim he filed on April 1, 2018.

Moreover, the amount of the deduction was calculated correctly by the review examiner. The record contains information that the claimant receives a gross pension each month of \$4,215.96. Divided by 4.3 weeks per month, this gives a weekly pension amount of \$980.46. Since this amount is more than his weekly benefit rate, the claimant is not entitled to any benefits as of April 1, 2018.

We, therefore, conclude as a matter of law that the claimant is subject to a pension deduction pursuant to the provisions of G.L. c. 151A, § 29(d)(6).

The portion of the review examiner's decision that subjects the claimant to a reduction in his weekly benefit rate in the amount of \$980.46 per week is affirmed. Since his full benefit rate is \$769.00, he has a new benefit rate of \$0.00 per week. We reverse the portion of the decision that applied the deduction as of the week ending April 28, 2018. Since the claimant received a pension payment for the month of April 2018, the reduction is to be effective the first week in April, the week ending April 7, 2018.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 24, 2019



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.

SVL/rh