

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

LOUIS CAPORUSSO
(Claimant)

PRECEDENT
DISABILITY DECISION
No. P-D-98
Case No. D-70-9

DEPARTMENT OF HUMAN
RESOURCES DEVELOPMENT

The Department appealed from Referee's Decision No. LB-D-22417 which reversed a determination of the Department holding the claimant ineligible for disability benefits beginning March 30, 1969 under section 2601-1(r) of Title 22 of the California Administrative Code.

STATEMENT OF FACTS

For a number of years the claimant owned and operated a restaurant in Long Beach, California. Effective July 1, 1967 the Department approved the claimant's application as an employer for elective coverage for disability compensation under section 708(b) of the Unemployment Insurance Code. Contributions to the Disability Fund were made only through the quarter ending March 31, 1968. The elective coverage agreement was terminated effective on or about November 25, 1968 because the business had been sold.

The claimant was hospitalized for tests in January 1967 and under treatment by one physician from January 18, 1967 until June 3, 1967 for a condition diagnosed as coronary insufficiency, sternal costochondritis, left. The claimant returned to work but was advised to "take it easy" and to try to supervise only. He tried to avoid the heavy work but that was not always possible with serving, walking and carrying things, particularly when they were busy. The claimant became unable to perform any services at the restaurant other than light supervision on September 1, 1968. The business continued to be operated by his wife until it was sold and the new owners took over on or about November 21, 1968.

After the business was sold, the claimant and his wife went to the East Coast to visit his aged and ill parents. While there, the claimant was hospitalized because of a myocardial infarction from December 23, 1968 until January 11, 1969. By letter dated January 17, 1969 the claimant wrote to the Department to explain he had sold his business, then had a heart attack, and wished to know about filing a disability claim. The claimant was again hospitalized from February 10, 1969 to March 5, 1969 before signing his initial claim form on April 22, 1969. On the form the claimant claimed disability benefits from December 23, 1968, but showed he last worked on September 1, 1968. The form was signed by the doctor on April 25, 1969 and postmarked the next day.

The Department established a disability claim effective March 30, 1969, with a potential maximum benefit amount of \$1,875 payable at the weekly rate of \$80. This award was based on base period wage credits of \$1,875 for each of the quarters ending in December 1967 and March 1968, with no wages shown for the quarters ending in June 1968 and September 1968.

On May 22, 1969 a representative of the Department interviewed the claimant and was informed the claimant had been under the care of another doctor before the heart attack in December 1968 and that the claimant's wife would mail all papers with respect to contributions for quarters following March 31, 1968. The record of the interview contained a notation that if the claimant was cleared on whether he had retired from the labor market, it should be explained to him that no benefits could be paid until he had paid his contributions for the missing quarters. On August 18, 1969 the Department issued a notice of determination that the claim for disability benefits was disallowed beginning March 30, 1969 on the ground the claimant had withdrawn from the labor market prior to the date he became disabled.

The question before us is whether the claimant is entitled to or eligible for disability benefits.

REASONS FOR DECISION

Section 140.5 of the Unemployment Insurance Code provides as follows:

"140.5. 'Unemployment compensation disability benefits' or 'disability benefits' refers to money payments payable under Part 2 of this division to an eligible unemployed individual with

respect to his wage losses due to unemployment as a result of illness or other disability resulting in such individual being unavailable or unable to work due to such illness or disability."

The authorized regulations in Title 22 of the California Administrative Code provide in pertinent part:

"2601-1(r). For the purposes of Section 140.5 of the code no individual shall be deemed eligible for disability benefits for any week of unemployment unless such unemployment is due to a disability. If an individual has been neither employed nor registered for work at a public employment office or other place approved by the director for more than three months immediately preceding the beginning of a period of disability, he is not eligible for benefits unless the Department finds that the unemployment for which he claims benefits is due to a disability and is not due to his previous withdrawal from the labor market."

The Unemployment Insurance Code provides with respect to elective coverage in pertinent part as follows:

"701. An employing unit, not otherwise subject to this division, which files with the director its written election to become an employer for not less than two calendar years, shall, with the written approval of the election by the director, become an employer subject to this division to the same extent as other employers as of the date stated in the approval."

* * *

"705. (a) Except as provided by subdivision (b) of this section, an elective coverage agreement approved by the director pursuant to any section of this article may be terminated as of January 1st of any calendar year only if the agreement has been in effect for two calendar years and if the employing unit . . . on or before the thirty-first day of January of that year, has filed with the director a written application for termination."

* * *

"706. The director may for good cause waive the requirement of section 705 that a written application for termination shall be filed on or before the thirty-first day of January."

* * *

"708. (b) Any individual who is an employer under this division or any two or more individuals who have so qualified may file with the director a written election that their services shall be deemed to be services performed by individuals in employment for an employer for the purposes of Part 2 only of this division. Upon the approval of the election by the director the services of such individuals shall be deemed to constitute employment for an employer for the purposes of Part 2 only of this division. Regardless of their actual earnings, for the purposes of computing disability benefit rights and worker contributions, they shall be deemed to have received remuneration for each calendar quarter in the highest of the maximum amounts stated in column A of Section 2655.

"(c) Contributions required under this division are payable on and after the date stated in the approval of the director. The director may levy assessments under this division for any amount due under this section.

"(d) No benefits shall be paid to any individual based upon remuneration deemed to have been received pursuant to this section unless all contributions due with respect to all remuneration deemed to have been received by such individual pursuant to this section have been paid to the department."

Although the Department determined the claimant was ineligible for disability benefits on the ground he had withdrawn from the labor market before the commencement of the disability, it is our opinion that a more basic question of entitlement must be resolved before any other issue of eligibility may be considered. That question is whether an employer who has an elective coverage agreement for disability compensation with the Department is entitled to claim any disability benefits at a time when his contributions are delinquent. In other words, may the owner of a disability insurance policy collect such insurance when he stopped paying premiums before the risk insured against arose? In our opinion he may not, for unless the premiums are current, the policy has lapsed and no coverage exists. Section 708(d) of the code so provides and we so hold in this case.

The claimant made contributions only through the quarter ending March 31, 1968. He considered himself unable to work as of September 1, 1968, two quarters later, and sold his business and then claimed benefits beginning December 23, 1968, three quarters later. He first informed the Department of his potential claim by letter dated January 17, 1969, after he had been delinquent in his premiums for three quarters. After his claim was filed, the Department beginning May 22, 1969 attempted to obtain the delinquent contributions from the claimant without success. Therefore, although the claimant had sufficient wage credits from the first two quarters of the base period for the effective date given his claim, March 30, 1969, to support a potential award of benefits, he was not entitled to claim such benefits because he was delinquent in his premiums.

Having decided the claimant was not entitled to benefits under section 708(d) of the code, it is unnecessary to decide whether benefits should also be denied on his claim under section 140.5 of the code and section 2601-1(r) of Title 22 of the California Administrative Code.

DECISION

The decision of the referee is modified. The claimant is not entitled to disability benefits under section 708(d) of the code. The claimant's eligibility for benefits under section 140.5 of the code and section 2601-1(r) of Title 22 of the California Administrative Code is not considered.

Sacramento, California, February 4, 1971.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

JOHN B. WEISS

DISSENTING - Written Opinion Attached

LOWELL NELSON

DON BLEWETT

DISSENTING OPINION

We do not agree with our colleagues that the claimant's "policy" has "lapsed" for nonpayment of "premiums." Sections 701, 705 and 706 of the code deal with the term of the elective coverage agreement and how it may be terminated; section 708(b) deals only with the payment of benefits when contributions have not been made. The Department has full power to enforce the contributions requirement here as with any other wage payments. Since the record before us clearly establishes that the Department has no intention of paying any disability benefits to the claimant unless his "premiums" are fully paid, it is our opinion that our fellow board members are disposing of this case on technical grounds, based on an erroneous concept, without serving any real purpose to the claimant or the Department and without considering the substantial issues presented on the merits.

Specifically, this unemployed and disabled claimant, who had been granted elective coverage by the Department and had established base period wage credits for a valid claim, was denied benefits beginning March 30, 1969 on the ground that he had withdrawn from the labor market before he became disabled. We think we should decide this question. Further, we think we should decide it in favor of the claimant. The claimant's regular and customary work was as a restaurant owner and operator for which he had been granted elective coverage. (Appeals Board Decision No. P-B-49) He left that work and became "unemployed" September 1, 1968 because unable to work in his regular and customary work. He later sold his business for the same reason. Since the claimant ceased working because unable to perform his usual work, we would hold that such action did not constitute a withdrawal from the labor market prior to his disability but, rather, constituted unemployment because of disability. (Disability Decisions Nos. 511 and 579) The fact that no claims were filed for this period or that the claimant had not kept up his contributions is not material to this issue.

We would affirm the referee's decision that the claimant is not ineligible for benefits under section 2601-1(r) of Title 22 of the California Administrative Code so that disability benefits would be payable to the claimant provided he is otherwise eligible. Such a holding would apprise the claimant of his potential eligibility with respect to the issue under appeal from the determination of the Department and leave to the Department the consideration and proper disposition of any other issues presented by the claim. Under section 664 of the California Evidence Code, we can presume the Department will regularly perform its official duty to enforce the provisions of section 708(d) of the Unemployment Insurance Code.

Even with this presumption, of course, it may well be appropriate in this case to suggest specific consideration by the Department of the issue under section 708(d) of the code. Also, in view of the claimant's notice to the Department by letter dated January 17, 1969, it would be appropriate to suggest consideration of whether good cause existed to extend the time of filing of the claim under section 2706.1 of the code to backdate it to at least December 23, 1968 instead of only to March 30, 1969. The record does not show that the Department informed the claimant by notice of determination of these possible issues or of any possible issue as to whether he was under the care of a physician who could and would support a claim for benefits beginning September 1, 1968, as required by section 2708 of the code, should the claimant wish to have his claim considered beginning that date when he first was unable to work.

More basically, the evidence before us appears to present some question as to whether elective coverage was properly granted in the first place, in view of the claimant's health situation as of July 1, 1967 and the provisions of section 704 of the code, and whether the contributions or "premiums" already paid by the claimant should be returned to him. But here again with this possible issue, as well as other possible issues, including that decided by our fellow board members, we would leave them for the primary, albeit suggested, consideration by the Department and here decide only the issue presented specifically to us on the merits.

We recognize that the Department's piecemeal approach to determination of the claimant's entitlement and eligibility for benefits in connection with his claim appears both frustrating and inconsistent with the spirit of procedural due process. However, the failure of the majority of this board to decide the specific issue presented to us on the merits results in but a further fragmentation process and delay.

This unemployed and disabled claimant, having apparent proper wage credits and a valid claim, is being asked to pay premiums only to ultimately again be denied benefits or again go through the process of appeal. With this procedure we cannot agree.

LOWELL NELSON

DON BLEWETT