

- DECISION -

Claimant:	Decision No.:	4888-BR-13
KYLE M WHITT	Date:	November 12, 2013
	Appeal No.:	1304237
	S.S. No.:	
Employer:	L.O. No.:	63
MAYORS OFFICE CITY OF BALTO	Appellant:	Claimant

Issue: Whether the claimant is receiving or has received a governmental or other pension, retirement or retired pay, annuity or other similar periodic payment which is based on any previous work of such individual, which is equal to or in excess of his/her weekly benefit amount, within the meaning of Maryland Code, Labor and Employment Article, Title 8, Section 1008.

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the Maryland Rules of Procedure, Title 7, Chapter 200.

The period for filing an appeal expires: December 12, 2013

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearing. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file.

The General Assembly declared that, in its considered judgment, the public good and the general welfare of the citizens of the State required the enactment of the Unemployment Insurance Law, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit

of individuals unemployed through no fault of their own. *Md. Code Ann., Lab. & Empl. Art., § 8-102(c)*. Unemployment compensation laws are to be read liberally in favor of eligibility, and disqualification provisions are to be strictly construed. *Sinai Hosp. of Baltimore v. Dept. of Empl. & Training, 309 Md. 28 (1987)*.

The Board reviews the record *de novo* and may affirm, modify, or reverse the findings of fact or conclusions of law of the hearing examiner on the basis of evidence submitted to the hearing examiner, or evidence that the Board may direct to be taken, or may remand any case to a hearing examiner for purposes it may direct. *Md. Code Ann., Lab. & Empl. Art., § 8-510(d)*; *COMAR 09.32.06.04*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*.

The *Agency Fact Finding Report* was not moved into evidence. The Board did not consider this document when rendering its decision.

The Board notes that the Agency and the employer, duly notified of the date, time and place of the April 1, 2013 Lower Appeals hearing and the November 5, 2013 Board hearing, failed to appear. The Board finds the claimant's testimony credible, consistent and uncontradicted.

The Board is persuaded that the payment the claimant received was not a disqualifying "pension" within the meaning of *Md. Code Ann., Lab. & Empl. art., Section 8-1008(a)(1)*. The Board finds that the claimant received a "disability retirement benefit" that is "in the nature of a Worker's Compensation award". See *Claimant's Exhibit B-1*. A disqualifying retirement payment...does not include a payment from a state or federal workers' compensation program." The Board finds the claimant's disability retirement benefit falls within the exception set forth in *Md. Code Ann., Lab. & Empl. art., Section 8-1008(a)(2)* and is not disqualifying.

The Board is persuaded based upon a preponderance of the credible evidence that the claimant is entitled to receive unemployment insurance benefits without its amount being reduced by his disability retirement payments.

Because the Board finds that the claimant's retirement disability payment is equivalent to a state worker's compensation payment and is not disqualifying, the Board declines to address the merits of the claimant's other legal arguments because they are moot.

The claimant prevailed on the issue of whether he filed a timely appeal within the meaning of *Md. Code Ann., Lab. & Empl. art., Section 8-806* in the April 16, 2013 decision. Because the claimant was not aggrieved by this portion of the hearing examiner's decision, and because the employer did not appeal the late appeal issue, the Board finds this issue is not before the Board. The hearing examiner's decision in this limited regard is final. The Board finds that the claimant only appealed the *Section 8-1008* issue. Therefore, the Board shall not address the late appeal issue in this decision.

FINDINGS OF FACT

The claimant previously worked for the City of Baltimore from September 30, 1985 through February 17, 2004 as a full-time firefighter. The claimant was separated from this employment due to a work-related injury causing a disability rendering him unable to continue work as a firefighter. On April 26, 2004, the claimant was granted a "disability retirement benefit" with an annual benefit amount of \$4,151.18. The disability retirement benefit "is considered in the nature of a Worker's Compensation award" in compensation for his work-related injury and not a regular service retirement benefit.

The claimant subsequently worked for an employment agency. The employment agency's client for whom the claimant worked was the City of Baltimore. The claimant did not perform work related to firefighting during his tenure with the employment agency. The claimant continued to collect his disability retirement benefit during this period.

In April 2012, the City of Baltimore ceased its contract with the employment agency. Notwithstanding, the city directly hired the claimant as a contractual employee to continue his work with the city. The claimant remained employed as a full-time contractual employee, without benefits, through December 31, 2012. On that date, the claimant was separated from employment with the City of Baltimore. The claimant continues to collect his disability retirement payment.

Upon his separation from employment, the claimant filed a benefits claim with a benefit year beginning December 30, 2012.

CONCLUSIONS OF LAW

Md. Code Ann., Lab. & Empl. art., Section 8-1008 provides, in pertinent part,

§ 8-1008. Retirement payments

(a) "Retirement payment" defined. In this section, "retirement payment":

(1) means an amount in the form of a pension, annuity, or retirement or retired pay from a trust, annuity, profit sharing plan, insurance fund, annuity or insurance contract, or any other similar lump sum or periodic payment that is based on any previous covered employment for a base period employer under a plan paid for wholly or partly by a base period employer; and

(2) does not include a payment from a state or federal workers' compensation program.

* * * * *

In the instant case, the Board finds the weight of the credible evidence supports a finding that the claimant received disability retirement payments that are equivalent to state workers' compensation program payments within the meaning of *Section 8-1008(a)(2)*. There is insufficient evidence that the claimant's

disability retirement payments must be treated as disqualifying retirement payments, in whole or in part, within the meaning of *Section 8-1008(a)(1)*.

DECISION

THE BOARD HOLDS that the claimant is not in receipt of a retirement payment within the meaning of *Section 8-1008(a)(1)*.

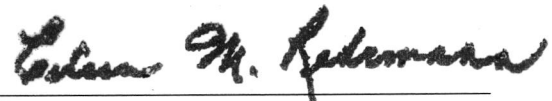
THE BOARD HOLDS that the clamant is in receipt of disability retirement payments equivalent to non-disqualifying state workers' compensation payments within the meaning of *Section 8-1008(a)(2)*.

No reduction may be made to the claimant's unemployment insurance benefits related to the claimant's receipt of the disability retirement payments.

The hearing examiner's decision is reversed.



Clayton A. Mitchell, Sr., Associate Member



Eileen M. Rehrmann, Associate Member

VD

Copies mailed to:

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