

Despite the claimant's email inquiries about obtaining travel reimbursement, the agency did not submit a request for this TAA benefit until a month into her training. The Board rules that the U.S. DOL's equitable tolling permits the agency to pay the benefits retroactively.

**Board of Review
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Issue ID: TAA-16-007

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Eric M. P. Walsh, a review examiner of the Department of Unemployment Assistance (DUA), to deny a travel reimbursement benefit afforded under the federal Trade Adjustment Assistance (TAA) program.¹ We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant opened an unemployment claim, effective May 29, 2016, and became eligible for regular unemployment benefits. On September 13, 2016, the claimant was determined eligible to receive TAA benefits while participating in an approved training program. On October 24, 2016, the Department of Career Services (hereinafter, "DCS" or "agency") further approved a travel allowance in connection with the training for the period beginning September 13, 2016. However, on November 10, 2016, the agency redetermined the claimant's eligibility for the travel allowance, denying the travel reimbursement benefit from September 13, 2016 through October 13, 2016, and approving the travel benefit, beginning October 14, 2016. The claimant appealed the one month disqualification to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's determination and denied the travel benefit from September 13, 2016, through October 13, 2016, in a decision rendered on February 1, 2017. We accepted the claimant's application for review.

The first month of TAA travel allowance was denied after the review examiner determined that the claimant did not request the benefit until October 13, 2016, and a Trade Act regulation, 20 C.F.R. § 617.22(c), prohibits the retroactive payment of TAA expenses. 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 conclusion that the prohibition against the payment of retroactive TAA benefits is without exception is supported by substantial

¹ The TAA benefits at issue were available pursuant to the Trade Adjustment Assistance Reauthorization Act of 2015 (TAARA 2015) (Pub. L. 114-27).

and credible evidence and is free from error of law, where the record shows that the claimant sought the TAA travel benefit as early as her first week of training in September.

Findings of Fact

The review examiner's findings of fact and credibility assessments are set forth below in their entirety:

1. On September 13, 2016, after being compelled to switch schools from Middlesex Community College to Mass Bay Community College due to the travel expense from the claimant's residence of record and the training location, an application for training was submitted with a training start date of September 6, 2016, which included the expenses of tuition and books.
2. The application was approved on September 13, 2016.
3. The claimant already began training at Middlesex Community College on September 6, 2016, but then switched to Mass Bay Community College effective September 13, 2016.
4. It is unknown why a travel expense was not included with or around the initial submission.
5. On September 16, 2016, the claimant first questioned her counselor about a travel allowance and continued to make inquiries about travel expenses through October 12, 2016.
6. On October 13, 2016, a modified submission was entered which included travel expenses, with a training start date of September 13, 2016, reflecting the new school and program at Mass Bay Community College beginning on September 13, 2016 and not September 6, 2016, as initially approved.
7. The modified application was approved on October 14, 2016, and the claimant received notification dated October 24, 2016. The notice stated, "We have received your request for travel allowances while in training. Your request has been approved effective September 13, 2016 for a start date of September 13, 2016.
8. On November 10, 2016, the [DCS] issued a revised approval for travel allowance while in training with an effective date of October 14, 2016, and issued a separate determination denying the request for retroactive travel allowances to September 13, 2016.
9. On November 17, 2016, the claimant filed an appeal.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate 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, under these circumstances, the DCS is prohibited from awarding TAA travel benefits retroactively.

The travel expense at issue is authorized under 20 C.F.R. § 617.28(a), which affords transportation expenses if the approved training is outside the claimant's commuting area. We are satisfied that the claimant is eligible for the reimbursement for travel from her home to Mass Bay Community College, inasmuch as the agency approved the benefit, beginning October 14, 2016. The question is whether the claimant may be approved before that date.

The Trade Act imposes an obligation upon the state agency to provide case management services to eligible workers who separate from a Trade-certified employer and who are covered by a trade certification. 19 U.S.C. § 2295. As part of the case management services, the agency must provide information relating to the availability of support services that are necessary to enable an individual to participate in training, including, *inter alia*, transportation. 19 U.S.C. § 2295(8). This obligation extends beyond simply communicating the availability of a benefit. The statute provides, in relevant part, as follows:

(a) The Secretary shall provide full information to workers about the benefit allowances, training, and other employment services available under this part and about the . . . application procedures, and the appropriate filing dates, for such allowances, training and services. The Secretary shall provide whatever assistance is necessary to enable groups of workers to prepare . . . applications for program benefits. . . .

19 U.S.C. § 2275(a).

In the present case, it appears that the agency did inform the claimant about the availability of the travel benefit. Finding of Fact # 5 states that she asked her DCS trade counselor about the allowance and how to get paid for it on September 16, 2016. This was during her first week of training. Although the record is silent as to whether the agency informed the claimant how to apply for the travel expense benefit, there was correspondence from her trade counselor on September 21, 2016, which stated he was working on the procedure for travel and would let her know.² The travel request was finally submitted on October 13, 2016. *See* Findings of Fact ## 4 and 6.³ The review examiner simply concluded that it was unknown why the travel expense benefit request was submitted a month late.

² The claimant's testimony about her trade counselor's email, while not explicitly incorporated into the review examiner's findings, 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).

³ The agency representative testified that a trade counselor submitted the claimant's request for travel reimbursement. This testimony is also part of the undisputed evidence presented at the hearing.

As a basis for denying the travel benefit prior to October 14, 2016, the review examiner cited the Trade Act regulations at 20 C.F.R. § 617.22(c), which provides that approval of training, including the payment of the costs of training, shall not be retroactive. We do not agree that this prohibition is absolute. In 2011, the U.S. Department of Labor (DOL) advised state agencies that the doctrine of equitable tolling is to be applied in situations where it would be manifestly unfair to deny TAA benefits based upon a missed statutory or administrative deadline. U.S. DOL Training and Employment Guidance Letter (TEGL) No. 8-11 (Oct. 19, 2011), p. 3 at 4A. Effectively, the doctrine waives a benefit eligibility deadline if the claimant exercised due diligence to meet it. Id. at 4B. The DOL advisory lists several benefit application deadlines, but notes that the list is not exclusive, and that other TAA benefit deadlines may be equitably tolled in appropriate cases. Id. at Attachment 1, p. 2 at 5.

As to the claimant's deadline for obtaining the travel allowance, the record remains unclear. The DCS representative testified that it should have been submitted with the training application, but an email that he sent to the claimant states that the travel reimbursements starts from the day it was submitted. *See* Exhibit # 3. The latter suggests it is a rolling deadline. Regardless, the claimant is being denied a TAA benefit due to her failure to apply for it by a certain time. Her failure to do so was not attributable to her lack of due diligence. She tried to obtain the benefit as early as September 16, 2016, and continued to do so through October 12, 2016.⁴ The fact that the review examiner declined to find a reason for the delay does not hinder our decision. Under the DOL's equitable estopped doctrine, the claimant need not show that the agency was at fault for failing to submit the application promptly. *See* TEGL No. 8-11, p. 3, 4B.

We, therefore, conclude as a matter of law that, under the circumstances, the DOL's doctrine of equitable tolling permits the award of TAA travel expenses to the claimant retroactively.

⁴ *See* Finding of Fact # 5. During the hearing, the claimant also read into the record emails that she sent to her trade counselor on September 20 and 28, 2016, asking how to get reimbursed for driving and gas.

The review examiner's decision is reversed. The claimant is entitled to receive the TAA travel reimbursement benefit, beginning September 13, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 13, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Judith M. Neumann, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL 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