

The record as a whole presents substantial evidence that the claimant was unable to perform keynote speaking services in 2020 due to the COVID-19 pandemic, and it supports her statement that the cancelled event was to be held in Massachusetts.

**Board of Review
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Issue ID: N6-FJV9-8KH8

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 we affirm in part and reverse in part.

The claimant filed a claim for PUA benefits with the DUA, effective March 22, 2020, which was denied in a determination issued on October 21, 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 February 19, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had failed to establish that she 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 there was insufficient evidence to show that any scheduled work in Massachusetts was cancelled 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 are set forth below in their entirety:

1. The claimant filed a claim for Pandemic Unemployment Assistance (PUA) which was determined to be effective March 22, 2020.
2. On October 21, 2020, the Department of Unemployment Assistance (DUA) issued a Notice of Non-Monetary Issue Determination – Covid-19 Eligibility to the claimant, stating that she was not eligible for PUA benefits.

3. Prior to filing for benefits, the claimant was a part-time human resources manager in Rhode Island and part-time self-employed as a part-time keynote speaker.
4. As a result of COVID-19, the claimant was unable to perform her keynote speaker events due to gathering restrictions. The claimant was able to continue working her management position part-time.
5. The claimant has no documentation showing that she worked, performed services, or was going to be working in Massachusetts in 2020.
6. The claimant began full-time with her human resource management position in Rhode Island beginning September 05, 2020.

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. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is ineligible for any PUA benefits in Massachusetts.

The claimant in this case seeks PUA benefits, a new unemployment benefit program provided under § 2102 of the CARES Act of 2020 and administered by the U.S. Secretary of Labor.¹ In order to qualify for PUA benefits, the claimant must show that she is a covered individual within the meaning of the CARES Act. Among the requirements to be considered a covered individual is that the claimant self-certify that she is unemployed for a reason listed under § 2102(a)(3)(A)(ii)(I)(aa)–(kk). Additionally, because the claimant is a resident of Rhode Island, she must prove that that she lost work, or a work opportunity, in Massachusetts in order to be eligible under a Massachusetts claim.

The claimant testified that she had performed most of her keynote speaking services in Massachusetts in 2019, but that she was unable to perform any of such services in 2020, because the conferences where she was to speak were cancelled due to the COVID-19 pandemic.² An eligible COVID-19 listed reason under the CARES Act, § 2102(a)(3)(A)(ii)(I)(gg), is that an individual will be eligible for PUA benefits if she was “scheduled to commence employment and [did] not have a job or [was] unable to reach the job as a direct result of the COVID-19 public health emergency.” In this case, because none of the documents which were submitted as evidence for the hearing identified the location of a cancelled March 24, 2020, speaker event, and some of

¹ Pub. L. 116-136 (Mar. 27, 2020), § 2102.

² 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).

the postponement dates were to be held in other states, the review examiner concluded that there was insufficient evidence to show that the claimant lost work in Massachusetts as a result of the COVID-19 emergency.

It is the review examiner 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 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).

In reaching her conclusion, the review examiner focused specifically on three emails contained in Exhibit 8, which refer to a rescheduled March 24, 2020, event. We agree that, by themselves, these emails do not explicitly tie the claimant to work in Massachusetts. If that were the extent of the evidence, it would not be unreasonable for the review examiner to conclude that such documents, by themselves, were 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.

Accompanying the three emails in Exhibit 8 is a claimant cover letter to the review examiner, explaining that the speaking engagement originally scheduled for March 24, 2020, was to be held in [City A], Massachusetts. This is evidence. The question is whether there is enough else in the record to show that it is a truthful statement.

We consider that this Exhibit 8 letter further states that the claimant performed her speaking work primarily through contracts with [Company Name] (Company A) of [City B], Massachusetts. The three emails (in Exhibit 8) that refer to the cancelled March 24, 2020, conference are from the Senior Vice President of Company A, showing a physical company address in [City B], Massachusetts address. Exhibit 6, a 2019 Form 1099 from Company A, shows the same [City B], Massachusetts address. We also consider that Exhibit 7, a copy of the claimant's 2019 Massachusetts non-resident tax return, reflects that, in 2019, the claimant paid taxes for work performed in Massachusetts.³ Together, this evidence demonstrates that the claimant had been performing services in Massachusetts for this [City B], Massachusetts vendor in 2019, and that the same vendor had retained her to perform services in 2020 at a March 24, 2020, event.

There is no question that the emails cancelling her services for the event on March 24, 2020, are from this vendor, Company A. Unfortunately, the record lacks a document showing that the

³ These exhibits are also part of the unchallenged evidence in the record.

original location of the March 24, 2020, conference was in Boston.⁴ Such evidence would have definitively corroborated the claimant's Exhibit 8 statement that the 2020 cancelled event was to be held in [City A]. However, the claimant's burden is merely to produce substantial, not definitive, evidence.

The fact that substantial evidence in the record corroborates the claimant's other specific statements in Exhibit 8 (*e.g.*, about Company A's address and her recent Massachusetts work for Company A), suggests that her statement about the 2020 event location in [City A] is also true. We believe that the record as a whole includes "such evidence as a reasonable mind might accept as adequate to support [this] conclusion." *Lycurgus*, 391 Mass. at 627–628. For this reason, we believe the review examiner's assessment is unreasonable in relation to the evidence presented.

The record also shows that the claimant was unable to perform this March 24, 2020, speaking engagement due to gathering restrictions imposed as a result of COVID-19. *See* Finding of Fact # 4; *see also* Exhibit 8.⁵ This demonstrates that the claimant was unable to perform scheduled employment as a direct result of the COVID-19 public health emergency.

Finally, we note that throughout this period, the claimant continued to work part-time at another job. *See* Findings of Fact ## 3 and 4. Earnings during this time must be reported to the DUA and may affect her weekly benefit amount. Once the claimant started working full-time on September 5, 2020, she was no longer unemployed and did not meet the qualification for any PUA benefits. *See* Finding of Fact # 6.

We, therefore, conclude as a matter of law that the claimant has presented substantial evidence to show that she was unable to perform services in Massachusetts for the listed COVID-19 reason under CARES Act, § 2102(a)(3)(A)(ii)(I)(gg), during the period March 22 through September 5, 2020.

⁴ The claimant produces such a document in her appeal to the Board. It is an email from the Senior Vice President of Company A, dated September 6, 2019, which includes the terms of her contract to perform keynote speaking services and it identifies the Massachusetts location of the March 24, 2020 conference. However, this document is not in the hearing record. We are not remanding this case because the review examiner who conducted the original hearing is unavailable to conduct an additional hearing to consider this new evidence. We render our decision based only upon the evidence currently in the record.

⁵ We refer to the email, dated March 10, 2020, from Company A, notifying the claimant that the March 24, 2020, event would be rescheduled because of the uncertainty of COVID-19. This is also part of the unchallenged evidence in the record.

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to receive PUA benefits for the period March 22, 2020, through September 5, 2020, if otherwise eligible. The claimant is not eligible to receive PUA benefits beginning September 6, 2020.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 17, 2021



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.

AB/rh