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Issue ID: 0014 2251 42

Claimant ID:

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Jeremy R. King, 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 June 3, 2014, which was approved by the agency with an effective date of June 1, 2014. On August 21, 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 3, 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 January 27, 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.¹ 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 obtained approval for a DUA training program, took a previously-planned trip to visit her parents in China, then returned to begin training in the DUA-approved program.

Findings of Fact

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

¹ In response to the claimant's allegations on appeal that the hearing was inadequately translated, part of our review included directing DUA's Multilingual Services Department to review the recorded hearing. After their review, they determined there were no deficiencies in the interpretation of the hearing.

1. The claimant primarily speaks Mandarin Chinese.
2. The claimant filed an unemployment claim with an effective date of 6/1/2014.
3. The claimant went to her local career center each week to submit her weekly requests for benefits.
4. In August, at the career center, where she learned about the Training Opportunities Program ("TOPS"), also known as the Section 30 program. The claimant learned that a pre-approved vocational course was available through the YMCA consisting of six months of an intensive English-as-a-Second-Language program followed by five months of computerized office skills training. Classes were available beginning in September, October, or November. Classes were scheduled for 26.25 hours per week, five days a week. The claimant wished to enroll in this course.
5. The claimant was planning a vacation to China and Taiwan, between 10/1/2014 and 10/31/2014. Therefore, the earliest class she could enroll in was the one beginning 11/10/2014. An employee through the YMCA training program informed the claimant that she could take the class beginning in November.
6. On 8/21/2014, the claimant, with the assistance of an employee of the YMCA training program, submitted her Section 30 application to the Department of Unemployment Assistance ("DUA"). The course, including both the English-as-a-Second-Language and the office skills training, was due to last from 11/10/2014 until 10/2/2015.
7. On 9/26/2014, DUA mailed the claimant a follow-up questionnaire about her Section 30 application, asking why she had not taken an earlier class. The claimant did not receive this questionnaire before leaving for China.
8. On 9/30/2014, the day before she was due to leave for China, the claimant went to her local career center to ask if she needed to do anything in regard to her unemployment claim. A career center representative informed the claimant that she just needed to stop requesting her weekly benefits while she was gone, and that nothing else was required of her.
9. On 10/1/2014, the claimant left for China.
10. On 10/3/2014, the DUA issued the claimant a Notice of Disqualification, stating that she was not eligible to receive up to 26 additional weeks of unemployment benefits while attending an approved Section 30 program, because she failed to respond to the questionnaire mailed on 9/26/2014. The claimant did not immediately receive this document because she was in China.
11. On 10/31/2014, the claimant returned from Taiwan.

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 the claimant 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.)

The review examiner found that the claimant learned of training programs offered by her school in September and October 2014, filed, for training benefits with DUA during the week ending August 23, 2014, took a planned trip to China from October 1 through October 31, 2014, and began her training program on November 10, 2014. The review examiner concluded the claimant was disqualified from training benefits because she did not enroll in the first available appropriate 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 (programs that began in September and October 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 planned a trip to China. She testified that she was accompanying an unidentified 89-year old woman to China and Taiwan. In one appeal document, the claimant contended that she went to visit her sister and brother, both of whom were in poor health, with her brother in the last stages of diabetes. In a second appeal document submitted by the

claimant's attorney, counsel added that the claimant's sister in China was struggling with cancer.

The claimant traveled out of the country from October 1 through October 31 and began her training program with the next available class after her return, the one beginning November 10, 2014. We also note that the claimant in good faith sought advice from a DUA career center representative, prior to her trip, about the status of her unemployment compensation claim and, as reflected in the administrative record, followed that representative's advice not to certify for benefits while she was out of the country. Under these compelling personal circumstances, we conclude that the claimant acted reasonably and in good faith in concluding that the first program "appropriate" for her was the one that began shortly 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 relatives 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 ailing 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 will be completed within one year, satisfying 430 CMR 9.05(2)(c). The program is listed as approved for training benefits within the Massachusetts One-Stop Employment System, and satisfies the job placement rate requirement of 430 CMR 9.05(2)(a). *See* Hearings Exhibit # 2B. 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.

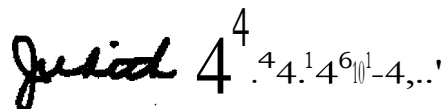
² The poor health of the claimant's siblings, while not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing and placed in the record, and are thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 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 26, 2015



Paul T. Fitzgerald, Esq.
Chairman



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/rh

