

Real estate agent showed that she had to stop performing her services in Massachusetts when her office was closed as a non-essential business in March, 2020. She further showed that she experienced a significant diminution of services throughout rest of 2020 and 2021 as a result of the COVID-19 restrictive protocols, her advanced age which put her at heightened risk were she to contract the virus, and the public’s fear surrounding the public health emergency.

**Board of Review
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Issue ID: N6-H84P-VPR3

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 15, 2020, which was initially approved. However, in a determination issued on July 7, 2021, the claimant was denied benefits. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, the review examiner affirmed the agency’s determination to deny PUA benefits in a decision rendered on November 17, 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 was unemployed 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. 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 consider additional evidence of the claimant’s work performed in 2020 and 2021 and how it was affected by the COVID-19 pandemic. The claimant attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner’s decision, which concluded that the claimant had failed to show that the COVID-19 public health emergency substantially diminished her real estate work in Massachusetts, is supported by substantial and credible evidence and is free from error of law.

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 Pandemic Unemployment Assistance (PUA) benefits, with an effective date of March 15, 2020.
2. The Department of Unemployment Assistance (DUA) determined that the claimant has a weekly benefit amount of \$752.
3. The claimant has worked as a Massachusetts real estate agent for approximately 35 years, working primarily at a brokerage office, and is paid a commission upon the sale of a property.
4. On or around March 10, 2020, the Governor of Massachusetts declared a state of emergency, which was followed by a shelter in place order which was given around March 27, 2020.
5. Real estate agents were deemed to be essential workers on or around April 1, 2020.
6. The brokerage office that the claimant worked out of, which contained most of her necessary work equipment and supplies, closed on March 24, 2020. The office reopened in a staggered fashion, and the claimant regained access to her supplies around June 1, 2020.
7. The claimant's role as a real estate agent normally involved the claimant meeting with the clients face to face, hosting open houses, and establishing personal contact with the clients so that she could better sell a property.
8. Because of restrictions related to the COVID-19 public health emergency, many fewer clients were willing to meet with the claimant, and she did not have another face-to-face meeting with a client until August 2020.
9. Clients began to feel more comfortable having people in their homes, and meeting with the claimant, after people began to be vaccinated in mid-2021.
10. Clients' willingness to participate in buying and selling real estate in person varied with the level of danger that was being predicted by government officials, with sales and participation increasing during periods of low transmission.
11. The claimant is over seventy years old and was unwilling to have close personal contact with clients, as her advanced age put her at greater risk of severe complications were she to contract COVID-19. The claimant became more comfortable meeting with clients after she was vaccinated in 2021.
12. The claimant had a total of seventeen real-estate transactions in 2019, seven transactions in 2020, and has had eight transactions in 2021.

13. For all of the sales that occurred between March 2020 and December 2021, the claimant was only able to perform those customary work duties that did not require [sic] to have direct contact with the buyers and sellers.
14. The claimant's first completed real-estate transaction after the start of the pandemic occurred in August 2020 and involved the sale of a vacant property.
15. During the twelve months before the start of the pandemic, the claimant had commissions greater than \$130,000.00, and she completed around twenty-two real estate transactions.
16. During the twelve months following the start of the COVID-19 pandemic, the claimant completed around six real estate transactions, and received around \$37,000.00 in commissions.
17. The claimant was unable to perform her customary job duties as a realtor from March 2020, and throughout most of 2021, due to restrictions related to the COVID-19 public health emergency, which prevented the claimant from interacting with clients in her customary close and personal manner.
18. The claimant changed her focus from serving property buyers, to selling vacant and estate properties, as these properties required much less direct contact with clients.
19. During property "open house" viewings, the claimant would often wait in her vehicle while clients viewed the property being shown, so as to limit contact between herself and clients. The claimant also used remote technology to interact with clients, to limit close personal contact.
20. The claimant was able to resume her customary work duties in December 2021, after the peak of the omicron variant of COVID-19.
21. The claimant has documents and graphs which were generated by her industry, which suggest a decline in the number of available houses for sale after the start of the pandemic. The claimant believes that the decline in the housing inventory is related to the higher cost of building materials and labor shortages, which resulted in fewer new homes being built, and mortgages forbearance measures taken by the government, which resulted in fewer home foreclosures and forced sales during the pandemic.
22. The claimant applied for PUA benefits because she had much less work and around a quarter of her usual income, as a result of restrictions related to the COVID-19 public health emergency.

Credibility Assessment:

The claimant offered substantial and credible testimony and evidence to show that her work and income was negatively impacted by the COVID-19 public health emergency.

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 consolidated 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 consolidated findings of fact and deems them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is not eligible for PUA benefits.

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 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 self-employed individuals will be eligible for PUA benefits if they are unemployed, partially employed, or unable to work because the COVID-19 public health emergency has forced them to suspend their customary work activities, or they "experienced a significant diminution of their customary or usual services because of the COVID-19 public health emergency," even absent a suspension of services."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 she had work in Massachusetts that was negatively impacted by the COVID-19 pandemic.

The consolidated findings provide that the claimant is as a self-employed real estate agent, who works at a brokerage office in Massachusetts. *See* Consolidated Finding # 3. In March, 2020, the brokerage office closed in response to the Governor declaring a state of emergency and COVID-19 shelter-in-place order. *See* Consolidated Findings # 4 and 6. Although real estate agents were deemed to be essential workers soon after the Governor's order, the claimant was unable to perform her customary services as a real estate agent, such as meeting with clients in-person, hosting open houses, or going into people's homes, due to the public's ongoing fear surrounding the COVID-19 public health emergency. *See* Consolidated Findings # 5 and 7. The claimant was unable to meet clients face-to-face or generate any income again until August, 2020. *See* Consolidated Findings ## 8 and 14. This evidence demonstrates that the claimant was working in Massachusetts when she had to suspend her work activities due to the COVID-19 public health emergency.

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

² *See* U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 16-20, (Apr. 5, 2020), Attachment I, C(1)(k), p. 1-6; UIPL 16-20, Change 6 (Sept. 3, 2021), Attachment I, C(1)(k), p. I-6.

³ *See* UIPL 16-20, Change 1 (Apr. 27, 2020), Attachment I, (kk)(1), p. I-3.

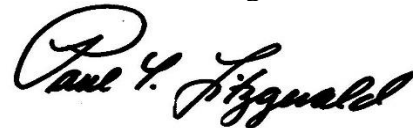
The record shows that the pandemic continued to affect the claimant's ability to provide services during the rest of 2020 and 2021. She was unable to work in a close and personal manner with her clients because her advanced age put her at heightened risk of severe complications were she to contract COVID-19, and her clients did not feel comfortable meeting in-person. *See Consolidated Findings ## 8-10, 11, and 17.*

The claimant had a difference of approximately \$93,000.00 in commissions when comparing the twelve months prior to, and the twelve months following, the start of the COVID-19 pandemic. *See Consolidated Findings ## 15, 16, and Remand Exhibit 5.* The claimant had a total of 17 transactions in 2019, compared to seven transactions in 2020 and eight transactions in 2021. *See Consolidated Finding #12.* The claimant became fully vaccinated in December, 2021, and, after a surge of variants of COVID-19 had passed around the same time, the claimant was finally able to resume her customary and usual services. *See Consolidated Finding # 20.* This evidence establishes that, although the claimant resumed her real estate work in August, 2020, she continued to experience a significant diminution of her customary and usual services due to the pandemic throughout most of 2020 and 2021.

We, therefore, conclude as a matter of law that the claimant has met her burden to demonstrate that she lost work for listed CARES Act reasons under § 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 15, 2020, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 21, 2022



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.

KB/rh