

Under principles of equitable tolling, claimant is entitled to the RTAA wage supplement even though his application was submitted after the eligibility period, because he acted with due diligence. His Career Center counselor never told him of a deadline and there is no explanation as to why she filed his application 4 months late.

**Board of Review
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Issue ID: TAA-17-004

BOARD OF REVIEW DECISION

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 federal Reemployment Trade Adjustment Assistance (RTAA) benefits under the Trade Act of 1974, as amended.¹ We assume jurisdiction to review pursuant to our authority under 19 U.S.C. § 2111(e), 20 C.F.R. § 617.51(a), and G.L. c. 151A, § 41. We reverse.

The claimant separated from a trade-certified employer and became eligible for a trade readjustment allowance (TRA) while he participated in an approved training program. Upon completing that program and becoming reemployed, the claimant applied for RTAA benefits with the DCS, which was denied in a determination issued on January 24, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both the claimant and a DCS representative, the review examiner affirmed the agency's initial determination and denied RTAA benefits in a decision rendered on July 11, 2017. We accepted the claimant's application for review.

RTAA benefits were denied after the review examiner concluded that the claimant failed to timely apply for these additional benefits and, thus, he was ineligible under 19 U.S.C. § 2291 and 20 C.F.R. § 617.² 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 is ineligible for RTAA benefits because his Career Center counselor submitted his

¹ Exhibit # 7 shows that the claimant became eligible for Trade Act benefits under the U.S. Department of Labor (DOL) Petition # 82,639. Therefore, he is subject to the provisions of the Trade Adjustment Assistance Extension Act of 2011 (TAAEA 2011). See U.S. DOL Training and Employment Guidance Letter (TEGL) No. 5-15, Change 1 (Sept. 12, 2016), sec. A.1., par. IV, p. A-6.

² The review examiner's hearing decision incorrectly cites "20 C.F.R. Part 612." This appears to be a typographical error. The U.S. Secretary of Labor's regulations promulgated pursuant to the Trade Act are found at 20 C.F.R. Part 617.

application after a September 28, 2016, deadline, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. Prior to filing for unemployment insurance benefits, the claimant worked as a fulltime computer technician/service technician for the 1st employer from 1995 until 2011 and then for the 2nd employer, the 1st employer's predecessor [sic], until January 2014. The claimant was paid \$27.00 or \$28.00 per hour in this position. The claimant's job with the 2nd employer was relocated to China.
2. On February 3, 2014, the claimant filed for unemployment insurance benefits (Exhibit 2).
3. On March 26, 2014, the Department issued a Determination approving the claimant for the TAA program (Exhibit 3).
4. The claimant started attending culinary school.
5. On March 28, 2014, the claimant applied for Trade Readjustment Allowance (hereinafter TRA) (Exhibit 4).
6. The claimant received regular unemployment insurance benefits from the week ending February 15, 2014 through the week ending September 6, 2014 (Exhibit 2).
7. The claimant received TRA benefits from the week ending September 13, 2014 to the week ending July 2, 2016 (Exhibit 2). The claimant received 95 weeks of TRA benefits.
8. The deadline date for the claimant to apply for Reemployment Trade Adjustment Assistance (hereinafter RTAA) was September 28, 2016.
9. The claimant finished school.
10. On July 26, 2016, the claimant started working for the 3rd employer, an assisted living facility, as a fulltime chef. The claimant is paid \$20.00 per hour in this position.
11. The claimant has a Counselor at the [Town A], Massachusetts Career Center.

12. In August 2016, the claimant had a telephone conversation with the Counselor inquiring into RTAA. The claimant informed the Career Counselor of his currently [sic] hourly rate.
13. The claimant believed the Career Counselor had applied for RTAA benefits on the claimant's behalf right away.
14. The Career Counselor did not inform the claimant there was a time limit on applying for RTAA.
15. The claimant did not know there was a time limit in which he was required to apply for RTAA.
16. After August 2016, the claimant followed up with the Counselor a couple of more times. The claimant asked the Counselor if she had applied for RTAA. The Counselor informed the claimant she was still attempting. The claimant had spoken with the Counselor in about September 2016.
17. Sometime after December 25, 2016, the claimant spoke with the Counselor again.
18. The Counselor informed the claimant that the claimant had gone beyond the time limit to apply for RTAA.
19. On January 10, 2017, the Career Counselor submitted a RTAA application on behalf of the claimant.
20. The Counselor explained the claimant could request a hearing.
21. On January 24, 2017, the Department of Career Services issued a Negative Determination denying the claimant RTAA benefits (Exhibit 7).

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 the claimant is not eligible for RTAA benefits.

The RTAA benefits at issue in this case are authorized under § 246 of the TAAEA of 2011. This provision makes a wage supplement available to eligible workers over the age of 50, who, after completing an approved training program, find new full-time jobs (or work at least 20 hours per week while enrolled in approved training) at a lower wage than the jobs from which they separated. *See* TEGL No. 10-11 (Nov. 18, 2011), sec. H, p. 29. For a worker, such as the

claimant, who has already received TRA benefits, he may receive RTAA benefits beginning on the date of reemployment for 104 weeks minus the total number of weeks that he received TRA benefits.³

In the present case, the claimant became eligible for RTAA benefits on July 26, 2016, when he began a new full-time job as a chef following completion of his culinary training program. *See* Findings of Fact ## 4, 9, and 10. Since he had already received 95 weeks of TRA benefits, he was potentially eligible for nine weeks of RTAA benefits (104 weeks minus the 95 weeks of TRA), starting with the week beginning July 24, 2016.⁴

In denying the RTAA benefits, the DCS determination refers to TEGL 5-15 as requiring that applications for RTAA must be filed within the eligibility period, and DCS entered as an exhibit, Appendix A from this document. *See* Exhibits 6 and 7.⁵ TEGL 5-15 is the operating instructions for implementing the Trade Act amendments enacted under the Trade Adjustment Assistance Reauthorization Act of 2015 (TAARA 2015), not for the 2011 amendments. Nonetheless, the requirement to seek RTAA benefits within the eligibility period is consistent with the DOL's regulation not to pay TRA cash benefits retroactively.⁶ Because the claimant was only eligible for RTAA benefits for nine weeks, beginning July 26, 2016, it would be consistent with this regulation to require him to apply for RTAA, a supplemental cash benefit, before that nine week period expired.

However, even with a September 28, 2016, application deadline, we do not believe that the late application in this case disqualifies the claimant from receiving RTAA benefits. The federal regulations also place an obligation upon the state agency to fully inform adversely affected workers of the reemployment services and allowances available under the Trade Act. 20 C.F.R. § 617.20(b)(3). This includes the application procedures and filing date requirements. *Id.* Here, the review examiner found that the claimant's Career Center counselor did not inform the claimant of any RTAA application deadline. Finding of Fact # 14. He did not know there was one. Finding of Fact # 15. The findings further show that he asked his Career Center counselor about the RTAA benefits in August, 2016, which was during his eligibility period and well before the September 28, 2016, date. *See* Findings of Fact ## 12 and 16. Even though he followed up to ask about his RTAA application a couple more times, the counselor did not submit the claimant's RTAA application until January 10, 2017. Finding of Fact # 19. There is no explanation for why the Career Center counselor missed the deadline.⁷

³ *See* § 246(4)(B) of the TAAEA of 2011.

⁴ The claimant started work on a Tuesday, July 26, 2016. *See* Finding of Fact # 10. It is unclear why the DCS assigned an eligibility end date of September 28, 2016, a Thursday, as opposed to a date at the end of the work week. However, whether the eligibility period ended on September 28 or 30 is immaterial to our decision.

⁵ Exhibit # 6 is the Appendix from TEGL 5-15, Change 1 (Sept. 23, 2016), and Exhibit # 7 is the DCS determination, dated January 24, 2017. Although not explicitly incorporated into the review examiner's findings, they are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

⁶ *See* 20 C.F.R. § 617.22(c).

⁷ The claimant testified without objection that his Career Center counselor did not know that there was a time limit. However, this did not make it into the review examiner's findings.

Under these circumstances, we believe the claimant is entitled to equitable tolling of the RTAA application deadline. The equitable tolling doctrine permits the suspension of statutory and administrative TAA deadlines where it would be manifestly unfair to deny eligibility. TEGL 8-11 (Oct. 19, 2011), sec. 4, p. 3. It is available to a worker who exercises due diligence, but nonetheless misses the eligibility deadline for reasons such as the agency's failure to inform him of the deadline. *Id.* at p. 3-4. In 2011, the DOL directed that equitable tolling be applied in all determinations and appeals for TAA deadlines missed after October 19, 2011. *See Id.*, sec. 5A.2, p. 5.⁸ In short, the appeal before us presents circumstances where the agency failed in its obligation to inform the claimant of a RTAA application deadline, but he, nonetheless, asked his Career Center counselor to apply for the benefits within the eligibility period. This constitutes due diligence on the claimant's part. We believe it would be manifestly unfair to disqualify him from receiving the RTAA benefits that he was otherwise entitled to simply because the counselor failed to submit his application on time.

We, therefore, conclude as a matter of law that the claimant is entitled to RTAA benefits under the Trade Act pursuant to the doctrine of equitable tolling.

The review examiner's decision is reversed. The claimant is entitled to receive nine weeks of RTAA benefits, beginning July 26, 2016, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 27, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

⁸ Equitable tolling also appears to have survived under the Trade Act as amended in 2015. *See* TEGL 5-15 (Sept. 4, 2015), sec. C.2, p. A-29.

AB/rh