

PUA claimant was not out of work due to COVID-19 while he continued to be employed. However, the evidence showed that he became eligible for PUA when he was unable to work upon being diagnosed with COVID-19 for a period of quarantine, and thereafter because he could not perform his work duties. Under the best evidence rule and in light of the CARES Act standard to self-certify to a listed COVID-19 reason for being out of work, his sworn testimony and other corroborating evidence was sufficient to establish that, after having the virus, he had difficulty breathing while performing his usual work tasks.

**Board of Review
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Issue ID: N6-FM56-FNTN

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 May 31, 2020, which was denied in a determination issued on October 16, 2020. 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, except for a limited period from July 12 through August 15, 2020, in a decision rendered on February 1, 2021. We accept the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had failed to establish that he was unemployed for a COVID-19 listed reason under the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, and, thus, he was not eligible for PUA benefits. 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 did not establish that he was unemployed due to a qualified COVID-19 reason, is free from error of law, where the claimant has presented substantial and credible evidence that, after he had contracted COVID-19, he was unable to work because he could not breathe with a mask on.

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) on or about August 11, 2020, which was determined to be effective May 31, 2020 with a weekly benefit amount of \$267.
2. The claimant worked on a per diem basis doing loading dock work at different warehouses. He found employment regularly and was usually paid by check.
3. When the COVID-19 emergency began, the claimant was no longer able to find per diem work at warehouses due to the risk of COVID-19.
4. In May, 2020, the claimant began working through a staffing agency as a W-2 employee and was placed at a hot dog manufacturing plant.
5. The claimant has a record of his paystubs showing weekly check dates from May 22, 2020, to July 10, 2020. There is a break in the paystubs check dates from July 10, 2020, until September 11, 2020. The claimant went to Tennessee in July to visit relatives.
6. On or around July 12, 2020, the claimant contracted the COVID-19 virus in Tennessee.
7. On July 16, 2020, the claimant tested positive for COVID-19 and subsequently quarantined in place for approximately three weeks.
8. The claimant returned to Massachusetts and was tested again at his neighborhood health center on August 3, 2020. He was still positive for the COVID-19 virus and maintained his quarantine. The claimant returned to the neighborhood health center and was tested a third time for the COVID-19 virus. On August 17, 2020, the claimant's healthcare provider notified him that he could resume his employment.
9. The claimant subsequently returned to work at the staffing agency placement with the hot dog plant. He received three pay checks before deciding to quit his employment.
10. On October 16, 2020, the Department of Unemployment Assistance (DUA) issued the claimant a Notice of Non-Monetary Issue Determination, COVID-19 Eligibility, finding the claimant ineligible for PUA benefits.
11. The claimant timely appealed the October 16, 2020 issue determination.

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 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 believe that the claimant has shown that he was out of work for a qualifying COVID-19 reason after contracting the virus.

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 he is a covered individual within the meaning of the CARES Act. Among the requirements to be considered a covered individual for PUA benefits is that the claimant self-certify that he is unemployed for a reason listed under § 2102(a)(3)(A)(ii)(I)(aa) – (kk).

The period at issue is from the effective date of the claimant's PUA claim, May 31, 2020, and thereafter. The findings of fact show that the claimant remained employed with the staffing agency at the hot dog manufacturing plant from May until the week ending July 11, 2020. *See* Findings of Fact ## 4 and 5. Because he was able to work, we agree with the review examiner that the claimant did not establish that he was out of work for any reason listed under the CARES Act during this time period.

On or about July 12, 2020, however, the claimant tested positive for COVID-19, and was required to quarantine until he was cleared to work on August 17, 2020. *See* Findings of Fact ## 6–8. An eligible COVID-19 listed reason under the CARES Act at § 2102(a)(3)(A)(ii)(I)(aa), is that the individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and is seeking a medical diagnosis. Because the claimant was diagnosed with COVID-19 during the period between July 12, 2020, through the week ending August 15, 2020, the review examiner correctly concluded that the claimant had established a listed COVID-19 reason for being out of work during these weeks, and he was eligible for PUA benefits.

Thereafter, beginning August 16, 2020, the review examiner disqualified the claimant because he concluded that the claimant had not established that he was impacted by COVID-19. We disagree.

The claimant returned to work at the hot dog manufacturing plant after he was cleared to return to work by his health care provider. *See* Findings of Fact ## 8 and 9. But, after three weeks, he quit. *See* Finding of Fact # 9. In the conclusion and reasoning section of his decision, the review examiner noted the claimant's testimony that he was unable to maintain this job due to lingering breathing problems stemming from his COVID-19 diagnosis. Specifically, the claimant had testified that this job was physical in nature, masks were mandatory, and that after being ill from the COVID-19 virus, it was too difficult to breathe with a mask on. He further testified that he tried working for a few days each week, but had to stop because of his difficulty breathing through a mask.²

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 U.S. Department of Labor (DOL) has issued guidance in the form of examples for each of the listed reasons under § 2102(a)(3)(A)(ii)(I) of the CARES Act.³ The DOL emphasizes that its examples are not an exhaustive list, but that states may consider other circumstances that align with one of the listed reasons and are applied in a manner consistent with the UIPL’s examples.⁴ One example listed under (aa) is:

An individual who has to quit his or her job as a direct result of COVID-19 because the individual has tested positive for COVID-19 or has been diagnosed with COVID-19 by a qualified medical professional, and continuing work activities, such as through telework, is not possible by virtue of such diagnosis or condition⁵

We are also mindful that § 2102(h) of the CARES Act provides that the Disaster Unemployment Assistance regulations at 20 C.F.R. Part 625 are to be applied to PUA benefits, “except as otherwise provided [in § 2102] or to the extent there is a conflict . . . ,” with “COVID-19 public health emergency” substituted for the term “major disaster” and the term “pandemic” for the term “disaster.”⁶ These regulations state that an individual is eligible for benefits, if an injury caused by the major disaster is the reason for the individual’s inability to work. 20 C.F.R. § 625.4(g).

Here, the claimant explained that continuing his work activities at the manufacturing plant was not possible, because of the lingering difficulty breathing due to COVID-19, which rendered him unable to wear a mask while working. We believe the claimant’s reason for stopping work aligns with the DOL example stated above and 20 C.F.R. § 625(g).

Nonetheless, the review examiner concluded that the claimant had not established that he was impacted by COVID-19, because he did not present documentary evidence to support his contention. “The review examiner bears ‘[t]he responsibility for determining the credibility and weight of testimony,’” Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980). 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). We believe the review examiner’s assessment is unreasonable in relation to the evidence presented.

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

³ See U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 16-20, Change 4 (Jan. 8, 2021), C(1).

⁴ See UIPL 16-20, Change 4, C(1), p. I-5.

⁵ UIPL 16-02, Change 4, C(1), p. I-5.

⁶ See also UIPL 16-20, Change 1 (Apr. 27, 2020), 4, p. 2.

documentary evidence.⁷ 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. In the case before us, when we look at the record as a whole, we believe the claimant has satisfied the substantial evidence test.

The claimant’s testimony about contracting the COVID-19 virus and why he could not subsequently work at his job was provided during 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.

Exhibits 6 and 8 are documents from health care providers confirming the claimant’s positive COVID-19 tests in July and August, 2020. This supports his testimony that he had COVID-19 just before returning to work. Exhibit 7 is a paycheck summary record showing sharply reduced gross earnings in three weeks in September, 2020, as compared to the weeks from May through early July, 2020.⁸ This evidence corroborates the claimant’s testimony that he tried working only a few days each week after returning from his illness.

To be sure, if the claimant had been able to produce medical evidence confirming his difficulty breathing after having COVID-19, the evidence would have been stronger. During the hearing, the review examiner asked if he had received any additional medical treatment, but the claimant stated that he did not. This means that such medical evidence 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, his testimony about the reason for being unable to work after August 16, 2020, was the best available evidence.

Finally, we consider that survivors of COVID-19 are known to experience persistent medical issues, including shortness of breath and other respiratory problems. Thus, the claimant’s testimony that, after having COVID-19, he had to stop work because of lingering respiratory issues is plausible. Together with the medical evidence confirming that the claimant was just getting over COVID-19, and payroll records corroborating his effort to work at least a few days in the weeks immediately following, the record as a whole includes ‘such evidence as a reasonable mind might accept as adequate to support a conclusion.’ Lycurgus, 391 Mass. at 627–628.

We, therefore, conclude as a matter of law that the claimant has met his burden to show that he was out of work for the listed COVID-19 reason under the CARES Act, § 2102(a)(3)(A)(ii)(I)(aa). He is entitled to PUA benefits during the period July 12, 2020, and thereafter, subject to a reduction of benefits in any week that he earned more than his weekly benefit amount plus earnings disregard.

⁷ See CARES Act, § 2102(a)(3)(A)(ii).

⁸ Exhibits 6, 7, and 8 are also part of the unchallenged evidence presented at the hearing.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied PUA benefits for the period of May 31 through July 11, 2020. The claimant is entitled to receive PUA benefits for the week beginning July 12, 2020, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 22, 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