

**Board of Review
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Issue ID: 0002 4687 95

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Heidi Saraiva, a review examiner of the Department of Unemployment Assistance (DUA), to deny a waiver of unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant separated from employment and filed a claim for unemployment benefits with the DUA, which was approved. On July 24, 2012, the DUA issued a determination finding that the claimant had been overpaid benefits for several weeks. In January, 2013, the claimant applied to DUA for a waiver of the overpayment assessment, which was denied in a determination, dated April 1, 2013. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, attended by the claimant, the review examiner affirmed the agency's determination in a decision rendered on May 21, 2013. The review examiner concluded that the claimant remained responsible for returning \$1,037.00 to the unemployment fund. We accepted the claimant's application for review.

The claimant's waiver application was denied after the review examiner determined that, under G.L. c. 151A, § 69(c), recoupment of the overpayment would not defeat the purpose of benefits already authorized, because she concluded that the claimant's household income was sufficient for her household's ordinary and necessary expenses. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to obtain additional evidence pertaining to the net income of the claimant and her husband, as well as information about additional household expenses. The claimant attended the remand hearing. Thereafter, the review examiner issued her 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 conclusion that the claimant's net monthly household income exceeds the household's necessary and ordinary monthly living expenses is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. On July 20, 2012, the claimant was issued a Form 3727, Notice to Claimant of Redetermination and Overpayment, finding her overpaid benefits on sequence 002 due to incorrectly reported partial earnings.
2. The date of the original determination, which resulted in the redetermination dated July 20, 2012 is unknown.
3. On July 24, 2012, the claimant was issued a Form 3727-J, Notice to Claimant of Disqualification and Constructive Deduction Redetermination and Overpayment, finding her overpaid benefits on sequence 002 because she was subject to a constructive deduction in the amount of \$266.00 beginning the week ending June 16, 2012 under Section 25(e)(1) of the Law.
4. The claimant worked part time as a bartender for the employer, a restaurant, from May 6, 2012 until June 2, 2012, when she left work. The claimant worked an average of 15 hours each week and was paid \$6.00 per hour plus tips.
5. The claimant reported her estimated gross weekly earnings when certifying her weekly unemployment benefits.
6. The claimant estimated her gross weekly earnings because she was paid bi-weekly by the employer and certified her benefits before receiving her paycheck.
7. On July 2, 2012, the claimant reopened her claim for unemployment benefits. The claimant notified the customer service representative that she left her work.
8. The claimant used the benefits that are now determined to be overpaid to pay her monthly mortgage payment.
9. The claimant resides with her husband and two (2) children ages 15 and 16.
10. The claimant is currently employed part time as a deli clerk for a new employer, a grocery store. The claimant began working for the employer on September 25, 2012. The claimant is paid \$8.50 per hour and works an average of 30 hours each week. The claimant is paid \$12.83 per hour when she works on Sunday. The claimant's average monthly gross income is \$1,137.00.
11. The average amount deducted from the claimant's paycheck on a weekly basis is as follows: Social Security deduction \$70.52; Medicare deduction \$16.48; Federal Income Tax withholding \$49.88 and State Income Tax withholding \$55.12. All of the monthly deductions total \$192.00.
12. The claimant's net monthly income totals \$945.00.

13. The claimant's husband works part time 30 hours each week and he earns \$2,040.00 per month.
14. The average amount deducted from the claimant's husband's paycheck on a monthly basis is as follows: Social Security deduction \$111.60; Medicare deduction \$26.10; Federal Income Tax withholding \$210.00; and State Income Tax withholding \$94.22. All of the monthly deductions total \$442.00.
15. The claimant's husband's net monthly income totals \$1,598.00.
16. The claimant receives \$236.00 of food stamps each month.
17. The value of the claimant's primary residence is unknown.
18. The claimant does not have a savings account.
19. The claimant's husband does not have a savings account.
20. The claimant and her husband have a joint checking account with a balance of \$170.00.
21. The claimant and her husband do not have any investment savings.
22. The claimant owns a 2004 Chrysler PT Cruiser.
23. The value of the 2004 Chrysler PT Cruiser is unknown.
24. The claimant's household assets are unknown.
25. The claimant's net household monthly income total is \$2,779.24.
26. The claimant's known assets total \$170.00.
27. The claimant pays a monthly mortgage of \$935.00 for her primary residence. The monthly mortgage payment includes real estate taxes and homeowner's insurance.
28. The claimant's vehicle has been paid in full.
29. The claimant's pays \$137.00 each month for automobile insurance.
30. The claimant does not pay for health insurance.
31. The claimant does not have a life insurance policy.

32. The claimant pays an average of \$170.00 each month for utilities (oil and electric).
33. The household monthly telephone, cable and internet bill totals \$173.00.
34. The claimant's monthly household cellular phone bill totals \$170.00.
35. The claimant's household monthly sewer and water usage totals \$80.00.
36. The claimant spends \$500.00 each month on groceries.
37. The claimant spends \$75.00 each month on clothing.
38. The claimant's household spends \$280.00 each month on gas to commute to work.
39. The claimant and her husband have no outstanding credit card debt.
40. The claimant's monthly household expenses total \$2,520.00.
41. The claimant has an outstanding debt of \$4,486.00 to a credit company for a repossessed vehicle.

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 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. Based upon the evidence in the record, we reject the accuracy of portions of consolidated findings # 10, 11, 12, 13, 15, 25, and 40 pertaining to the calculation of certain income and expense figures, as discussed more fully below. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence.

The claimant was denied a waiver under G.L. c. 151A, § 69, which provides, in relevant part, as follows:

- (c) The commissioner may waive recovery of an overpayment made to any individual, who, in the judgment of the commissioner, is without fault and where, in the judgment of the commissioner such recovery would defeat the purpose of benefits otherwise authorized or would be against equity and good conscience.

The DUA regulations further define the phrase, "defeat the purpose of benefits otherwise authorized," as follows:

Defeat the purposes of benefits otherwise authorized means that recovery of the overpayment would deprive the overpaid claimant, or individuals dependent on the claimant, of income required for ordinary and necessary living expenses. This depends upon whether the overpaid claimant or his dependents have income or financial resources sufficient for more than ordinary and necessary needs, or are dependent upon all current income for such needs. Ordinary and necessary living expenses include, but shall not be limited to:

- (a) fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, accident and health insurance, taxes, and work-related transportation expenses;
- (b) medical and hospitalization expenses;
- (c) expenses for the support of others for whom the individual is legally responsible;
- (d) other miscellaneous expenses which may reasonably be considered as part of an individual's necessary and ordinary living expenses.

At the remand hearing, the claimant produced copies of paystubs for herself and her husband for the month of August, 2013. (R. Exhs. 10 and 11.) These show their payroll deductions and net incomes for a snapshot in time. Significantly, neither the claimant nor her husband works a fixed number of hours per week. Nonetheless, the exhibits constitute substantial and reliable evidence of the family's earnings during this period.

Consolidated findings #10-12 pertain to the claimant's payroll deductions and income. In consolidated finding #10, the review examiner reached a finding that the claimant's "average monthly gross income is \$1,137.00." It is unclear how or why the review examiner calculated this *average* monthly gross income figure, when the sum of the claimant's gross earnings for the month reflected in R. Exhibit 10 was \$1,160.68.¹ We also reject the review examiner's figure of \$945.00 in consolidated finding #12 as the claimant's net monthly income, because the sum of weekly net income shown in R. Exhibit 10 is \$927.50.

Further, it is unclear how the review examiner concluded in consolidated findings # 13 and # 15 that the claimant's husband worked 30 hours each week and earned \$2,040.00 per month with a net monthly income of \$1,598.00. These figures are not supported by the record. The claimant testified that her husband's hours and earned income vary widely.² Remand Exhibit 11 bears this out. Her husband's three biweekly paystubs for roughly the same period of time as the weeks reflected in the claimant's paystubs show he worked 48, 60, and 72 hours. His paystubs show that his total net pay for those six weeks was \$2,037.12, for an average weekly income of \$339.52. That comes to \$1,471.25 net pay per month.

¹ The figures contained in the claimant's paystubs, appearing in R. Exhibit 10, while not explicitly incorporated into the review examiner's findings, 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).

² We similarly rely upon the claimant's undisputed testimony provided at the hearing. Id.

Thus, the paystubs contained in R. Exhibits 10 and 11 show that the claimant's net monthly income is actually \$927.50, and her husband's net monthly income is \$1,471.25. When added to the monthly food stamp allotment of \$236.00, the net household monthly income is \$2,634.75, not the \$2,779.24 set forth under consolidated finding #25.

As for household expenses, the review examiner failed to include the \$110 per month that the claimant spends each month for toiletries and paper goods and \$165 spent every year to clean the couple's oil burner.³ Therefore, consolidated finding # 40 is incorrect; the claimant's monthly household expenses total \$2,644.00. Not only is this family not bringing in enough money to pay their expenses, but R. Exhibits 14, 15, and 16 show that the claimant has been unable to keep up with her monthly bills for telephone, cable, and internet; for cellular phone service; and for water and sewer.⁴ The record also shows that the claimant is delinquent on an auto loan in the amount of \$4,485.56.⁵

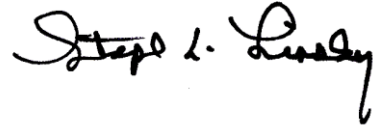
Since the claimant has shown by substantial and credible evidence that her household does not have sufficient income to meet the family's ordinary and necessary living expenses, we conclude as a matter of law that she has satisfied her burden to prove that recovery of the overpayment would defeat the purpose of benefits otherwise authorized, under G.L. c. 151A, § 69(c).

³ The claimant testified that they spend \$110 per month at Walmart for toilet paper, toothpaste, etc. Id.

⁴ R. Exhibit 14 shows that in August, 2013, the claimant had an outstanding past due amount of \$175.35 to Comcast. R. Exhibit 15 showed an outstanding past due balance to Verizon Wireless of \$171.87. R. Exhibit 16, the claimant's water and sewer bill for the same period, showed a past due amount of \$224.81.

⁵ R. Exhibit 6.

The review examiner's decision is reversed. The claimant's overpayment is waived and she is not responsible for returning \$1,037.00 to the unemployment fund.



Stephen M. Linsky, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION – May 13, 2014



Judith M. Neumann, Esq.
Member

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.

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