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Issue ID: 0002 5350 42

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Rorie Brennan, a review examiner of the Department of Unemployment Assistance (DUA), to deny benefits for the week ending March 24, 2012 and indefinitely thereafter. Benefits were denied on the ground that the claimant was not in unemployment, as defined under G.L. c. 151A, §§ 29 and 1(r).

The claimant had filed a claim for unemployment benefits, which was initially approved. On October 18, 2012, the DUA issued a Notice of Redetermination and Overpayment, informing the claimant that he was not entitled to benefits beginning the week ending March 24, 2012, that he had been overpaid $9,795.00 for the weeks ending March 31, 2012 through July 7, 2012, and that he must repay that amount to the DUA without interest. The claimant appealed the redetermination to the DUA Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's redetermination in a decision rendered on April 12, 2013. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On October 30, 2013, a justice of the Lowell District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence concerning the claimant's business and prior work history so that we could determine if the claimant's work for his own business rendered him not in unemployment. The claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether the review examiner's conclusion that the claimant was not in unemployment beginning the week ending March 24, 2012, is supported by substantial and credible evidence and is free from error of law, where the claimant has a prior history as a CEO working more than 40 hours per week, and the subsequent formation of his consultancy business was a means that the claimant used to obtain work.

After reviewing the entire record, including the testimony from the initial and remand hearings, the District Court's Order, and the consolidated findings of fact, we reverse the review examiner's decision.

Findings of Fact

The review examiner's consolidated findings of fact, which were issued following the District Court remand, are set forth below in their entirety:

1. On 03/23/12, the claimant filed a claim for benefits.

2. In March 2012, the claimant became separated from his full time employment. The claimant applied for and began receiving unemployment benefits.

3. From the week ending 03/31/12, the claimant became a consultant in his industry. The claimant hoped that the consulting would lead to full time employment as he did not wish to remain self-employed.

4. The claimant devotes approximately 25 – 30 hours per week to self-employment (his consultancy business) and approximately 30 hours per week on seeking full time employment.

5. The claimant's consulting was part of a reasonable job search based on the claimant's situation as a 64 year old former CEO.

6. Given the claimant's former work schedule as a CEO (40 – 80 plus per week), the 20 hour a week test for self-employment is not reasonable.

7. The claimant formed an LLC for his consulting business and rented office space. The dates of the lease on the claimant's office space were 07/23/12 – 07/31/13. The claimant formed his LLC on 09/12/12.

8. During the period in question: 03/24/12 – 07/07/12, the claimant had one week (06/30/12) in which he received remuneration from his consulting work. The claimant earned $818.00 for the week in question.

9. On 10/18/12, the local office issued a Notice of Redetermination and Overpayment, Form 3727-B, determining that the claimant was not entitled to benefits for the 15 weeks ending 03/31/12 through 07/07/12 because the local office determined that the claimant was self-employed for a major portion of his time. It was determined that the claimant was overpaid and that the overpayment was due to error without intent to defraud

10. The claimant appealed the 10/18/12 determination.

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 ultimate conclusion that the claimant is not entitled to benefits is free from error of law. Upon such review, the Board adopts the review

examiner's consolidated findings of fact, with the exception of the legal conclusions contained within Findings of Fact #5 and #6 (specifically, the reasonability of the claimant's work search and the DUA test for self-employed claimants). In so doing, we deem the factual findings to be supported by substantial and credible evidence. Based on the review examiner's new findings of fact, we conclude that the claimant was in unemployment as of the week ending March 24, 2012.

G.L. c. 151A, § 29(a), authorizes benefits to be paid to those in total unemployment. Total unemployment is defined at G.L. c. 151A, § 1(r)(2), which provides, in relevant part, as follows:

> "Total unemployment", an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable and available for work, he is unable to obtain any suitable work.

G.L. c. 151A, § 29(b), authorizes benefits to be paid to those in partial unemployment. Partial unemployment is defined at G.L. c. 151A, § 1(r)(1), which provides, in relevant part, as follows:

> "Partial unemployment", an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week….

In order for the claimant to be eligible for benefits, he must be in some state of unemployment, whether total or partial. In this case, the review examiner concluded that, since the claimant devoted a major portion of his time to his own business, he was not in unemployment at all.

We first note that, for the period of the overpayment in this case, the weeks ending March 31, 2012, through July 7, 2012, the claimant's business was not active. Indeed, the claimant formed the limited liability company in September, 2012. However, the claimant rented office space as of July 23, 2012, and the review examiner found that, as of March 31, 2012, he became a consultant in his industry and devoted twenty-five to thirty hours per week to self-employment. Thus, even if the LLC was not formed until September, 2012, the claimant was working for himself beginning several months before that.

The question turns on whether the claimant, who was working for himself beginning in March 2012, was able and available for work, such that he could be considered to be in unemployment. *See* G.L. c. 151A, § 1(r)(2). The review examiner initially determined that he was not in unemployment and presumably based this conclusion on the DUA's own Service Representative's Handbook provision 1411(A). That section provides as follows:

> **(A) Self-Employment Major Portion of Claimant's Time**
>
> A claimant who is engaged in an independent business enterprise, sole proprietorship, or partnership which takes a major portion of his or her time is considered to be fully self-employed and ineligible under §29(a) and §1(r) on the grounds that he or she is in neither partial nor total unemployment. If the hours of

> self-employment occur during a shift typical for the claimant's occupation then a "major portion" of a claimant's time will be considered to be 20 hours per week or more.

We agree with the general underlying premise of this section, which is that claimants in self-employment will not be considered to be unemployed if they devote a major portion of their time to their own self-employment. However, the review examiner found that the claimant has a history of working 40 to 80 hours per week, for an average of 60 hours per week. He devotes 25 to 30 hours, or an average of 27-1/2 hours, per week to his own business. Therefore, he does not devote a majority of his time to self-employment.[1]

In light of the review examiner's new findings of fact, Section 1411(B) is more applicable to the claimant's situation. That section provides the following:

> **(B) Self-Employment – Minor Portion of Claimant's Time**
>
> A claimant who is self-employed during a minor portion of his or her time is eligible as long as the work does not interfere in any way with his or her employability or availability to work as an employee elsewhere. An otherwise eligible claimant whose only source of income for a given week was from part-time self-employment may qualify for benefits provided the amount of "net earnings" in any week is less than his weekly benefit rate plus the amount disregarded under §29(b).

As noted above, the claimant spends a minor (less than half) portion of his time to self-employment. The findings of fact made by the review examiner, as well as the documents submitted by the claimant during the remand hearing, show that the work for his own business is a means by which the claimant is trying to obtain new, full-time work elsewhere.[2] In short, the evidence supports a conclusion that having this business makes the claimant more attractive as an employee and potentially more employable. His work is directly related to his search for full-time work. Thus, the claimant's decision to start a business can be viewed as a reasonable approach to obtain full-time employment.

We, therefore, conclude as a matter of law that the review examiner's original decision to deny benefits was not free from error of law; because the consolidated findings of fact support a conclusion the claimant was in self-employment for only a minor portion of his time, and his business venture was a reasonable means by which he was trying to gain full-time employment.

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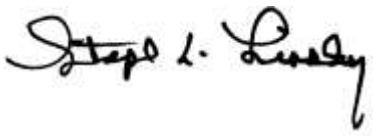
[1] We think that the reference to twenty hours in Section 1411(A) assumes that a claimant has a 40-hour work week. Given the facts of this case, the assumption as to a 40-hour work week (and thus the 20-hour threshold) is not applicable.

[2] Although the claimant submitted documents into evidence at the remand hearing showing that owning a small business can help obtain other work, the review examiner made no findings from those documents. Instead, she included a conclusory legal conclusion in Finding of Fact #5 that the claimant's work for himself was part of a reasonable job search. We have rejected the review examiner's purported fact-finding as to the reasonability of the work search, because it constitutes a legal, rather than factual, issue. However, a finding of fact that having a business was part of claimant's work search is supported by substantial and credible evidence in the record.

The review examiner's decision is reversed. The claimant is entitled to benefits, pursuant to G.L. c. 151A, §§ 29 and 1(r), beginning the week ending March 24, 2012 if otherwise eligible. He has not been overpaid any benefits.



BOSTON, MASSACHUSETTS
DATE OF DECISION - June 2, 2014

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ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS 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.

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.

SF/rh