

- DECISION -

Claimant:
RICHARD N ZALUSKY

Decision No.: 1644-BR-12

Date: April 13, 2012

Appeal No.: 1136755

S.S. No.:

Employer:
FORT MONMOUTH
ABERDEEN PROVING GROUND CPAC

L.O. No.: 60

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: May 14, 2012

REVIEW OF THE RECORD

After a review of the record, and after deleting the last paragraph, the Board adopts the hearing examiner's modified findings of fact. The Board makes the following additional findings of fact:

The claims examiner concluded that the claimant's pension payments from the U. S. Army were from a base period employer, and were in excess of his weekly benefit amount, thus rendering the claimant subject to disqualification under the provisions of §8-1008.

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, 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)*.

Md. Code Ann., Labor & Emp. Article, § 8-1008 and *COMAR 09.32.02.14* provide that an individual may be partially disqualified from the receipt of benefits for each week in which the Secretary determines that the individual, who is otherwise eligible for benefits, receives a retirement payment, if the weekly amount of the retirement payment is less than the individual's weekly benefit amount. In such a case, the individual may receive benefits which are reduced by the amount of the retirement payment.

As provided in §8-1008, "retirement payment" 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 does not include a payment from a state or federal workers' compensation program.

Md. Code Ann., Labor & Emp. Article, §8-1008, further provides a formula to compute the effect of a retirement payment on eligibility for benefits, which states that: (1) if a base period employer paid the full cost of the plan that provides the retirement, the full retirement payment shall be considered; and (2) if a base period employer paid only part of the cost of the plan that provides the retirement payment, 50% of the retirement payment shall be considered. In addition, §8-1008, requires that to compute the weekly amount of a periodic retirement payment, it shall be prorated on a weekly basis for the period between periodic retirement payments. Read collectively, *Maryland Code, Labor & Employment Article, Title 8, Section 101 (c) and (b)*, define "base period employer" as "any employing unit who paid wages to an individual during the first 4 of the last 5 completed calendar quarters immediately preceding the start of the benefit year."

In his appeal, the claimant reiterates his contentions from the hearing and argues that his U. S. Army pension payments should not render him ineligible. He bases this contention on four primary factors: 1) that the Army (as his most recent Federal civilian service employer) was his base-period employer; 2) that the Army (from which he receives his pension) was not a base period employer; 3) that he incorrectly

answered a question concerning the receipt of a pension from an employer for whom he had worked within the last 18 months; and 4) that a portion of his pension is actually for a service-related disability.

The Board has thoroughly reviewed the evidence of record in this matter and agrees with the claimant's contentions. The claimant was receiving a pension from the U. S. Army following his retirement, in 1997, after more than twenty years of active-duty military service. He worked for a brief period for an unrelated, non-federal employer, then accepted a position as a Federal civilian employee, assigned to the Aberdeen Proving Grounds, under the supervision of the U. S. Army. The claimant was separated from that employment due to a reduction in force after more than ten years of employment. The claimant is not eligible for a pension as a Federal civilian employee.

The claimant's only base period employer is the U. S. Army, as a civilian employee. The claimant is receiving his pension from the U. S. Army, as a retired member of the military. The Board will draw a distinction between these two periods of employment because they are functionally different. First, as a civilian employee of the U. S. Army, the claimant was subject to different work-place rules and practices than he had previously experienced as an active-duty soldier. Second, the pension he receives was completely and totally unrelated to his most-recent employment. It existed, in 1997 when he retired, under the same conditions as it exists today. It was not impacted, at all, by the claimant's subsequent employment with the U. S. Army. It is merely an unfortunate coincidence that the claimant happened to accept employment from the same employer who pays his retirement pension. The periods of employment are not connected and the U. S. Army paying his pension should not be considered the same as the U. S. Army from whom he recently was laid off due to a reduction in force. The question has only become an issue because of the fact that the claimant accepted a civilian position from his former military employer. This issue would not have arisen if, for example, the claimant had accepted a similar position with the U. S. Air Force, or if the claimant had taken a similar position with any private employer.

Additionally, the Board notes that, when the claimant retired from active-duty service, if he had elected to file a claim for benefits, it would have been a UCX (Unemployment Compensation for Ex-Service Personnel) claim. Any benefits for which he may have been eligible would have been under this program. The claimant's claim for benefits, now, would be under the UCFE (Unemployment Compensation for Federal Employees) program. These are distinct and unrelated benefit programs. The Board finds the distinction between these different programs to be analogous to the distinction between the two types of employment the claimant had with the same employing unit.

The Board is of the opinion that the claimant's most recent base-period employer, should not be considered to be the same as the employer from whom he receives his pension. Because of this, the Board will not further consider the claimant's contention that part of his pension payment is for a military disability.

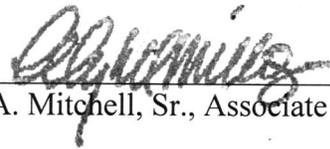
DECISION

IT IS HELD THAT the claimant does not receive a pension payment from a base-period employer. Pursuant to *Maryland Code Ann., Labor and Emp. Article, §8-1008*, the claimant's pension payments are not disqualifying.

The hearing examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

VD

Copies mailed to:

RICHARD N. ZALUSKY

FORT MONMOUTH

SUSAN BASS DLLR

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

RICHARD N ZALUSKY

SSN #

Claimant

vs.

FORT MONMOUTH
ABERDEEN PROVING GROUND CPAC

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: 1136755
Appellant: Claimant
Local Office : 60 / LARGO

November 30, 2011

For the Claimant: PRESENT

For the Employer:

For the Agency:

ISSUE(S)

Whether the claimant's receipt of a pension based on wages from a base period employer is disqualifying within the meaning of MD Code Annotated, Labor and Employment Article, Title 8, Section 1008.

FINDINGS OF FACT

The claimant, Richard Zalusky, filed a claim for unemployment insurance benefits, establishing a benefit year effective September 11, 2011, and a weekly benefit amount of \$430.00. The base period for this claim consists of the second, third and fourth quarters of 2010 and the first quarter of 2011.

The claimant's last employment was as a civilian employee of the United States Army at Aberdeen Proving Ground. The claimant's began working as a civilian for this employer in 1998 and last day worked in this capacity on September 14, 2011. The claimant began receiving a pension when he retired from active duty from the United States Army in October of 1997 and continues to receive that pension. The claimant did not contribute to the pension.

The claims specialist denied the benefits starting the week beginning November 1, 1997 until meeting the requirements of the law, because the claimant received, and continues to receive, monthly retirement

payments, contrary to the requirements in Maryland Code Annotated, Labor & Employment Article, Title 8, Section 1008.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-1008 and COMAR 09.32.02.14 provide that an individual may be partially disqualified from the receipt of benefits for each week in which the Secretary determines that the individual, who is otherwise eligible for benefits, receives a retirement payment, if the weekly amount of the retirement payment is less than the individual's weekly benefit amount. In such a case, the individual may receive benefits which are reduced by the amount of the retirement payment.

As provided in Section 8-1008, "retirement payment" 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 does not include a payment from a state or federal workers' compensation program.

Section 8-1008 further provides a formula to compute the effect of a retirement payment on eligibility for benefits, which states that: (1) if a base period employer paid the full cost of the plan that provides the retirement, the full retirement payment shall be considered; and (2) if a base period employer paid only part of the cost of the plan that provides the retirement payment, 50% of the retirement payment shall be considered. In addition, Section 8-1008 requires that to compute the weekly amount of a periodic retirement payment, it shall be prorated on a weekly basis for the period between periodic retirement payments. Read collectively, Maryland Code, Labor & Employment Article, Title 8, Section 101 (c) and (b), define "base period employer" as "any employing unit who paid wages to an individual during the first 4 of the last 5 completed calendar quarters immediately preceding the start of the benefit year."

EVALUATION OF THE 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.

In the case at bar, the claimant began receiving a pension when he retired from the United States Army in 1997. Thereafter, the claimant worked as a civilian at Aberdeen Proving Ground for the United States Army. Although the claimant worked for the employer in different capacities, it is still considered the same employer. Since 1997, the claimant has received monthly retirement payments, pursuant to his employment with the employer, in the amount of \$1,883.00, and retains the entire amount for his personal, immediate usage. Since the pension was non-contributory, the full monthly payment amount is deductible from any unemployment insurance benefits to which the claimant might be eligible, pursuant to Maryland Unemployment Insurance Law. The amount to be deducted is calculated as follows:

$\$1,883.00$ (monthly retirement payment) $\times 12 = \$22,596$ (annual retirement amount).

$\$22,596$ (annual retirement amount) $\div 52 = \$434.54$ (weekly retirement amount)

$\$434.54$ (amount deductible from U. I. benefits) rounded up to the nearest dollar, as per Agency practice = $\$435.00$ (weekly deductible retirement amount).

Accordingly, I hold that the claimant's retirement payments warrant a disqualification from the receipt of unemployment insurance benefits pursuant to Title 8, Section 1008.

DECISION

IT IS HELD THAT the claimant is in receipt of a retirement payment that effectively disqualifies the claimant from receiving unemployment benefits within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1008 and COMAR 09.32.02.14. Benefits are denied for the week beginning November 1, 1997 and until the receipt of retirement pay is no longer a bar to benefits. The claimant will then be eligible for benefits so long as all other eligibility requirements are met. The claimant may contact Claimant Information Service concerning the other eligibility requirements of the law at ui@dllr.state.md.us or call 410-949-0022 from the Baltimore region, or 1-800-827-4839 from outside the Baltimore area. Deaf claimants with TTY may contact Client Information Service at 410-767-2727, or outside the Baltimore area at 1-800-827-4400.

The determination of the Claims Specialist is affirmed.



E K Stosur, 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 December 15, 2011. 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 : November 03,2011
CH/Specialist ID: UTW3H
Seq No: 001
Copies mailed on November 30, 2011 to:
RICHARD N. ZALUSKY
FORT MONMOUTH
LOCAL OFFICE #60
SUSAN BASS DLLR