

**Board of Review
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**Issue ID: 0014 2251 21
Claimant ID:**

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Joseph Tyman, a review examiner of the Department of Unemployment Assistance (DUA), denying an extension of the claimant's unemployment benefits while she participated in a training program. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant filed a claim for unemployment benefits on July 1, 2014, which was approved by the agency with an effective date of June 29, 2014. During the week ending August 23, 2014, the claimant filed an application for training benefits, pursuant to G.L. c. 151A, § 30(c), which was denied by the agency in a determination issued on October 6, 2014. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's determination in a decision rendered on March 3, 2015.

Training benefits were denied after the review examiner determined that the claimant had not begun her training in the first available appropriate program and, thus, was disqualified, under G.L. c. 151A, § 30(c), and 430 CMR 9.04(2)(d). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accepted the claimant's application for review. Our decision is based upon our review of the entire record, as well as a review of DUA computer records regarding the claimant's claim for benefits and her chosen program's eligibility for training benefits.

The issue before the Board is whether the review examiner's conclusion that the claimant was ineligible for training benefits because she did not attend the first available appropriate program is supported by substantial and credible evidence and is free from error of law, where the record reflects that the claimant took a previously-planned and prepaid trip to visit her parents in China, then returned to begin training in a DUA-approved program.

Findings of Fact

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

The claimant filed a claim for unemployment benefits with the Department of Unemployment Assistance ("DUA") during the week ending July 5, 2014, with the claim being made effective as of that same week.

2. Prior to filing, the claimant had worked full time for a national baking chain as a senior operator for forty (40) hours per week at the pay rate of \$18.75 per hour, a position from which she was formally and permanently separated on June 30, 2014 with no recall or return to work date.
3. After filing, the claimant became aware of a combination program offered by the teaching branch of a local YMCA located at Tremont Street in Boston, MA ("Institution") that offered twenty-four (24) weeks of English as a Second Language ("ESL") courses followed up with twenty (20) weeks of training to receive a certificate in Computerized Office Skills.
4. In August 2014, the claimant went to the Institution with other candidates and inquired about the program, at which time she learned that a session with available space was set to begin as of September 2, 2014.
5. The claimant determined that she would not take this session as, prior to her separation from work, she had planned to take a personal trip to China to see her parents and did not want to cancel that trip.
6. The claimant then enrolled in the same course's scheduled session that began on October 27, 2014, while others who were there with her that day signed up for the September 2 session successfully.
7. Both sessions were held at the Institution itself on Tremont Street.
8. During the week ending August 23, 2014, the claimant submitted an application for Training Opportunities Program ("TOP") benefits to the DUA based on her participation in the Institute's certificate program.
9. A representative of the Institution ("Representative") filled out part of the form, stating that the claimant would participate in forty-four (44) total weeks of classes, each containing thirty (30) hours of class time over five (5) days per week.
10. The Representative added that the program places graduates in related jobs seventy-five (75) percent of the time.
11. The claimant then went to China from September 17 through October 7, 2014 before beginning her session of the program at the Tremont Street location on October 27.
12. On October 6, the DUA issued the claimant a "Notice of Disqualification" stating that she was not eligible for TOP benefits due to not providing an answer as to why she was not taking the first available session for her desired course.

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 of fact 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 reject the review examiner's legal conclusion that the claimant did not begin her training program with the first available appropriate course.

The review examiner's initial decision to deny the claimant's application for training benefits derives from G.L. c. 151A, § 30(c), which relieves claimants who are enrolled in approved retraining programs of the obligation to search for work and permits extensions of up to 26 weeks of additional benefits. The procedures and guidelines for implementation of training benefits are set forth in 430 CMR 9.00-9.09. Under G.L. c. 151A, § 30(c), it is the claimant's burden to prove that she fulfills all of the requirements to receive training benefits.

The agency denied the claimant's application for training benefits after concluding that she had failed to return a DUA Custom Fact Finding request, which she did not receive prior to leaving on a trip to China and Taiwan. After she appealed the disqualification to the DUA Hearings Department, the review examiner affirmed the disqualification, concluding that she had not enrolled in the first available program that was open to her, pursuant to 430 CMR 9.04(2)(d), which states, in pertinent part, as follows:

A claimant who applies ... for training [shall be eligible for training benefits] if (d) the claimant begins training in the first available *appropriate* program, which is affordable for the claimant or for which funding is available, for which he or she has been approved which is located within a reasonable distance from the claimant's residence. (Emphasis supplied.)

After the claimant appealed the disqualification to the DUA Hearings Department, the review examiner affirmed the disqualification. The review examiner found that the claimant learned of a training program offered by her school with space available that began on September 2, 2014; filed for training benefits with DUA during the week ending August 23, 2014; chose to take a trip to visit her parents in China from September 17 through October 7, 2014, which she had planned prior to her separation from employment; and began her training program on October 27, 2014. The review examiner concluded the claimant was disqualified from training benefits because she did not enroll in the first available session. We disagree.

Although it is undisputed that the claimant did not begin her studies in the earliest program that began after she filed for training benefits (the one that began on September 2, 2014), the review examiner's conclusion overlooks the requirement in 430 CMR 9.04(2)(d) that claimants begin training "in the first available *appropriate* program" (emphasis added). Here, the claimant had previously planned a trip to visit her elderly parents in China and had purchased airplane tickets before she found her training program.¹ The claimant traveled out of the country from September

¹ The claimant testified that her parents were elderly and in poor health, and that she had purchased her airline tickets before she had applied for school. These contentions were reiterated in her appeal of the agency's initial determination. See Hearings Exhibit # 11. The age and health of the claimant's parents, and the timing of her purchase of airline tickets prior to finding her training program, while not explicitly incorporated into the review

17 through October 7, and began her training program with the next available class after her return, the one beginning October 27, 2014. We take administrative notice that the claimant did not certify for benefits while she was out of the country. Under these compelling personal circumstances — taking a prearranged and prepaid trip out of the country to visit elderly and ailing parents — we conclude, as a matter of law, that the claimant acted reasonably and in good faith in concluding that the first available program that was appropriate for her was the one that began after she returned from her trip. In so concluding, we also note that it was more appropriate under these circumstances for the claimant to travel to visit ailing parents before commencing a year-long program than it would have been for the claimant to begin the program and then need to suspend studies to travel mid-program due to a further decline in the health of the claimant's relatives.

Having concluded that the claimant took the first program that was available and appropriate for her circumstances, we consider the rest of her application for training benefits. The review examiner's findings of fact show that the claimant's program satisfies the pertinent requirements of the regulations that implement G.L. c. 151A, § 30(c). The program meets more than 20 hours per week, satisfying the requirements of 430 CMR 9.05(2)(b). The program lasts 44 weeks and thus can be completed within a year, satisfying 430 CMR 9.05(2)(c). The program has a job placement rate of 75%, satisfying the requirement of 430 CMR 9.05(2)(a).

We, therefore, conclude as a matter of law that the claimant's application for extended benefits meets the standards and criteria set forth in G.L. c. 151A, § 30(c), and 430 CMR 9.01-9.09.

examiner's findings, are part of the unchallenged evidence introduced at the hearing and placed in the record, and 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).

The review examiner's decision is reversed. The claimant is entitled to receive an extension of up to 26 times her weekly benefit rate while she attends this program, pursuant to G.L. c. 151A, § 30(c).

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 25, 2015

Handwritten signature of Paul T. Fitzgerald in black ink, with the number 1004,40- written below it.

Paul T. Fitzgerald, Esq.
Chairman

Handwritten signature of Judith M. Neumann in black ink.

Judith M. Neumann, Esq.
Member

Member Stephen M. Linsky, 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.

JPC/jv

