

- DECISION -

Claimant:
PIERRE P BANDA

Decision No.: 5528-BR-12

Date: November 20, 2012

Appeal No.: 1227458

S.S. No.:

Employer:
AMERICAN FAMILY LIFE ASSURANCE
COMPANY OF COLUMBUS INC

L.O. No.: 61

Appellant: Claimant

Issue: Whether the claimant was able, available and actively seeking work within the meaning of the Maryland Code, Labor and Employment Article, Title 8 Section 903.

- 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 20, 2012

REVIEW OF THE RECORD

After a review of the record, the Board adopts the hearing examiner's findings of fact. The Board makes the following additional findings of fact:

The claimant has no restrictions on his ability to work. The claimant is maintaining an active work search of two to three job contacts per week. The claimant continues to attempt to secure earnings through sales of insurance products for the employer named herein. The part-time nature of the claimant's insurance sales work does not preclude him from seeking or accepting other, full-time work.

The Board concludes that these facts warrant different conclusions of law and a reversal of the hearing examiner's decision.

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. *Md. Code Ann., Lab. & Empl. Art., § 8-510(d)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*.

The claimant has the burden of demonstrating by a preponderance of the evidence that he is able, available and actively seeking work. *Md. Code Ann., Lab. & Empl. Art., § 8-903*. A claimant may not impose conditions and limitations on his willingness to work and still be available as the statute requires. *Robinson v. Md. Empl. Sec. Bd, 202 Md. 515, 519 (1953)*. A denial of unemployment insurance benefits is warranted if the evidence supports a finding that the claimant was unavailable for work. *Md. Empl. Sec. Bd. v. Poorbaugh, 195 Md. 197, 198 (1950)*; compare *Laurel Racing Ass'n Ltd. P'shp v. Babendreier, 146 Md. App. 1, 21 (2002)*.

A claimant should actively seek work in those fields in which he is most likely to obtain employment. *Goldman v. Allen's Auto Supply, 1123-BR-82*; also see and compare *Laurel Racing Ass'n Ltd. P'shp v. Babendreier, 146 Md. App. 1 (2002)*.

The term "available for work" as used in §8-903 means, among other things, a general willingness to work demonstrated by an active and reasonable search to obtain work. *Plaugher v. Preston Trucking, 279-BH-84*. A claimant need not make herself available to a specific employer, particularly when the employer cannot guarantee her work, in order to be available as the statute requires. *Laurel Racing Ass'n Ltd. P'shp v. Babendreier, 146 Md. App. 1, 22 (2002)*.

Section 8-903 provides that a claimant must be able to work, available to work, and actively seeking work in each week for which benefits are claimed.

In his appeal, the claimant offers no specific contentions of error as to the findings of fact or the conclusions of law in the hearing examiner's decision. The claimant does not cite to the evidence of record and makes no other contentions of error.

On appeal, the Board reviews the evidence of record from the Lower Appeals Division hearing. The Board will not order the taking of additional evidence or a new hearing unless there has been clear error, a defect in the record, or a failure of due process. The record is complete. Both parties appeared and

testified. Both parties were given the opportunity to cross-examine opposing witnesses and to offer and object to documentary evidence. Both parties were offered closing statements. The necessary elements of due process were observed throughout the hearing. Sufficient competent evidence exists in the record upon which the Board may make its decision. The Board finds no reason to order a new hearing or take additional evidence in this matter.

Contrary to the hearing examiner's conclusion, the Board finds the claimant was available for work at all times material to this decision. The claimant is performing services for the employer, in a part-time capacity, for which he is paid commissions. The claimant is not occupied on a full-time basis in this pursuit and has been maintaining an active and appropriate work search. The claimant is not precluded from accepting an offer of suitable from another employer because of this work or because of any other restriction or limitation. The Board is of the opinion that the hearing examiner erred in finding the claimant ineligible for benefits based upon this work.

The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

The Board further notes that, because the named employer here is not a base-period employer, its experience rating is unaffected by this decision.

The Board finds based upon a preponderance of the credible evidence that the claimant has met his burden of demonstrating that he was able, available, and actively seeking work within the meaning of *Robinson v. Md. Empl. Sec. Bd.*, 202 Md. 515 (1953) and §8-903. The decision shall be reversed for the reasons stated herein.

DECISION

The claimant is able to work, available for work and actively seeking work within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 903. Benefits are allowed from the week beginning May 6, 2012.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

RD

Copies mailed to:

PIERRE P. BANDA

AMERICAN FAMILY LIFE ASSURANCE

SUSAN BASS DLLR

DENNIS SULLIVAN ESQ.

AFLAC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

PIERRE P BANDA

SSN #

Claimant

vs.

AMERICAN FAMILY LIFE ASSURANCE
COMPANY OF COLUMBUS INC

Employer/Agency

Before the:

**Maryland Department of Labor,
Licensing and Regulation
Division of Appeals**
1100 North Eutaw Street
Room 511
Baltimore, MD 21201
(410) 767-2421

Appeal Number: 1227458
Appellant: Employer
Local Office : 61 / COLLEGE PARK
CLAIM CENTER

September 07, 2012

For the Claimant: PRESENT

For the Employer: DENNIS SULLIVAN, ESQ.

For the Agency:

ISSUE(S)

Whether the claimant is able, available for work and actively seeking work within the meaning of the MD Code Annotated, Labor and Employment Article, Title 8 Sections 903 and 904; and/or whether the claimant is entitled to sick claim benefits within the meaning of Section 8-907.

PREAMBLE

All parties contend that the above captioned employer is not actually an employer of the claimant. The parties believe that the claimant is an independent contractor. The Examiner specifically does not make a finding as to whether the claimant is an employee or independent contractor, as that was not a noticed issue.

FINDINGS OF FACT

The claimant, Pierre Banda, filed for unemployment insurance benefits establishing a benefit year effective March 20, 2011 with a weekly benefit amount of \$430.00.

The claimant has an involvement with the above captioned entity where he sells supplemental insurance and is paid solely by commission. He began this relationship on May 9, 2012. He works twenty five to twenty eight hours per week trying to sell insurance. The claimant reports his earned commission when he files for benefits.

CONCLUSIONS OF LAW

Md. Code Ann., Labor of Emp. Article, Section 8-903 provides that a claimant for unemployment insurance benefits shall be (1) able to work; (2) available for work; and (3) actively seeking work. In Robinson v. Maryland Employment Sec. Bd., 202 Md. 515, 97 A.2d 300 (1953), the Court of Appeals held that a claimant may not impose restrictions upon his or her willingness to work and still be available as the statute requires.

The claimant is not meeting the eligibility requirements of the law where he is spending 25 hours per week trying to set up his own business, and contacting two to three employers per week in his job search. A claimant must not completely divest himself of his business to meet the requirements of Section 8-903, but a claimant who spends as much as 25 hours per week promoting his business, while making only two to three job contacts, is not meeting the Section 8-903 requirements. Veith, 34-BR-82.

EVALUATION OF EVIDENCE

The Hearing Examiner considered all of the testimony and evidence of record in reaching this decision. Where the evidence was in conflict, the Hearing Examiner decided the facts on the credible evidence as determined by the Hearing Examiner.

The claimant had the burden to show, by a preponderance of the evidence, that he is in compliance with Agency requirements. In the case at bar, that burden has not been met. The claimant spends a substantial amount of time of trying to grow his business with this employer. Whether he is an independent contractor or employee of the above captioned employer is irrelevant for purposes of this hearing. The amount of time he is spending selling insurance establishes that he is not available for work as that term is defined by Maryland law. He is essentially already working close to a full time job, and therefore not available for work. Accordingly, a disqualification is warranted and benefits will not be allowed for those weeks in which the claimant demonstrated a material restriction upon availability for work, as discussed above.

DECISION

IT IS HELD THAT the claimant is not fully able, available and actively seeking work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-903. Benefits are denied for the week beginning May 6, 2012 and until the claimant is fully able, available and actively seeking work without material restriction.

The determination of the Claims Specialist is modified.



B F Sapp, Esq.
Hearing Examiner

Notice of Right to Request Waiver of Overpayment

The Department of Labor, Licensing and Regulation may seek recovery of any overpayment received by the Claimant. Pursuant to Section 8-809 of the Labor and Employment Article of the Annotated Code of Maryland, and Code of Maryland Regulations 09.32.07.01 through 09.32.07.09, the Claimant has a right to request a waiver of recovery of this overpayment. This request may be made by contacting Overpayment Recoveries Unit at 410-767-2404. If this request is made, the Claimant is entitled to a hearing on this issue.

A request for waiver of recovery of overpayment does not act as an appeal of this decision.

Esto es un documento legal importante que decide si usted recibirá los beneficios del seguro del desempleo. Si usted disiente de lo que fue decidido, usted tiene un tiempo limitado a apelar esta decisión. Si usted no entiende cómo apelar, usted puede contactar (301) 313-8000 para una explicación.

Notice of Right of Further Appeal

Any party may request a further appeal either in person, by facsimile or by mail with the Board of Appeals. Under COMAR 09.32.06.01A(1) appeals may not be filed by e-mail. Your appeal must be filed by September 24, 2012. You may file your request for further appeal in person at or by mail to the following address:

Board of Appeals
1100 North Eutaw Street
Room 515
Baltimore, Maryland 21201
Fax 410-767-2787
Phone 410-767-2781

NOTE: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing : August 28,2012

CH/Specialist ID: WCP5C

Seq No: 001

Copies mailed on September 07, 2012 to:

PIERRE P. BANDA

AMERICAN FAMILY LIFE ASSURANCE

LOCAL OFFICE #61

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