Because the last date that the claimant performed, or could have performed, wage-earning services for his employer preceded the date covered by the TAA certification, he was not eligible to apply for TAA benefits. The date that severance payments end is not the "last day worked" within the meaning of the Trade Act and its regulations.

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Issue ID: 0020 1532 17

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The Department of Unemployment Assistance (DUA) TRA Unit, appeals a decision by J. I. Cofer, a review examiner assigned to the DUA Hearings Department, to award federal Trade Adjustment Assistance (TAA) benefits under the Trade Act of 1974, as amended, 19 U.S.C. § 2101 *et seq*. (2015) (Trade Act)[1]. We review, pursuant to our authority under 19 U.S.C. § 2311(e), and G.L. c. 151A, § 41, and we reverse.

After separating from his employer, the claimant became eligible for regular unemployment benefits, effective January 24, 2016. Subsequently, he applied for TAA benefits under the U.S. Department of Labor TAA Decision 91984, released on September 2, 2016. In a determination rendered by the DUA TRA Unit on October 20, 2016, the claimant's application for TAA benefits was denied. The claimant appealed the determination to the DUA Hearings Department. Following a hearing on the merits, attended by both the claimant and a representative from the DUA TRA Unit, the review examiner overturned the agency's initial determination and awarded TAA benefits in a decision rendered on April 6, 2017.

After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the agency's appeal, the Board denied the agency's application for review. However, the Director of the DUA requested that the Board revoke its decision on the ground that information presented to the review examiner about the claimant's actual separation date may have been incorrect and that such an error would materially affect the claimant's eligibility for TAA benefits. In an order, dated July 5, 2017, the Board revoked its denial and remanded the case to the review examiner to take additional evidence concerning the claimant's last date of employment with the trade-certified employer.

Both the claimant and a representative from the DUA TRA Unit participated in a remand hearing on August 4, 2017, and based upon the consolidated findings of fact that emerged from that

[1] Trade Adjustment Assistance Reauthorization Act of 2015 (P.L. No. 114-27) (TAARA 2015).

hearing, the Board rendered a decision on September 1, 2017, denying TAA benefits to the claimant.

Subsequently, the Board learned that the claimant did not have an opportunity to see or object to several documents offered into evidence by the DUA at the August remand hearing. The Board issued an order revoking its September 1, 2017, decision and remanding the case a second time, specifically to present the claimant with an opportunity to review Remand Exhibit # 9, and to present any rebuttal evidence. Following a remand hearing attended by both the claimant and a representative of the DUA TRA Unit, the review examiner has issued revised 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 original conclusion, that the claimant is eligible for TAA benefits under TAA Decision 91984, is supported by substantial and credible evidence and is free from error of law, where the most recent consolidated findings of fact show that the claimant's last date of work preceded the period covered by the TAA Decision.

Findings of Fact

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

1. The claimant filed a claim for unemployment insurance benefits. The effective date of the claim is 1/24/16.

2. The claimant worked for a certain employer (the employer). He began this employment in 1998.

3. The claimant performed worked [sic] for the employer until 2/11/15. 2/11/15 was the last day the claimant performed any work for the employer.

4. The employer granted severance pay to the claimant. The claimant received this severance pay from 2/11/15 until 1/13/16.

5. The claimant did not perform any work for the employer in the period 2/12/15 through 1/13/16.

6. The claimant filled out a TAA questionnaire. The questionnaire featured the question, "last day you worked for the employer?" The claimant responded 1/13/16. He responded with this date because this was when his severance pay ended.

7. The U.S. Department of Labor Issued TAA (Trade Adjustment Assistance) Decision 91984. The decision was dated 9/02/16. The officer who wrote the decision indicated, "I determine that workers of [the employer], Resource Management Division, [Town A], Massachusetts, who are engaged in activities related to the supply of remote/virtual project staffing, meet the

worker group certification criteria…I make the following certification: 'All workers of [the employer], Resource Management Division, [Town A], Massachusetts, who became totally or partially separated from employment on or after July 5, 2015 through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended."

8. DUA determined that the claimant was not a member of the group certified in TAA Decision 91984. The claimant appealed.

9. The claimant did not work in the employer's Resource Management Division.

10. The employer submitted a questionnaire to DUA. The questionnaire was dated 5/10/17. The questionnaire prompted the employer to provide the "Claimant's last day on the job." The employer responded, "2/11/15."

11. The employer's agent submitted a document to DUA. The document was dated 7/14/17. In the document, the agent reported that the last day the claimant performed work for the employer was 2/11/15. The agent reported that the claimant received a separation package and that the employer paid severance pay to the claimant until 1/13/16.

12. CREDIBILTY ASSESSMENT: The employer reported to DUA that the claimant last performed work for it on 2/11/15. In [the] 8/04/17 hearing, the claimant was asked when the last day he performed work for the employer was. He was asked several times. The claimant gave evasive responses and did not answer the question. The claimant later responded that he did not remember when the last day he performed work was. Given the totality of the testimony and evidence presented, the claimant's testimony in its entirety is not credible because the claimant gave evasive responses and then testified with a professed unclear memory. Furthermore, in the 11/21/17 remand hearing, the claimant testified that the last day he performed work for the employer was 2/11/15.

Ruling of the Board

In accordance with our statutory obligation, we review 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. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. Consolidated Finding of Fact # 9, in which the review examiner states that the claimant did not work in his former employer's Resource Management Division, is contrary to his original decision and is not supported by any testimony or evidence presented at the remand hearing. Additionally, what appears as Consolidated Finding # 12 is the review examiner's credibility assessment. It is not a finding of fact, and we do not treat it as one. In adopting the remaining findings, we deem them to be supported by

substantial and credible evidence. As discussed more fully below, we again reject the review examiner's original legal conclusion that the claimant is eligible for TAA benefits.

The Trade Act provides relief in the form of training and other assistance to groups of workers who have lost their jobs due to import competition or the shift of labor to foreign countries. *See* 19 U.S.C. § 2272(a). Congress has articulated specific criteria for determining whether a group of workers is eligible for Trade Act assistance. Id. It has delegated that determination to the U.S. Secretary of Labor (Secretary). 19 U.S.C. § 2273(a). The process calls for the Secretary to issue a certification of eligibility to apply for the Trade Act assistance. Specifically, 19 U.S.C. § 2273(a) provides, in relevant part:

> [T]he Secretary shall determine whether the petitioning group meets the requirements of section 2272 of this title and shall issue a certification of eligibility to apply for assistance under this subpart covering workers in any group which meets such requirements. *Each certification shall specify the date on which the* total or partial *separation began* or threatened to begin.

(Emphasis added.)

In the present case, the claimant seeks TAA benefits pursuant to TAA Decision 91984, a certification issued by the Secretary for a certain group of workers who had been employed by the claimant's most recent employer. As stated in Consolidated Finding # 7, the covered group of workers includes all workers who separated from this employer's [Town A], Massachusetts Resource Management Division on or after July 5, 2015.

In his initial decision, the review examiner wrestled with the question of whether the claimant, who had worked in the employer's [Town A], Massachusetts Resource Management "Organization," was part of this certified group of workers. Because there was no evidence to suggest that there had been a Resource Management "Division" and the claimant had engaged in the same work activities as those identified in the certification, we think the review examiner reached the correct logical conclusion that the entities were the same. For this reason, we denied the agency's application for review, effectively affirming the review examiner's decision rendering the claimant eligible for TAA benefits.

We rescinded our denial of review, however, upon learning that the review examiner may not have been provided with the claimant's correct date of separation for purposes of TAA benefit eligibility. The actual date is important. As evident from the language in 19 U.S.C. § 2273(a), Congress did not intend to grant trade assistance to every unemployed worker who had worked at the trade-certified firm; each certification is date-specific. Congress charged the Secretary with determining *when* a significant number of workers had become separated or threatened with separation, *when*, due to trade competition, production or sales decreased, imports increased, or work shifted to other countries, and *when* such events contributed importantly to those workers' separation or threat of separation. 19 U.S.C. § 2272(a).[2]

[2] We are also mindful that the Secretary cannot set the impact date more than a year before the petition for certification was filed. *See* 19 U.S.C. § 2273(b). In this case, the petition for TAA Decision 91984 was filed July 5, 2016. *See* Exhibit # 2.

Since the question of the claimant's eligibility for TAA benefits depends upon whether he is an adversely affected worker under TAA Decision 91984, he must not only have worked in the organization or division named in the certification, but he must have separated from the employer on or after July 5, 2015. *See* Consolidated Finding # 7. Under the Trade Act, a worker's date of separation is defined in the Secretary's regulations at 20 C.F.R. § 617.3, as follows:

> (l) Date of separation means: (1) With respect to a total separation – (i) For an individual in employment status, the *last day worked* . . . .[3]

(Emphasis added.)

During the initial hearing, the review examiner relied upon the claimant's testimony that he separated on January 13, 2016.[4] However, after remand, it is evident that the claimant's last day worked — the day he stopped performing services for the employer — was February 11, 2015. His severance payments began the following day. January 13, 2016, is the date that his severance payments ended. We interpret 20 C.F.R. § 617.3(l)(1)(i) to mean the last day that an individual performed, or could have performed, wage-earning services, and not, as the claimant argues, the date his employer terminated his severance payments. *Compare* Billings v. Division of Employment Security, 399 S.W.3d 804, 807–809 (Mo. 2013) (where employer declared that employee was not to work, but was to be paid between notice of layoff and its effective date, and the employee was paid actual work pay and not severance pay, then the employee was considered still working for purposes of 20 C.F.R. § 617.3(l)(1) until the layoff effective date). In this case, February 11, 2015, predates the eligibility period in TAA Decision 91984 by four months. For this reason, we conclude as a matter of law that the claimant is not a member of the subject group of workers covered by the Secretary's Decision.

We are satisfied that the claimant has now been afforded a full and fair hearing with the opportunity to review and rebut all evidence in the record. We have considered the claimant's evidence showing that his former employer designated January 13, 2016, as his formal "termination" or "separation" date from the company.[5] For purposes of TAA eligibility, however, we must apply the regulatory definition under 20 C.F.R. § 617.3(l) for date of separation. Thus, the question before us is not when the claimant severed all legal ties with his former employer, it is his *last day worked*.

In the appeal before us, the claimant's last day worked is a mixed question of law and fact.[6] Consolidated Finding # 3, which states that February 11, 2015, was the last day that the claimant performed work for the employer, is founded on substantial evidence in the record. This includes an October 17, 2017, email from Human Resources representative [B], in which she

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[3] An individual in employment status is distinguished from an individual on a leave of absence or an individual who is partially separated. *See* 20 C.F.R. § 617.3(l)(1)(ii) and (2). There is no representation here that the claimant was on a leave of absence or partially separated.

[4] *See* Finding of Fact # 2 in Remand Exhibit # 1.

[5] *See* Exhibit # 7, page 2; and Remand Exhibit # 14, pages 2 and 3.

[6] *See* Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979) ("Application of law to fact has long been a matter entrusted to the informed judgment of the board of review."); *see also* 19 U.S.C. § 2311(e) and 20 C.F.R. § 617.51(a).

confirms that February 11, 2015, was the claimant's last day worked (Remand Exhibit # 14, page 2),[7] the claimant's admission during the most recent remand hearing that the last day he physically worked for the employer was February 11, 2015, and responses to DUA questionnaires completed by the employer's third-party administrator that his last day on the job or last day worked was February 11, 2015 (Remand Exhibit # 9, pages, 1, 3, and 4). Further, nothing in the record indicates that the claimant performed or could have performed wage-earning services for the employer after that date.

The review examiner's decision is reversed. Because the claimant's last day worked was February 11, 2015, he is not eligible to apply for TAA benefits pursuant to TAA Decision 91984.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 9, 2018

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

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

[7] [B]'s October 17, 2017, email discredits her earlier July 11, 2017, statement that indicates that the claimant was working at the employer's [Town A] office through January 13, 2016. *See* Exhibit 7, page 2.