

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT**

In the Matter of)
)
JOHN KELLAR) OAH No. 21-0901-PUA
) Agency No. P21 270
_____)

APPEAL DECISION

Docket Number: P21 270

Hearing Date: May 25, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

John Kellar

None

CASE HISTORY

The claimant, John Kellar, timely appealed a January 22, 2021 determination which denied Pandemic Unemployment Assistance (PUA) benefits under the CARES Act, Public Law 116-136.¹ The Department of Labor and Workforce Development referred the appeal to the Office of Administrative Hearings on May 3, 2021. Under the terms of referral, an administrative law judge (ALJ) hears and decides the appeal under procedures specific to PUA appeals. AS 44.64.060 procedures do not apply.

A recorded hearing took place on May 25, 2021. Mr. Kellar testified under oath. The Division of Employment and Training Services (DETS) provided written materials but was not a live participant. The record closed on May 28, 2021.

The issue before the ALJ is whether the claimant meets the eligibility requirements of the Act.

FINDINGS OF FACT

Mr. Kellar initially established a claim for Pandemic Unemployment Assistance benefits effective the week ending March 28, 2020. He was found eligible and PUA benefits were issued. On January 22, 2021, DETS determined that the claimant was not eligible for PUA starting the week ending October 10, 2020, because he was not impacted by COVID-19 in a manner that made him a covered individual under the program.² DETS determined that the claimant's moss removal and gutter cleaning business typically closed for the season by early October each year.

¹ The written notice of the determination is dated January 25, 2021.

² DETS separately determined that the claimant was not a covered individual for the week ending March 28, 2020 through the week ending April 11, 2020. Mr. Kellar does not dispute that finding.

The claimant has a complex medical history. His diagnoses include lower extremity venous insufficiency and significant bilateral lower extremity peripheral arterial disease. He also has underlying high susceptibility to pulmonary infections due to lung damage from smoking.

The claimant worked doing carpentry and gutter installation until 2018, when his medical condition interfered with his ability to find jobs. Since July 1, 2018, he has worked solely for himself at his business, JFI Services. He does moss removal and gutter cleaning from mid-April to early October. He also does other odd jobs.

During the winter off-season, the claimant stated he continues doing occasional odd jobs. However, he described his off-season work and income in a very general way, suggesting that this work is highly sporadic and generates very little income. He spoke shoveling driveways and sweeping and sanding steps, but said he often does that work at no charge.

In 2019, Mr. Kellar's gross receipts from JFI Services were \$9,800. His net profit was \$5,740. He earned the majority of this income during the outdoor construction season. The claimant may earn about 10% of his annual income from wintertime jobs, but he did not document such earnings.

The claimant appears to have earned no income in 2020. Starting in mid-April 2020, his lack of work was a direct result of the COVID-19 pandemic. On the advice of a health care provider, Mr. Kellar self-quarantined at home to the maximum extent possible because he is at heightened risk of severe complications if he were to contract COVID-19.

On January 21, 2021, one of his doctors, Joseph Ty Bell, M.D., wrote a letter confirming his advice to self-quarantine because the claimant's medical condition places him at high risk of severe complications if he contracted COVID-19. The letter suggests Dr. Bell expected the claimant to get vaccinated at his earliest opportunity. Dr. Bell wrote in part:

For this reason, it is best for him to self-quarantine at home until he can receive the Covid-19 vaccine. Hopefully he will be part of the next wave of persons receiving the vaccine due to his higher risk of severe complication when it is available.

Mr. Kellar actually received his first Covid-19 vaccine dose around May 1, 2021. He was in the process of determining whether and when to receive the second dose when the hearing took place. He planned to confirm his doctor's recommendation after the hearing and submit an update by May 28, 2021.

On June 1, 2021, Mr. Kellar submitted a note from Kimberli Brock, APRN, FNPc, summarily stating that the claimant "has been unable to work the past year [due to]

healthcare status [with] COVID 19 pandemic – he is unable to return to work at this time.”

EXCERPTS OF RELEVANT PROVISIONS OF LAW

The CARES Act of 2020, Public Law 116-136, Title II, Sec. 2102 Pandemic Unemployment Assistance

(3) COVERED INDIVIDUAL.—The term “covered individual”—

(A) means an individual who—

(i) is not eligible for regular compensation or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107, including an individual who has exhausted all rights to regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107; and

(ii) provides self-certification that the individual—

(I) is otherwise able to work and available for work within the meaning of applicable State law, except the individual is unemployed, partially unemployed, or unable or unavailable to work because—

(aa) the individual has been diagnosed with COVID–19 or is experiencing symptoms of COVID–19 and seeking a medical diagnosis;

(bb) a member of the individual's household has been diagnosed with COVID–19;

(cc) the individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID–19;

(dd) a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID–19 public health emergency and such school or facility care is required for the individual to work;

(ee) the individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID–19 public health emergency;

(ff) the individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID–19;

(gg) the individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency;

(hh) the individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19;

(ii) the individual has to quit his or her job as a direct result of COVID-19;

(jj) the individual's place of employment is closed as a direct result of the COVID-19 public health emergency; or

(kk) the individual meets any additional criteria established by the Secretary for unemployment assistance under this section; or

(II) is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107 and meets the requirements of subclause (I); and

(B) does not include—

(i) an individual who has the ability to telework with pay; or

(ii) an individual who is receiving paid sick leave or other paid leave benefits, regardless of whether the individual meets a qualification described in items (aa) through (kk) of subparagraph (A)(i)(I).

Unemployment Insurance Program Letter (UIPL) 16-20, Change 2 Issued by U.S. Department of Labor on July 21, 2020:

Clarification on item (kk) of acceptable COVID-19 related reasons. Section 2102(a)(3)(A)(ii)(I)(kk) of the CARES Act provides for the Secretary of Labor to establish any additional criteria under which an individual may self-certify eligibility for PUA benefits. Section C.1.k. of Attachment I to UIPL No. 16-20 provides for coverage of an independent contractor whose ability to continue performing his or her customary work activities is severely limited because of the COVID-19 public health emergency. The example provided includes a driver of a ride sharing service who has been forced to suspend operations because of COVID-19. Question 42 of Attachment I to UIPL No. 16-20, Change 1, explains that an independent contractor who experiences a “significant diminution of work as a result of COVID-19” may be eligible for PUA. With these examples in UIPL Nos. 16-20 and 16-20, Change 1, the Secretary provides coverage under item (kk) to those self-employed individuals who experienced a

significant diminution of services because of the COVID-19 public health emergency, even absent a suspension of services.

APPLICATION

The CARES Act, Public Law 116-136, Title II, Sec. 2102 Pandemic Unemployment Assistance defines a “covered individual” as a person who is not eligible for unemployment benefits under any state or federal program and who is unemployed or underemployed because of one or more listed reasons. The claimant is not eligible for other unemployment programs because he lacks recent wages in covered employment.

Guidance from the U.S. Department of Labor in UIPL 16-20 Change 2, above, holds that a self-employed individual who experiences a significant reduction in work as a direct result of the pandemic may be considered a covered individual. Eligibility also exists if an individual is unable to perform his normal work because of his doctor’s advice to self-quarantine due to concerns related to COVID-19

The Division agreed that the claimant’s business was directly impacted by the COVID-19 pandemic from the week ending April 18, 2020, through the week ending October 3, 2020. Those weeks define his normal gutter cleaning and moss removal season. The claimant argued his eligibility should continue through the winter because he would have worked if his health care provider had not advised him to self-quarantine.

The claimant did not show that his need to self-quarantine disrupted his normal off-season business activity or income. The claimant normally earns very little if any income after early October. He described some off-season work, like shoveling, that can be done in a socially distant manner. The evidence does not support a finding that he experienced a significant diminution of services as of the week ending October 10, 2020, or that his doctor’s advice impacted his employment or income after that week. The undersigned is unable to find that he is a covered individual as of the week ending October 10, 2020, or thereafter.

The claimant argued he should re-qualify for PUA benefits during the spring of 2021, because his normal seasonal work would have started then. As of May 25, 2021, he continued to self-quarantine based on Dr. Bell’s advice. After the hearing, he submitted the document from Kimberli Brock stating that he has been unable to work and remains unable to work due to his healthcare status and the pandemic.


DECISION

The denial determination issued on January 22, 2020 is **AFFIRMED**. The claimant is not a covered individual for PUA purposes for the week ending October 10, 2020 and thereafter.

The claimant argued he should re-qualify for PUA during the 2021 summer work season. This issue not resolved here. The Division should review and make an initial

determination on this claim, as it involves weeks well after the denial determination at issue in this appeal. Mr. Kellar can request a new appeal if he disagrees with the resulting decision. This matter is **REMANDED** for further review by the Division.

Dated: June 2, 2021

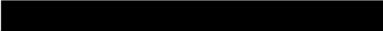

For: Kathryn Swiderski
Administrative Law Judge

APPEAL RIGHTS

This decision is final unless an appeal is filed in writing to the Commissioner of Labor and Workforce Development **within 30 days** after the decision is mailed to each party. The appeal period may be extended only if the appeal is delayed for circumstances beyond the party's control. A statement of rights and procedures is enclosed.

CERTIFICATE OF SERVICE

I certify that on June 2, 2021 the foregoing decision was served on John Kellar (by mail and email). A courtesy copy has been emailed to the DETS UI Technical Team, UI Appeals Team, & UI Support Team.


Office of Administrative Hearings