

The claimant continued to perform real estate services after the onset of the COVID-19 public health emergency and actually earned more in 2020 than the prior year, until the activity dropped off in the fall. Held he failed to show that the pandemic, as opposed to seasonal demand, competition, or long-term changes in the market, was responsible for the diminution of services. He is not entitled to PUA benefits.

**Board of Review
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Issue ID: N6-H8FD-MP92

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 affirm.

The claimant filed a claim for PUA benefits with the DUA, effective March 15, 2020, which was denied in a determination dated June 25, 2021. 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 November 29, 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 he 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 for additional evidence about the claimant's employment in Massachusetts. 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 not proven that he lost real estate work due to COVID-19, and therefore he was not eligible to receive PUA benefits, 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 PUA benefits, with an effective date of March 15, 2020. The Department of Unemployment Assistance (DUA) determined that the claimant has a benefit rate of \$267 per week on the claim.
2. The claimant is self-employed as a realtor and has worked in real estate for around ten years. The claimant worked for an agency in [City A], Massachusetts, until November 2019 when he moved to a new agency in [City B], Massachusetts.
3. The claimant mainly worked in the rental sector but was transitioning to focus on sales in 2020 at the new agency.
4. The claimant's gross income in 2019 was \$31,893 as reported on his Schedule C. This was reported on a 1099-MISC form and is all from his work as a realtor. No unemployment benefits were included in his 2019 tax returns.
5. The claimant's gross income in 2020 was \$69,908, as reported on his Schedule C. This was reported on a 1099-NEC and is all from his work as a realtor. The claimant additionally received \$12,672 in unemployment benefits in 2020 which are reported on a provided 1099-G but are not reported on the Schedule C.
6. The claimant had not filed his 2021 tax returns at the time of the hearing but provided copies of his 2021 1099 forms. The claimant provided a 1099-NEC showing \$2,995 from real estate work. The claimant earned \$769 from a delivery service as shown on a 1099-K, and \$11,340 in unemployment benefits on a 1099-G.
7. Prior to the pandemic, the claimant averaged three to four rental deals a month with an annual slow down in the rental market after September each year.
8. In 2020, the claimant had transitioned to a sales market with a focus on investment deals. The claimant averaged one deal a month through the first eight months of 2020 but none thereafter.
9. The claimant earned more from real estate in 2020 than 2019. In 2019, the claimant earned a net income of \$21,535 and in 2020, the claimant earned a net of \$56,952 from real estate.
10. The claimant anticipated making a larger income in 2020 than he did based on his move from the rental market to the more lucrative investment sales market. The claimant believed that he had laid the groundwork for potential deals in 2019 and early 2020 for up to seven deals that subsequently did not go through.
11. On June 25, 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 January 2, 2021. The claimant appealed the DUA's determination.

Credibility Assessment:

The claimant participated in both the initial and the remand hearings via telephone. The claimant has worked in real estate for around ten years with a focus on the rental market. The claimant testified that he was transitioning to the more lucrative investment sales market with a view to using the contacts he had developed amongst the [metro area] landlord community after moving to a new sales-based agency in November 2019. A letter provided from the new agency verifying his new affiliation corroborated that testimony.

The claimant asserted that he had anticipated completing more deals in 2020 than he eventually did and was expecting to earn more income. The claimant believed he had been in a position to complete up to seven additional deals in 2020 if it were not for the pandemic. The only documentation provided by the claimant in support of that belief was information on four properties in the [metro] area. In two cases, the documentation provided was no more than a memorandum describing properties with no indication if activity was pursued or considered. In two cases, the claimant provided copies of Purchase Offers written on February 23, 2020, and February 24, 2020, and testified that the deals failed to complete because of the pandemic in March 2020 and thereafter. The claimant provided no documentation showing his employment was affected by the pandemic.

At the original hearing, the claimant had provided a 2020 Schedule C which was actually for his spouse with the same last name. For the remand hearing, the claimant provided copies of 1099s and Schedule Cs for 2019 and 2020 with his name which appear to be true and accurate copies. The claimant's 1099s and Schedule Cs show his earnings increased significantly in 2020. In 2019 the claimant earned a net income of \$21,535 and in 2020 the claimant earned a net of \$56,952 from real estate, more than double his 2019 earnings

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. As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant is ineligible for PUA benefits.

The claimant in this case seeks PUA benefits, an unemployment benefit program provided under § 2102 of the CARES Act of 2020 and administered by the U.S. Secretary of Labor¹. In order to qualify for PUA benefits, the claimant must show that he is out for work for a reason listed under 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 he or she was “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, claimants who work as independent contractors or gig workers can qualify for PUA if they demonstrate 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.”³

The claimant provided testimony that he was attempting to transition to sales work after focusing on rentals, and that the pandemic undermined deals that had been in the works. *See Findings of Fact ## 4 and 10*. The claimant had begun this transition to earn more money and switched real estate agencies in November, 2019, to facilitate higher earnings. *See Findings of Fact ## 2 and 10*. Indeed, the claimant did earn more money, according to this Schedule C, in 2020 over 2019. *See Findings of Fact ## 4, 5, and 9*.

The review examiner originally found that the claimant could not have been affected by the pandemic because of this increase in income.⁴ The claimant argued that he would have earned even more money had the pandemic not happened and he had been able to close more deals — as many as seven by his estimate. *See Finding of Fact # 10*. While the claimant has provided some evidence that he worked on such deals, he has not demonstrated how far along these deals were, nor how the pandemic interfered with his ability to close them. Further, the claimant testified on remand that, despite his attempted transition to sales, most of his deals in 2020 were rentals.⁵

On remand, the claimant provided some additional evidence that shows a drop in his income in the fall of 2020. He provided a list of real estate deal closings that show that he was last able to realize a commission as late as August, 2020, but none thereafter. It is also clear that he secured far fewer deals in 2020 overall compared to 2019. *See Finding of Fact # 8 and Exhibit 8*. In addition, the claimant demonstrated that this decline in his real estate business continued into 2021, when his annual real estate income fell to \$2,995 from \$69,908 in 2020. *See Findings of Fact ##*

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

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

³ UIPL 16-20, Change 4 (Jan. 8, 2021), p. I-8.

⁴ The claimant mistakenly submitted his wife’s Schedule C in his original hearing before the review examiner. Based on that Schedule C, the review examiner ruled the claimant earned more money in 2020 over 2019 and therefore was ineligible for PUA. As noted in the credibility assessment, the claimant provided the correct Schedule C, which showed the claimant had earned less than his wife but still more than he had earned in 2019.

⁵ While not explicitly incorporated into the review examiner’s findings, this part of the claimant’s testimony 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 and 6. These 2021 earnings are consistent with his testimony that his real estate work only began to recover late in 2021.⁶

However, the claimant has failed to show that it was the COVID-19 public health emergency that caused the decline in his sales and income. He testified that, while in the process of changing his business model within the real estate industry from rentals to sales in 2020, he was still both signing leases and making sales for the first six months of the pandemic. *See* Findings of Fact ## 3 and 8.

It may well have been that his sales dropped off in the fall due to the same seasonal forces that affected rentals, due to increased competition for sales, or as a result of long-term changes in market forces. *See* Finding of Fact # 7; *see also* Board of Review Decision N6-FJV9-KPF2 (Mar. 8, 2022). None of these are reasons listed under the CARES Act to grant the claimant benefits. Without more, the record lacks substantial evidence to demonstrate that the COVID-19 public health emergency caused the claimant to experience a diminution of services.

We, therefore, conclude as a matter of law that the claimant has not met his burden to show that he was unemployed for a listed reason under the CARES Act, § 2102(a)(3)(A)(ii)(I)(kk).

The review examiner's decision is affirmed. The claimant is not entitled to receive PUA benefits for the week beginning March 15, 2020, and for subsequent weeks.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 8, 2022



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

⁶ This portion of the claimant's testimony is also part of the unchallenged record.

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.

MS/rh