

The review examiner improperly relied on inconsistent testimony and documentary evidence that he acknowledged was of unknown authenticity to find credible the claimant's testimony about his Massachusetts work in 2020. As such, this credibility assessment was not supported by the record. In the absence of any credible evidence indicating the claimant worked in Massachusetts in 2020, he is not entitled to PUA benefits.

**Board of Review
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Issue ID: N6-H59H-VVF3

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 15, 2020, which was denied in a determination issued on March 31, 2021. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, the review examiner affirmed in part and overturned in part the agency's initial determination, awarding the claimant PUA benefits from the period between March 15, 2020, and August 1, 2020, and denying benefits thereafter in a decision rendered on May 26, 2021. We accepted the claimant's application for review.

Benefits were awarded in part and denied in part after the review examiner determined that the claimant had shown that he was unemployed for a COVID-19 listed reason under the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 from March 15, 2020, through August 1, 2020, but failed to show that he was unemployed for a COVID-19 listed reason thereafter, and, thus, the claimant was not eligible for PUA benefits as of August 2, 2020. 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 the claimant was eligible for PUA benefits when unable to perform his work as a bartender, because the restaurant at which he worked was shut down due to the COVID-19 pandemic, and ineligible for benefits when he failed to return to work when the restaurant reopened, 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 PUA benefits with an effective date of March 15, 2020.
2. The Department of Unemployment Assistance (DUA) determined that the claimant has a benefit rate of \$267 per week on the claim.
3. The claimant filed his PUA claim using a Massachusetts address.
4. The claimant has worked for many years at a bar in Massachusetts, in different capacities.
5. The claimant worked part-time and inconsistently at the bar in 2019 for a total of 420 hours.
6. The claimant worked at the bar during the first quarter of 2020 for a total of 240 hours.
7. The bar closed on or about March 16, 2020, because of the COVID-19 public health emergency, and as a result, the claimant stopped working.
8. The claimant did not return to work once the bar reopened on August 1, 2020.
9. The reason for the claimant's not returning to work is unknown.
10. On March 30, 2021, the DUA sent 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.
11. The claimant appealed the DUA's 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 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 Finding of Fact # 6 and the portion of Finding of Fact # 7 that finds the claimant stopped working at the bar in March, 2020, as it is inconsistent with 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 presented credible evidence showing he worked in Massachusetts in 2020.

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

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

the meaning of the CARES Act. Among the criteria for eligibility established by the Secretary of Labor, in accordance with § 2102(a)(3)(A)(ii)(I)(kk) of the CARES Act, is that an individual will be eligible for PUA benefits if they were “unemployed, partially employed, or unable or unavailable to work because the COVID-19 public health emergency has severely limited his or her ability to continue performing his or her customary work activities, and has thereby forced the individual to suspend such activities.”² Further, a claimant must file for PUA benefits in the state where he or she was working at the time he or she became unemployed.³ Therefore, in order to be eligible for benefits, the claimant must show that he had work in Massachusetts that was impacted by the COVID-19 pandemic.

The review examiner found credible the claimant’s testimony that he worked part time at a bar in Massachusetts until it shut down due to COVID-19. He based this determination on a W-2 form submitted by the claimant, and a letter purporting to be from the owner of the bar verifying the information on the W-2. 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). Upon review of the record, we note that determinative provisions of the credibility assessment are either incomplete or internally inconsistent, and, as a result, we believe the claimant’s credibility assessment is unreasonable in relation to the evidence presented.

The review examiner determined that the claimant’s 2020 W-2 was sufficient evidence to establish that the claimant was working in Massachusetts in 2020 when his work was impacted by the COVID-19 pandemic. In so finding, the review examiner relied upon a letter, which was admitted into evidence as Exhibit 10, purporting to be from the owner of the bar and restaurant at which the claimant worked.⁴ Despite his reliance on this letter, the review examiner concluded that its authenticity was “unknown” because the letter was unsigned and did not contain the name of the owner. We concur that such omissions detract from the authenticity of the letter. Moreover, Exhibit 10 is not a scan or photograph of an actual letter sent or delivered to the claimant; it is a picture of a word processing document displayed on a computer screen. Without any indication that someone other than the claimant prepared this document and uploaded this picture, we believe the review examiner improperly relied upon the substance of this unverified document to find the claimant’s 2020 W-2 form credible.

The claimant’s 2020 W-2 form, which was admitted into evidence as Exhibit 7, indicates that the claimant earned gross wages of \$2,400.00 during the 2020 calendar year.⁵ While this wage information is consistent with the claimant’s testimony that he earned \$10.00 per hour and worked a total of 240 hours during the period between January 1, 2020, and March 15, 2020, it is facially inconsistent with the law. The minimum wage in Massachusetts during the 2020 calendar year was \$12.75 per hour, and the tipped minimum wage was \$4.95 per hour. G.L. c. 151, §§ 1 and 7.

² See U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 16-20 (April 5, 2020), Attachment I, C(1)(k), p. I-6.

³ See UIPL16-20, Change 1 (Apr. 27, 2020), Attachment I, B(7), p. I-3.

⁴ Exhibit 10 is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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).

⁵ Exhibit 7 is also part of the unchallenged evidence introduced at the hearing and placed in the record.

Additionally, a tipped employee who earns less than the regular minimum wage in any given shift must be compensated up to the amount they would have earned if they were earning the standard minimum wage. G.L. c. 151, § 7. Therefore, if we were to accept that the claimant worked 240 hours during the 2020 calendar year, his gross earnings should have been at least \$3,060.00. In contrast, if the claimant earned only \$2,400.00 in 2020, he would have only worked a total of 188.24 hours. Therefore, the information which the review examiner relied upon to determine the credibility of the evidence presented by the claimant is both internally inconsistent and implausible in light of the requirements of G.L. c. 151, §§ 1 and 7.

Additional inconsistencies in the record further detract from the credibility of the claimant's testimony. For example, the claimant testified that he had begun working full-time as of March 2020. However, this information is facially inconsistent with evidence that he did not return to work once the employer re-opened in August 2020. Further, as the review examiner noted in his decision, the claimant's 2019 W-2 form did not match the 2019 wages reported to the DUA. Both of these issues detract from the overall credibility of the evidence presented by the claimant.

Considering the above-enumerated issues, we conclude that the review examiner's credibility assessment is unsupported by the evidence of record. In the absence of any credible evidence showing the claimant was working in Massachusetts in 2020, the claimant has failed to meet his burden to establish his eligibility for PUA benefits.

We, therefore, conclude as a matter of law that the claimant has not met his burden to show that he was in unemployment within the meaning of the CARES Act, § 2102(a)(3)(A)(ii)(I)(kk).

The review examiner's decision is affirmed in part and reversed in part. The claimant is not entitled to receive PUA benefits as of the week beginning March 15, 2020.



Charlene A. Stawicki, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 16, 2021



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
(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.

LSW/rh