

A claimant who received long-term workers' compensation disability benefits as part of a settlement did not have sufficient wages in her base period for an unemployment claim.

**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 found her monetarily ineligible for an unemployment claim. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm, but on grounds that differ from those articulated by the review examiner in her decision.

The claimant filed a claim for unemployment benefits with the DUA, and the claim was determined to be effective August 5, 2018. On September 3, 2018, the DUA sent the claimant a Monetary Determination stating that she was not eligible for a claim, because there were insufficient wages in her base period. 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 in a decision rendered on June 19, 2019.¹

The review examiner concluded that the claimant was not monetarily eligible for a claim pursuant to the provisions of G.L. c. 151A, §§ 24(a), 1(a), and 1(s), because the claimant had insufficient wages in her base period or alternate base period upon which to base the claim. The review examiner rejected the claimant's argument that the base period should be extended due to her receipt of workers' compensation benefits. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accept 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 decision that the claimant is monetarily ineligible for an unemployment claim is supported by substantial and credible evidence and is free from error of law, where the claimant received both long-term disability benefits and workers' compensation benefits in her base period.

Findings of Fact

¹ We are aware that some litigation occurred prior to the hearing in this matter. An exhaustive review of those proceedings is not necessary to decide this appeal. It is sufficient to say that DUA records show that the matter was remanded from the court for a hearing on the merits of the Monetary Determination.

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

1. The claimant worked full time as an administrative assistant for an employer from March 2009 until April 23, 2018, when she was separated [sic] employment.
2. The claimant had a set schedule of hours Monday through Friday from 7:30am to 3:00pm. The claimant worked 20 hours a week during the summer.
3. The claimant was paid approximately \$28.09 per hour.
4. The claimant's last physical day of work for the employer was March 8, 2017 because of psychological issues.
5. The employer paid the claimant accrued paid time off in March and April 2017, until she exhausted her time.
6. The claimant filed a claim for Long Term Disability ("LTD") benefits, which was a benefit she received through her employer. On May 10, 2017, the claimant's LTD claim was approved and the insurance company deemed her totally disabled beginning March 9, 2017. The claimant was awarded monthly benefits in the amount of \$2,144.74, which represented 60% of her pay, beginning June 2017.
7. In March 2017, the claimant filed a workers' compensation claim with the Department of Industrial Accidents (the "DIA") for a psychological injury that began on December 6, 2016. Total Disability benefits is based on 60% of an employee's pay.
8. On July 12, 2017, the claimant attended a DIA hearing for workers' compensation benefits. The claimant was awarded workers' compensation medical benefits under Chapter 152 Sections 13 and 30 of the Law. The claimant was not awarded disability benefits. The Order read in part; "Employee's request for disability benefits is denied pending a full evidentiary hearing."
9. The DIA hearing for disability benefits was scheduled to begin April 10, 2018. Prior to the conclusion of the hearing, the claimant and the employer agreed upon a settlement, which represented approximately 2 years of future Section 34 workers' compensation benefits, effective May 2, 2018, running into the future. The lump sum settlement payment was for \$70,000.00 with the claimant being paid a net settlement amount of \$59,400.00, which represents payment to the claimant of \$133.78 [sic] over the course of her life expectancy of 37 years. The employer agreed to pay the claimant's medical bills up until the date of the settlement agreement on May 1, 2018. The settlement was made on the basis that the employer would not admit liability for the claimant's injury.

10. The workers' compensation lump sum settlement payment caused a reduction in the claimant's LTD benefits. The claimant's monthly benefit payment was reduced to \$214.47. She received the benefits until July 31, 2018.
11. The claimant did not file a claim for unemployment benefits in the year 2017.
12. The claimant filed an initial claim for unemployment benefits with an effective date of August 5, 2018 and a benefit year end date of August 3, 2019. The claimant was not paid any wages during the benefit year of the claim, which extended from July 1, 2017, through June 30, 2016, or during the alternate base period, which extended from October 1, 2017 through August 4, 2018.
13. On September 3, 2018, the Department of Unemployment Assistance issued the claimant a Monetary Determination under Section 24(a) & 1(a) & 1(s) of the Law, which notified her she was not monetarily eligible to receive weekly 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 conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. Finding of Fact # 8 states that the claimant attended a "DIA hearing" on July 12, 2017. In fact, there was no hearing. Documentation in the record indicates that, on July 12, 2017, there was a "conference" with an administrative judge of the Department of Industrial Accidents. *See Exhibit ## 8a and 8b.* Finding of Fact # 9 states that a settlement was reached "[p]rior to the conclusion of the [DIA] hearing." No evidence suggests that a hearing actually took place. The record supports a finding and conclusion that the full evidentiary hearing noted in the DIA judge's August 28, 2017, order never occurred, because a settlement was reached between the parties. Finally, Finding of Fact # 12 indicates that the "claimant was not paid any wages, during the benefit year of the claim, which extended from July 1, 2017 through June 30, 2016." There are two typographical errors here. The reference to "benefit year" should actually be "base period." In addition, the 2016 date should be 2018.

We note these issues with the findings of fact. However, none of them affect the ultimate outcome of this matter. As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant is monetarily ineligible for an unemployment claim.

To be monetarily eligible for a claim, the claimant must have earned sufficient wages in the primary or alternate base period to satisfy the requirements of G.L. c. 151A, § 24(a). That section of law provides, in pertinent part, as follows:

An individual, in order to be eligible for benefits under this chapter, shall—

(a) Have been paid wages in the base period amounting to at least thirty times the weekly benefit rate

There is no dispute in this case that the claimant stopped working for her employer on March 8, 2017, and filed her claim for unemployment benefits in 2018, such that the effective date of her claim is August 5, 2018. The primary base period (July 1, 2017, through June 30, 2018) and alternate base period (October 1, 2017, through August 4, 2018) of the claim,² therefore, cover periods of time in which the claimant was not working and received no wages for services from her employer.

The question presented in this case is whether the claimant's base period should be extended, or lengthened, due to receipt of workers' compensation benefits. G.L. c. 151A, § 1(a) provides, in pertinent part, as follows:

[I]f a claimant received weekly compensation for temporary total disability under the provisions of chapter one hundred and fifty-two or under a similar law of the United States, . . . or payments for similar specified injuries under workers' compensation laws of any other state or under any similar law of the United States, for more than seven weeks within the base period, as heretofore defined, his base period shall be lengthened by the number of such weeks, but not to exceed fifty-two weeks, for which he received such payments

The review examiner concluded that the base period could not be lengthened, pursuant to this section of law, because "the claimant was never paid weekly compensation [for] temporary total workers' compensation disability benefits." We disagree with this conclusion.

The review examiner found that, prior to a hearing on whether the claimant would receive weekly workers' compensation disability benefits, the parties settled the matter. The "History and Reasons for Settlement" was signed by the parties on April 10, 2018. That document states that "the parties agreed to this proposed settlement which represents approximately two years of future Section 34 benefits, effective May 2, 2018, running into the future." *See* Exhibit # 10b.³ Therefore, the claimant was receiving workers' compensation benefits for her total disability during the base period of her claim, which includes the period from May 2, 2018, through June 30, 2018, (the primary base period) or the period from May 2, 2018, through August 4, 2018 (the alternate base period).⁴

² *See* G.L. c. 151A, § 1(a) (defining base period).

³ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

⁴ We recognize that G.L. c. 151A, § 1(a) states that the base period may be lengthened due to receipt of "weekly" workers' compensation benefits. Here, technically, the claimant did not receive weekly benefits, she received a lump sum amount. However, the "History and Reasons for Settlement" specifically cites G.L. c. 152, § 34, which is the section of workers' compensation law allowing for the payment of compensation "during each week of [total] incapacity." For purposes of this decision, we treat the period of time covered by the lump sum amount as representing weeks in which the claimant received compensation for total incapacity, as contemplated by G.L. c. 152, § 34.

We now move to whether the claimant is monetarily eligible. As noted above, the claimant's primary base period runs from July 1, 2017, through June 30, 2018. During this base period, the claimant was receiving the worker's compensation benefits for eight weeks, May 6, 2018, through June 30, 2018.⁵ Counting back eight full weeks from July 1, 2017, extends the base period to include April 30, 2017, through June 24, 2017, which is in the second quarter of 2017. The record does not contain exact figures for this period of time. However, Exhibit # 4 shows that the claimant was paid a total of \$4,952.61 in the second quarter of 2017, and the review examiner found that the claimant was paid through April of 2017. *See* Finding of Fact # 5.

Although the claimant's extended base period barely includes time in which the claimant could have been paid wages, considering that the extended base period begins on April 30 and the claimant was only paid through April of 2017, we will, nevertheless, undertake an analysis of monetary eligibility using her wages from the second quarter of 2017. When we use this full quarterly figure, the claimant is still not monetarily eligible for the claim. As noted above, to be monetarily eligible for a claim, the claimant must have been paid at least thirty times her weekly benefit rate in the base period. The benefit rate is equal to fifty percent of a claimant's average weekly wage. *See* G.L. c. 151A, § 29(a). The average weekly wage is defined as "an amount equal to one twenty-sixth of the total wages reported for an individual in the two highest quarters of his base period; provided that if wages reported include not more than two quarters in said base period, his weekly wage shall be deemed to be one thirteenth of the total reported for the highest quarter." G.L. c. 151A, § 1(w). With the extension to her base period, the claimant has one quarter of wages in the second quarter of 2017. The total amount of wages in the base period is \$4,952.61.⁶ The total amount of wages (\$4,952.61) divided by thirteen weeks gives an average weekly wage of \$380.97. Half of this amount gives \$190.49 for the weekly benefit rate. This benefit rate times thirty yields \$5,714.70. Because the claimant was not paid at least \$5,714.70, she is not eligible for a claim based on her primary base period.

The claimant's alternate base period runs from October 1, 2017, through August 4, 2018. With this length of time, the claimant was receiving her workers' compensation disability benefits for thirteen weeks (May 6, 2018, through August 4, 2018).⁷ Counting back thirteen full weeks extends the base period to include July 2, 2017, through September 30, 2017. The claimant had no wages during this period of time, as she stopped performing services in March of 2017, and was paid her accrued time through April of 2017. Without any countable wages in this extended base period, the claimant is also not monetarily eligible for a claim using her alternate base period.

In her appeal to the Board, the claimant argues that she "was awarded, by the DIA judge, Workers' Compensation benefits under M.G.L. c. 152, §§ 13 and 30, retroactive to January 25, 2017." *See* Claimant's Appeal to Board of Review, p. 9. While the evidence contained in Exhibit # 8a shows this to be true, the statute does not allow the lengthening of the base period due to the receipt of *any* type of workers' compensation benefits. A base period extension is only allowed if the claimant receives "weekly compensation for temporary total disability." The

⁵ G.L. c. 151A, § 1(t) defines a week as "seven consecutive days beginning on a Sunday." Therefore, the period from May 2 through May 5, 2018, was not a countable "week."

⁶ Again, for purposes of this decision, we are using the full quarterly figure for the second quarter of 2017, when, in reality, the claimant was probably paid much less than that for the period beginning April 30, 2017.

⁷ *See* G.L. c. 151A, § 1(t).

DIA judge explicitly indicated that he was not awarding benefits for that reason in his order. A full hearing was to be held to determine if the claimant was going to receive such weekly compensation. Thus, even though the claimant received some type of benefits pursuant to the workers' compensation laws, it was not the kind of benefits contemplated by G.L. c. 151A, § 1(a).

In our view, a liberal construction of G.L. c. 151A, § 1(a), as suggested by the claimant pursuant to G.L. c. 151A, § 74, does not help her cause. Again, the statute at issue is very specific as to when the base period can be lengthened. To allow the lengthening in the circumstances presented here would require us, in effect, to re-write the statute or interpret it in a way that is not consistent with the plain language of the provision. During the hearing, the claimant's attorney suggested that the claimant was receiving a type of "wage replacement" through the long-term disability benefits, and this type of wage replacement should be treated as equivalent to the weekly total disability workers' compensation benefits contemplated in G.L. c. 151A, § 1(a).⁸ If the statute had been written with general language referring to wage replacement, then we could liberally construe it include all types of wage replacement schemes. However, here, we are guided by the canon of statutory construction *expressio unius est exclusion alterius*.⁹ We presume the Legislature intended to limit the circumstances in which the base period could be lengthened. Moreover, we cannot ignore the clear legislative mandate contained within the text of G.L. c. 151A, § 1(a), which refers only to the workers' compensation law. *See DiGiulio v. Dir. of Department of Unemployment Assistance*, 94 Mass. App. Ct. 292, 296 (2018) (recognizing the need to interpret Chapter 151A liberally but also give meaning to clear statutory language).

Therefore, we conclude, as a matter of law, that the claimant is not monetarily eligible for an unemployment claim pursuant to the provisions of G.L. c. 151A, §§ 24(a), 1(a), and 1(s), because she has insufficient wages in the base period to establish such a claim.

⁸ The amount of workers' compensation benefits would be equivalent to the amount of long-term disability benefits. *See Findings of Fact ## 6 and 7.*

⁹ "[T]o express or include one thing implies the exclusion of the other, . . . For example, the rule that 'each citizen is entitled to vote' implies that noncitizens are not entitled to vote." *Black's Law Dictionary* 602 (7th ed. 1999).

The review examiner's decision is affirmed, as it is supported by substantial and credible evidence and free from error of law. The claimant is not monetarily eligible for an unemployment claim, effective August 5, 2018.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 5, 2019



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Chairman 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