

Since the claimant's net household income exceeds his monthly household expenses, he is not entitled to an overpayment waiver under G.L. c. 151A, § 69(c), as recovery of the overpaid benefits would not defeat the purpose of benefits otherwise authorized.

**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 deny the claimant's request for a waiver of an overpayment that had been assessed to him. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant was assessed an overpayment of \$4,487.00 pursuant to G.L. c. 151A, § 71. He applied for a waiver of recovery of the overpayment, which was denied by the agency in a determination issued on November 10, 2018. The claimant appealed the denial of the waiver to the DUA hearings department. Following a hearing on the merits, which the claimant attended, the review examiner affirmed the agency's initial determination and denied the waiver in a decision rendered on December 15, 2018. We accepted the claimant's application for review.

The review examiner determined that, although the claimant was not at fault, recovery of the overpayment would not be against equity and good conscience or defeat the purpose of benefits otherwise authorized, and, thus, the claimant was not entitled to a waiver of overpayment under G.L. c. 151A, § 69(c). 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 to obtain additional testimony and other evidence pertaining to the claimant's monthly household income and expenses. The claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue on appeal is whether the review examiner's decision, which concluded that recovery of the overpayment would not defeat the purpose of benefits otherwise authorized under G.L. c. 151A, § 69(c), is supported by substantial and credible evidence and is free from error of law, where the consolidated findings establish that the claimant's monthly net household income exceeds his necessary and ordinary living expenses.

Findings of Fact

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

1. The claimant filed a claim for unemployment insurance benefits with an effective date of January 7, 2018.
2. In a decision issued on May 24, 2018, the Department of Unemployment Assistance (DUA) found the claimant was ineligible from [sic] receiving benefits he had been paid for a number of weeks during the claim, and found that he had been overpaid for those weeks.
3. The DUA determined the claimant was not at fault for the overpayments.
4. The claimant filed a request for waiver of recovery of \$4,487.00 in overpayments on October 25, 2018.
5. On November 10, 2018, the DUA issued a Notice of Disqualification under Section 69(c) of the law, which stated "You have not established that your income or resources are insufficient to enable you to meet ordinary living expenses and repay the debt. Additionally, you have not established that you gave up any rights when you collected unemployment benefits or used the money for purposes other than those for which you have spent non-benefit funds. Recovery of the overpayment would not be against equity and good conscience nor defeat the purpose of benefits otherwise authorized." The Notice of Disqualification notified the claimant repayment of the remaining balance had not been waived and he had failed to establish his inability to repay the debt.
6. The claimant used the unemployment insurance benefits he received to pay monthly living expenses. The claimant did not incur any financial obligation that he might not have incurred but for the receipt of such benefits.
7. The claimant did not forego applying for any other type of benefits or insurance as a result of receiving unemployment insurance benefits.
8. The claimant is married and lives with his wife and three dependent children ages 9, 5 and 1 in a home owned by his parents.
9. The claimant and his wife are responsible for \$1300 per month in rent.
10. The claimant and his wife have utility payments averaging \$765 in total each month:

Electric \$519 (during winter)
Gas \$133
Cable/Internet and Phone \$113
Total \$765

11. The claimant and his wife have past due balances on many of their utility bills. The Electric bill has an outstanding balance of \$1354. The claimant pays an [installment] amount of \$104.15 each month towards the past due balance in addition to his new monthly charges. The \$519 monthly payment includes the installment of \$104.15. The Internet and phone bill has a past due balance of \$108.
12. The claimant and his wife also incur \$176 in monthly charges for Direct TV.
13. The claimant and his wife also incur \$175 per month in cell phone charges.
14. The claimant and his wife do not have any childcare expenses. The claimant's parents provide childcare for their children when they are working.
15. Neither the claimant nor his wife own any real property.
16. Both the claimant and his wife are currently employed full-time. The claimant began working as [a] highway maintainer for [Employer Name] earning \$14.72 per hour in March of 2018. The claimant is part of a union. As of January 1, 2019, he earns \$14.95 per hour. His net monthly earnings average \$2318. His wife is employed full-time at a retail pharmacy and earns \$18 per hour. Her net monthly earnings average \$2722. The claimant and his wife earn an average of \$5040 per month in net earnings from their work after payroll tax, health and dental insurance deductions. The claimant and his wife do not have any other sources of income.
17. The claimant and his wife own a 2015 Toyota Rav4, which requires a monthly payment of \$494 per month. They also own a 2000 Chevrolet Tahoe outright. They pay monthly auto insurance for both vehicles in the amount of \$180 per month. The Toyota Rav4 was recently in an accident, but was repaired and is in good condition.
18. The claimant anticipates the Tahoe will need a new exhaust system shortly, due to the age of the vehicle. The estimated repair cost is \$1000.
19. The claimant's wife has student loans totaling \$23,359.34. As the monthly payments are currently being deferred for her student loans, no monthly payment is due.
20. The claimant and his wife have 10 credit cards. The total outstanding balance for all the credit cards is \$15,416. The total minimum monthly payment for all the credit cards is \$493.
21. The claimant and his wife have non reimbursed medical expenses totaling \$737.60. These expenses include \$100 owed to [Hospital A]; \$69.60 unpaid

dental balance; \$568.09 to [Hospital B]. The claimant and his wife pay \$25 per month to [Hospital B].

22. They also owe the IRS \$2709 from 2017 and have an outstanding collection account with a balance of \$136.57 from [Company A].
23. The claimant has savings in the amount of \$6 and approximately \$200 in his checking account. The claimant stashes \$30-\$40 dollars of cash away in the house each month for emergencies.
24. The claimant and his wife incur the following additional average monthly expenses:

Food \$600
Gas and travel \$300
Clothing/Diapers \$150
Personal Hygiene \$50
Laundry/Cleaning \$50
Total \$1150

Credibility Assessment:

The record was held open following the claimant's testimony at the remand hearing to allow him the opportunity to provide documentation to substantiate his monthly obligations. The claimant supplied 39 pages of documentation to DUA detailing income and monthly obligations for both he and his wife.

The claimant submitted pay stubs for both himself and his wife for the last four pay periods, covering December 2018 and January 2019. The paystubs show both the claimant and his wife are paid bi-weekly. The net earnings are after deductions were made for federal and state taxes, social security, [Medicare], health and dental insurance and union dues. They were calculated by adding monthly net totals and dividing by 4 to get the average biweekly net total. That figure was then multiplied times 2.15 to get the average monthly net total. DUA assumes there are 4.3 weeks in a month so the claimant and his wife received 2.15 paychecks per month. In terms of net earnings, I did not include the wife's 5% contribution to her 401K fund as that was discretionary. The claimant's retirement contributions were included because he works for the [Employer Name] and his contribution to his retirement is mandatory.

The claimant's average monthly earnings were calculated as follows:
 $\$909.67 + \$1,140.21 + \$1,175.48 + \$1,087.01 = \$4,312.37$ Total Net Earnings of the 4 checks

$\$4,312.37$ divided by 4 = $\$1,078.09$ = average bi-weekly net earnings.
 $\$1,078.09 \times 2.15$ weeks in a month = $\$2,317.89$ average net earnings per month.

The wife's average monthly earnings were calculated as follows: \$1,145.06 (\$1072.96 + \$72.10) + \$1282.83 (\$1,202.26 + \$80.57) + \$1253.78 (\$1,175.00 + \$78.78) + \$1,382.72 (\$1,295.98 + \$86.74) = \$5064.39 Total Net Earnings of the 4 checks.

\$5064.39 divided by 4 = \$1,266.10 = average bi-weekly net earnings
\$1,266.10 x 2.15 weeks in a month = \$2,722.12 average net earnings per month.

The claimant submitted bank records showing payments for rent. Although the payments were somewhat uneven, he frequently made bi-monthly payments of \$650. The claimant's testimony that he is obligated to pay \$1300 per month is credible. The claimant explained that months he paid less [w]ere times he did not have the money to pay \$1300.

The claimant submitted bills for his utilities and cell phones. The claimant testified his gas is filled every 6 weeks or so and not monthly. As he only submitted one gas bill showing a purchase amount of \$199, his monthly gas obligation was calculated as \$132. The claimant testified his home is heated by electric heat and costly to heat in the winter. The claimant only submitted two electric bills that cover 11/20/18-12/20/18 and 12/20/18-01/22/19. The claimant's testimony that he is obligated to pay approximately \$515 per month in electric bills in the winter is credible. It is unknown what the cost of his electric is during the warmer months, as the claimant did not supply documentation for any months other than the ones described above.

Many of the claimant's utility bills are past due or carry an outstanding balance. The claimant testified he paid \$360 per month for cable, internet and cell phones combined. He stated he paid approximately \$180 per month for cable and internet and \$180 for his cell phones. The claimant submitted 2 cell phone bills from Xfinity Mobile showing the monthly bill to be \$175 when rounded. The claimant also submitted 1 bill from Xfinity/Comcast dated January 2019 showing an amount of 220.90 due. However, this included a past due amount of \$108.08. The actual charges for the month of January were \$113 when rounded. I did not include the past due amount as part of the claimant's normal monthly obligation. It is noted, the claimant also submitted a bill for Direct TV in the amount of \$246.79. Of this amount \$71.27 was past due and \$175.52 showed as new charges. I did not include this bill in the claimant's monthly utility chart, as the claimant testified he gets his cable/internet and phones including cell phone from one provider. As such, this monthly obligation was viewed as discretionary.

Ruling of the Board

In accordance with our statutory obligation, we review the examiner's decision and determine: (1) whether the consolidated findings of fact are supported by substantial and credible evidence; and (2) whether the original conclusion that the claimant is not entitled to an overpayment waiver is free from error of law. Upon such review and as discussed more fully below, the Board adopts the review examiner's consolidated findings of fact except as follows. We set

aside the portion of Consolidated Finding of Fact # 16, which states that the claimant's wife's net monthly earnings average \$2,722.00 per month and the total monthly household income is \$5,040.00. In the credibility determination, the review examiner states that when calculating the wife's earnings, she included the portion of the wife's pay that she puts into a 401K account each pay check. Since we do not generally take into consideration a party's retirement accounts when calculating his or her monthly income, we will calculate the wife's monthly income based on the net pay shown on her pay stubs, after all deductions have been made. This amounts to an average of \$2,570.00 per month. Thus, the combined net monthly income for the claimant's household is \$4,888.00 and not \$5,040.00. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence.

The claimant was denied a waiver under G.L. c. 151A, § 69, which provides, in relevant part, as follows:

(c) 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.

The DUA regulations further define the phrase, "defeat the purpose of benefits otherwise authorized," as follows:

Defeat the purposes of benefits otherwise authorized means that recovery of the overpayment would deprive the overpaid claimant, or individuals dependent on the claimant, of income required for ordinary and necessary living expenses. This depends upon whether the overpaid claimant or his dependents have income or financial resources sufficient for more than ordinary and necessary needs, or are dependent upon all current income for such needs. 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.

Under G.L. c. 151A, § 69(c), if the claimant erroneously received 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. Here, the review examiner concluded that the claimant was not at fault for the overpayment, and nothing in the record indicates otherwise. However, the review examiner denied the claimant's request for a waiver, concluding that recovery of the overpayment would not be against equity and good conscience or defeat the purpose of benefits otherwise authorized, because the claimant's monthly income exceeds his ordinary and necessary living expenses.

We agree with the review examiner's conclusion that denial of the waiver would not be against equity and good conscience, as there is no indication in the record that the claimant was placed in a worse position due to his receipt of the unemployment benefits. We also agree with the review examiner's conclusion that denying the waiver would not defeat the purpose of benefits otherwise authorized. The totality of the evidence in the record shows that the claimant has a monthly net household income of approximately \$4,888.00 and a total of \$4,758.00 in ordinary and necessary living expenses each month, which includes the Direct TV expense that the review examiner considers discretionary. Since the claimant's net monthly household income exceeds his total monthly household expenses, recovery of the overpaid benefits would not deprive the claimant of the income required for the ordinary and necessary living expenses of his household.¹

We, therefore, conclude as a matter of law that recovery of the overpaid benefits would neither defeat the purpose of benefits otherwise authorized, nor be against equity and good conscience, pursuant to G.L. c. 151A, § 69(c).

The review examiner's decision is affirmed. The claimant's request for waiver of recovery of overpaid benefits is denied. The claimant must repay to the DUA \$4,487.00 (or the remaining balance if different) in overpaid benefits. We note that the claimant may reapply for an overpayment waiver should his financial circumstances change in the future.

BOSTON, MASSACHUSETTS
DATE OF DECISION – March 26, 2019



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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.

¹ We note that the claimant submitted documentary evidence showing several outstanding balances owed to various creditors. Since no evidence was provided showing that he or his wife were making monthly payments on several of these bills, these debts were not taken into account when calculating his household's monthly expenses.

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