

Review examiner's rejection of testimony that the claimant was working in Massachusetts when he was laid off due to COVID-19 was not reasonable in light of the evidence presented. The claimant met his burden to show that he was working in Massachusetts and that he lost work as a physical therapist due to a COVID-19 reason listed in the CARES Act. He is eligible for PUA benefits.

**Board of Review
100 Cambridge Street, Suite 400
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: N6-FJV8-K8PJ

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 Pandemic Unemployment Assistance (PUA) benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant filed a claim for PUA benefits with the DUA, effective March 22, 2020, which was denied in a determination issued on September 16, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination and denied PUA benefits in a decision rendered on May 3, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had failed to establish that he had lost work in Massachusetts for a COVID-19 listed reason under the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, and, thus, the claimant was not eligible for PUA benefits under a claim filed in Massachusetts. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant is ineligible for PUA benefits in Massachusetts because he did not establish that he had been working in Massachusetts and laid off due to the COVID-19 public health emergency, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant filed a claim for Pandemic Unemployment Assistance (PUA) with an effective date of March 22, 2020.

2. On September 16, 2020, the Department of Unemployment Assistance (DUA) issued the claimant a Notice of Non-Monetary Issue Determination, informing him that he was not eligible to receive benefits beginning the week ending February 8, 2020. He was informed that he was not eligible to receive benefits, because he failed to respond with the appropriate documentation by the due date.
3. Prior to the pandemic, the claimant worked as a physical therapist for a health services company.
4. The claimant has an email from the company showing that he was assigned to work at a hospital in Massachusetts in 2019.
5. The claimant has a screenshot from the Massachusetts Division of Licensure which shows that he was issued a Physical Therapist's License on November 11, 2019.
6. The claimant has invoices from his wife's mental health provider.
7. The claimant worked for a Nebraska based company in 2020. The company issued the claimant a W-2.
8. The claimant was not working or going to be working in Massachusetts when he was affected by COVID-19.

[Credibility Assessment:]¹

During the hearing, the claimant testified that in 2020 that he worked as a physical therapist for a health services company, and that he was let go in March 2020 due to the pandemic. He further testified that he lived in Massachusetts in early 2020, but later moved to Missouri. I do not find the claimant's testimony on this subject to be credible.

When asked if he had documents showing that he lived in Massachusetts in 2020, the claimant said all he had were rent checks that he sent to his mother-in-law, and invoices from his wife's therapist. He further testified that he gets his mail sent to him electronically. However, it is unclear if the checks were deposited by the claimant's mother-in-law, and if the place the claimant was renting was in Massachusetts. Furthermore, the invoice from the therapist list[s] a Massachusetts address, but does not show that the claimant was living in Massachusetts in 2020. Moreover, if the claimant lived in Massachusetts for [a] long period of time, it stands to reason that he would have more documentation showing that he lived in Massachusetts in 2020.

¹ We have copied and pasted here the review examiner's credibility assessment, which appears in the conclusions and reasoning section of his decision.

The claimant also provided a 2020 W-2, paystubs, and bank statements and his 2020 tax return. The W-2 and paystubs say that Massachusetts taxes were taken out, but they list the claimant's Maryland address. However, the claimant's UI records show no wages for 2020. Moreover, the tax return does not appear to have been filed.

In addition, the claimant provided a Physical Therapist License issued by the Commonwealth of Massachusetts, an email from his wife's employer, and email from the claimant's employer. The existence of these documents does not necessarily show that the claimant was working, or going to be working, in 2020. Given the other information in the record, including the documentation and testimony noted above, these documents are insufficient to show that the claimant was working or was supposed to work in Massachusetts in 2020.

In light of the evidence presented above, it is concluded the claimant was not working or going to be working in Massachusetts when he was affected by COVID-19.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject the portion of Finding of Fact # 7 stating that the company for which the claimant worked in 2020 issued him a Form W-2 since there is no Form W-2 in the record. We reject Finding of Fact # 8, stating that the claimant was not working or going to be working in Massachusetts when he was affected by COVID-19, as it is not supported by the record. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant did not meet the eligibility requirements to establish a Massachusetts PUA claim.

The claimant in this case seeks PUA benefits, a new unemployment benefit program established under § 2102 of the CARES Act of 2020 and administered by the U.S. Secretary of Labor.² In order to qualify for PUA benefits, the claimant must show that he is a covered individual within the meaning of the CARES Act. To be considered a covered individual under this program, the claimant must self-certify that he is unemployed for a reason related to the COVID-19 public health emergency listed under § 2102(a)(3)(A)(ii)(I)(aa)–(kk). Additionally, to be eligible under a Massachusetts claim, the claimant must establish that he was working or going to be working in Massachusetts when he lost work due to the COVID-19 public health emergency.

The claimant and his wife testified that, prior to filing the PUA claim, the claimant was a traveling physical therapist. As such, the claimant worked on three-to-six-month assignments in various locations and maintained a tax home in Maryland. From November 18, 2019, through March 21, 2020, the claimant worked at a clinic in Massachusetts under a contract with a Nebraska-based

² Pub. L. 116-136 (Mar. 27, 2020), § 2102.

company. They further testified that, on March 19, 2020, the claimant was informed in person that he was being let go (along with other contractors) due to the COVID-19 public health emergency, effective the following Monday, March 23, 2020, and that he never received a written notice or written explanation of the reason for the lay-off.³

As noted in the review examiner's credibility assessment, the claimant submitted multiple documents to show that he had been earning wages in Massachusetts prior to the effective date of his claim. He submitted his paystubs for the weeks ending March 15, 2020, and March 22, 2020, showing that Massachusetts taxes were withheld from his wages. Exhibit 7. He also submitted a screenshot of his pay history.⁴ Exhibit 8. Finally, the claimant submitted his and his wife's 2020 joint tax returns, which included a federal return and a state return for Massachusetts. Exhibit 10. The Massachusetts state return shows that the claimant reported his wages from the Nebraska-based employer and paid state income tax on them in Massachusetts. *Id.*, pp.160–211. This 277-page packet of 2020 tax returns also includes a certification of electronic filing showing that the federal tax return was submitted on May 12, 2021. *Id.*, p.112.

In addition to these financial documents, the claimant submitted an email from his employer regarding his work assignment in Massachusetts. Finding of Fact # 4. The email, dated November 15, 2019, states that the claimant is set to start work on Monday, November 18, and provides the full address of the worksite in Massachusetts. Exhibit 13, p. 2. The claimant also provided a screenshot of the public record of his Massachusetts physical therapist's license, which was issued on November 11, 2019. *See* Finding of Fact # 4, and Exhibit 13, p. 3.

As the review examiner noted in his credibility assessment, the claimant also provided documents to establish that he had been living in Massachusetts in 2020. He submitted personal checks dated March 30, 2020, purportedly given to the claimant's mother-in-law as rent for a Massachusetts residence. *See* Exhibit 11. He also provided documents with his wife's name and the Massachusetts mailing address he provided on his PUA application. *See* Exhibit 2, p. 8 (PUA application), Exhibit 14 (invoices for therapy sessions dated December 19, 2019, and January 31, 2020, showing the claimant's wife's name and Massachusetts address), and Exhibit 15 (email dated May 1, 2020, from the claimant's wife to her new employer, asking for paperwork to be sent to the Massachusetts address).

Nevertheless, the review examiner concluded that the claimant's testimony was not credible, and that the claimant had not met his burden. It is the review examiner's responsibility to determine the credibility and weight of the claimant's testimony and documentary evidence. *See Hawkins v. Dir. of Division of Employment Security*, 392 Mass. 305, 307 (1984). Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). "The test is whether

³ This testimony from the claimant and his wife are not explicitly incorporated into the review examiner's findings. However, this testimony, as well as Exhibits 2, 7, 8, 10, 11, and 13–15 discussed below, are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. *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 This screenshot lists the most recent eight out of eighteen paychecks. It shows that the claimant was paid weekly for the weeks ending February 9, 2020, to March 22, 2020.

the finding is supported by ‘substantial evidence.’” Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted). “Substantial evidence is ‘such evidence as a reasonable mind might accept as adequate to support a conclusion,’ taking ‘into account whatever in the record detracts from its weight.’” Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted).

Based on the record before us, we do not believe that the review examiner’s credibility assessment and conclusions are reasonable in relation to the evidence presented. The review examiner discredited the claimant’s paystubs, the primary documentation showing that the claimant was working in Massachusetts immediately before the effective date of the claim, because the wages could not be verified in UI Online, the DUA’s electronic record-keeping system. Such verification is not necessary. The claimant has no control over whether his former employer reported his wages to the DUA and should not be penalized for the employer’s failure to do so. Similarly, the review examiner did not credit the claimant’s 2020 tax returns, since he did not see any indication that they had been filed. As noted above, the 277-page packet with the claimant’s 2020 federal and state tax returns includes a certification of electronic filing showing that the federal return was submitted on May 12, 2021. Exhibit 10, p. 112. The claimant should not be penalized for the review examiner’s oversight.

We agree that the claimant’s other documents do not, on their own, prove that the claimant was working in Massachusetts when he was affected by COVID-19. They do, however, corroborate each other and support the claimant’s contentions. Furthermore, the claimant’s burden is merely to produce substantial, not definitive, evidence. Taken together, the testimony given at the hearing and the documents the claimant submitted are substantial evidence that the claimant was working in Massachusetts prior to March 23, 2020, the effective date of the claim. Therefore, we conclude that the claimant has met his burden to prove that he was working in Massachusetts at the relevant point in time.

The question remains as to whether the claimant meets the requirement that he was unemployed for a reason related to the COVID-19 public health emergency listed under § 2102(a)(3)(A)(ii)(I)(aa)–(kk). The U.S. Department of Labor (DOL) issued guidance including as a listed COVID-19 related reason employees who were laid off as a direct result of the COVID-19 public health emergency.⁵

In this case, the claimant reported on his PUA application that he “had to quit [his] job, was laid off, or had [his] hours reduced as a result of COVID-19.” Exhibit 2, p. 4. During the hearing, the claimant and his wife testified that the claimant was let go from the contract under which he had been working due to the COVID-19 public health emergency. The claimant’s stated reason for being out of work falls within the DOL guidance cited above.

We note that the review examiner stated in his credibility assessment that he did not credit the testimony that the claimant was let go in March 2020 due to pandemic. However, he did not explain why he did not credit this portion of the testimony. We believe this assessment is unreasonable given the claimant’s burden under the CARES Act and the evidence presented

⁵ See U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 16-20, Change 6 (Sept. 3, 2021), Attachment I, (kk)(4), p. I-7.

It is important to note that under the CARES Act, Congress merely requires that an individual self-certify that he is unemployed for an approved COVID-19 reason, not that he prove it with documentary evidence.⁶ The Massachusetts Supreme Judicial Court's definition of substantial evidence, quoted above, also does not require documentary proof. *See Lycurgus*, 391 Mass. at 627-628.

The testimony about the claimant being laid off as of March 23, 2020, due to the COVID-19 public health emergency was provided at the hearing under oath, and there is nothing in the record which contradicts it. Even so, if that were the extent of the evidence, it would not be unreasonable for the review examiner to conclude that such testimony, by itself, was not substantial evidence. *See McDonald v. Dir. of Division of Employment Security*, 396 Mass. 468, 470 (1986) (a review examiner is not required to believe self-serving, unsupported, evidence, even if it is uncontroverted by other evidence). But in this case, the record includes more,

As discussed above, Exhibit 2 shows that when the claimant applied for PUA benefits, he reported that he was first impacted by COVID-19 on March 23, 2020. Exhibits 7 and 8 document that the claimant was paid weekly by his employer until the week ending March 22, 2020. Inasmuch as March 23, 2020, is the day Governor Baker ordered non-essential businesses to close due to the COVID-19 pandemic,⁷ this evidence corroborates the testimony that the claimant was let go due to the COVID-19 public health emergency.

Had the claimant been able to produce documentation from his employer confirming the reason for his lay-off, the evidence would have been stronger. However, during the hearing, the claimant and his wife testified that the claimant had not received any written notice or explanation for the lay-off. Thus, such documentation was not available. "If the proponent has presented the best available evidence, which is logically adequate, and is neither contradicted nor improbable, it must be considered." *New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 471 (1981), *quoting* L.L. Jaffe, *Judicial Control of Administrative Action* 598, 608 (1965). Under these circumstances, the testimony that the claimant was laid off due to the COVID-19 public health emergency was the best available evidence.

We, therefore, conclude as a matter of law that the claimant has met his burden to show that he was working in Massachusetts when he was impacted by COVID-19, and he lost work for a listed COVID-19 reason under the CARES Act, § 2102(a)(3)(A)(ii)(I)(kk).

The review examiner's decision is reversed. The claimant is entitled to receive PUA benefits for the week beginning March 22, 2020, and for subsequent weeks, if otherwise eligible.

⁶ *See* CARES Act, § 2102(a)(3)(A)(ii).

⁷ *See* COVID-19 Order No. 13 – Order Assuring Continued Operation of Essential Services in the Commonwealth, Closing Certain Workplaces, and Prohibiting Gatherings of More than 10 People (Mar. 23, 2020).

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 6, 2025



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS
STATE DISTRICT 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.

REB/rh