New York Unemployment Insurance Coalition

By Certified Mail

June 8, 2012

Unemployment Insurance Appeal Board
P.O. Box 15126
Albany, New York 12212-5126

Re: Recent Appeal Board Decisions Regarding The Intersection of Unemployment Insurance Benefits and Social Security Disability Insurance Benefits

Dear Members of the Appeal Board:

On behalf of the New York Unemployment Insurance Coalition, we write to bring to your attention two recent appeal board decisions regarding the intersection of unemployment insurance benefits (UIB) and Social Security Disability Insurance benefits (SSDI). These decisions appear to create a *per se* rule that automatically bars applicants for SSDI benefits from claiming UIB, which is erroneous as a matter of law. Such a mechanical approach is inconsistent with Third Department precedent and prior Board decisions. We ask that the Board exercise its authority pursuant to New York State Labor Law Section 534 and reconsider these decisions in light of the discussion below.

Background

Two recent appeal board decisions, specifically In the Matter of Deborah A. McGavin (AB No. 551733) and In the Matter of Peter C. Lockwood (AB No. 557472), involved claimants who applied for both UIB and SSDI around the same time. The Department of Labor (DOL) issued initial determinations holding the claimants ineligible to receive UIB on the basis that claimants were not capable of work. In both cases, claimants contend that despite their impairments, they were still capable of working at the time they were certifying for UIB and had not received a notice from the Social Security Administration (SSA) that they were eligible for SSDI benefits. The DOL Administrative Law Judge, however, sustained the initial determinations because both claimants applied for SSDI benefits and were later deemed eligible for such benefits. The Appeal Board upheld both decisions.

In McGavin, the Appeal Board cited Appeal Board No. 478816A, stating "we have held in prior decisions, the very act of certifying to total disability in order to qualify for SSDI benefits automatically renders the claimant ineligible for unemployment insurance benefits for lack of capability for work, unless the individual is legally blind and falls within special exceptions (See Appeal Board No. 540271)." Similarly, in Lockwood, the Appeal Board stated "[s]ince the claimant has been determined to be disabled under the provisions of the Social Security Administration, and since those provisions define disability as total disability, and an inability to

work in his past occupation or adjust to any new employment, the claimant is not capable of working for unemployment purposes."

The Board's reliance on AB 478816A, which cites AB 94995 as authority, is misplaced because it misinterprets unemployment insurance law by relying on its own incorrect interpretation of provisions under the Social Security Act. The Board should not summarily conclude that applicants for SSDI who also apply for UIB are unable to work without engaging in further individualized fact-finding consistent with unemployment insurance law. Previous decisions by the Appeal Board and the Third Department specifically warn against such a summary conclusion, stating that there must be a fact-based determination of the individual's ability to work. While it may seem contradictory that a claimant might apply for SSDI stating that he or she is unable to work and at the same time certify for UIB stating that he or she is ready, willing and able to work, there are many situations where both claims can co-exist.

Even in the context of SSA disability benefits, work and disability are not one hundred percent incompatible. SSA has programs in which beneficiaries may test their ability to return to work without losing SSA benefits. Moreover, the Supreme Court has held that receipt of SSA disability benefits is not presumptively incompatible with a claim under the Americans with Disabilities Act (ADA) that the disability benefits recipient can perform the essential functions of his or her job with or without reasonable accommodations, a requirement to invoke the protections of the ADA. Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999). In that case, the Supreme Court held that claims for SSDI benefits and for ADA damages did not inherently conflict, and the employee was entitled to an opportunity to explain the discrepancy between her statement in pursuing SSDI benefits that she was totally disabled and her ADA claim that she could perform essential functions of her job. In reaching that holding, the Court noted that an "SSA representation of total disability differs from a purely factual statement in that it often implies a context-related legal conclusion, namely 'I am disabled for purposes of the Social Security Act.'" Id. at 802. In particular, the Court observed that the SSA does not take into account whether a person can work with reasonable accommodations, whereas a person who can perform the essential functions of a job with reasonable accommodations is entitled to raise a claim of discrimination if he or she is denied that job because of a disability. Id. at 803. Similarly, a claimant can be ready, willing, and able to work if provided with reasonable accommodations and still be eligible to receive disability benefits from the SSA.

The SSA itself acknowledges that under Cleveland, receipt of unemployment insurance benefits does not preclude receipt of SSDI. Rather, it is evidence to be considered, along with other evidence. See http://www.socialsecurityinsider.com/wp-content/uploads/20100809-SSA-memo-unemployment-insurance-ui-soical-security.pdf.

Unemployment Insurance Law

Section 591.2 of the Unemployment Insurance Law imposes two conditions for eligibility for benefits: the claimant must be "capable of work" (*i.e.*, (s)he must possess the physical and mental ability to perform work) and the claimant must be "ready, willing and able to work in his usual employment or in any other for which he is reasonably fitted by training and experience"

(*i.e.*, "available for work"). According to the Electronic Interpretation Service Index[1], "[i]n resolving a question of capability involving long term or serious conditions, claims personnel are not only to consider the nature and extent of the impairment, but also evaluate the claimant's residual capacity for work." In addition, "[a] claimant is considered to be available for work if (s)he places no unreasonable restrictions on the type or conditions of employment (s)he will accept, is making a diligent effort to obtain work, and is prepared to start work without delay upon securing employment." Id.[2]

I. Prior Third Department and Appeal Board decisions rejecting *per se* ineligibility for claimants who have applied for SSDI are correct and should be the relevant precedent.

The Third Department has held that a claimant's application to the SSA may only be considered as supportive evidence of a factual determination of disqualification, rather than a *de facto* establishment of such disqualification. In In the Matter of John L. Roehsler, the Third Department remanded an Appeal Board decision, and stated

> " … claimant's application to the Social Security Administration might properly have been treated as a evidence supportive of a factual determination of disability and consequent disqualification; but we are unable to determine whether the board gave the application that effect or whether the decision is to be construed as embodying the *legally erroneous holding that the mere filing of the application established disability and consequent disqualification from unemployment insurance benefits as a matter for law*."

In the Matter of John L. Roehsler, 19 A.D.2d 927 (3d Dep't 1963) (emphasis added).[3]

The Third Department subsequently confirmed its rejection of a mechanical rule that the mere filing of an application for SSDI automatically disqualifies entitlement to UIB. In the Matter of Herbert Katzen, 111 A.D.2d 1068 (3d Dep't 1985), the court cited Roehsler and noted that "[i]t is pertinent that the Administrative Law Judge concluded that he was constrained to find claimant ineligible as of … the date the disability application was filed. Such a mechanical interpretation should be rejected." Id. at 1069.

The Board correctly applied Roehsler in Appeal Board Case No. 113, 369 stating that the

> "application for disability benefits under the Federal Social Security Act and the receipt of benefits thereunder are evidentiary matters, but do not constitute conclusive proof of incapability under the provisions of the

[1] See http://www.labor.ny.gov/ui/aso/Section_0700.htm#700.

[2] Requiring a reasonable accommodation to be able to perform work could not lawfully be considered an "unreasonable restriction" under Title II of the ADA, governing public programs such as unemployment insurance. 42 U.S.C. §§ 12131-12165.

[3] In this case, claimant applied for both UIB and SSDI benefits because he was uncertain for which benefit his respiratory condition would qualify him and he did so without concealment or intent to defraud. While claimant requested the SSA to make available his medical records for the other agency, SSA refused. See Cleveland, 526 U.S. at 805 (inconsistency of claims normally tolerated by our judicial system).

> Unemployment Insurance Law. This is especially true, since the Social Security Act encourages the resumption of work by recipients of disability benefits, in that the Act specifically requires a recipient for such benefits to submit to vocational rehabilitation. Moreover, the Act provides for the continuance in the payment of disability benefits notwithstanding that the recipient thereof engages in employment for a period of time while receiving such benefits."

http://www.labor.ny.gov/ui/aso/16.htm#1617.

The rule set forth in Roehsler is clear: a claimant's mere filing of an application for SSDI does not automatically disqualify a UIB applicant based on capability under Section 591.2 of the Unemployment Insurance Law. The guidance set forth in Roehsler and Katzen should be followed, dictating that an application for SSDI may be only used as partial evidence of disqualifying lack of capacity, and that such application – absent individualized fact-finding – does not alone provide sufficient grounds for disqualification from UIB. The decisions cited above are more consistent with unemployment insurance law than the knee-jerk rule improperly applied in McGavin and Lockwood and should be used in considering these types of cases.

II. AB 478816A should not be used as a basis for the recent Appeal Board cases because it failed to consider the nature and extent of the impairment and evaluate the claimant's residual capacity for work under unemployment insurance law and instead relied on its erroneous interpretation of provisions of the Social Security Act.

In AB 478816A (cited in McGavin), the Appeal Board misinterprets SSDI law regarding work, and reaches erroneous conclusions about the nature of work that can be performed by SSDI recipients. In AB 478816A, the claimant applied for UIB and SSDI on or about September 1993 because she could not continue working in her then-current employment but could still perform light duty work. While claiming UIB, she searched unsuccessfully for light duty work as a registered nurse. In March 1994, the claimant was found eligible for SSDI (effective February 1993) and subsequently participated in a computer training as part of the vocational rehabilitation services provided under the Social Security Act.

In this decision[4], the Board correctly recognized that under the Social Security Act, "disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a period of not less than 12 months" and that "an individual shall be determined under a disability only if his physical and mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." The Board also recognized that recipients

[4] The Board overturned its prior decision (AB 476856) in the same case. In AB 476856, the Board found the claimant capable of and eligible for UIB finding credible evidence that claimant was prepared for suitable light duty work as a nurse or in an office and searched for that type of work and also enrolled in training to improve her prospects of obtaining general office work since she could no longer work in her usual employment as a registered nurse.

of SSDI benefits are permitted to participate in vocational rehabilitation services and "render services" during a period of trial work without the need to determine whether the claimant is no longer disabled.

However, the Board drew erroneous conclusions from this analysis. In particular, it incorrectly assumed that an absence of "substantial gainful activity" for SSDI purposes constitutes an absence of "capability" in the UIB context. The Board stated that "the permitted vocational rehabilitation service during the trial work period is not synonymous with substantial gainful work or with any light duty work." This conclusion is baseless, because absent individualized fact-finding, there is no way of knowing whether claimant's light duty work would have amounted to substantial gainful work under the provisions of the Social Security Act. In AB 478816A, the record remained undeveloped in this area.

In actuality (in contrast to the Board's analysis), the definition of "disability" and "substantial gainful activity"[5] under the Social Security Act are very different from the Board's understanding of related "capability" and "ready, willing and able" standards and there is no justification for the Board to interpret and rely on the Social Security Act to determine a claimant's capacity and availability under unemployment insurance law. The steps for determining disability, 20 C.F.R. § 404.1520, use sweeping generalizations appropriate to the administration of a massive nationwide claims system. See Cleveland, 526 U.S. at 804; Heckler v. Campbell, 461 U.S. 458, 467 (1983).

For example, under its regulations on determining whether a claimant is "disabled," the SSA deems certain types of medical conditions, those that meet a "listing," to render one eligible for benefits *per se*, without any separate showing of functional incapacity. 20 C.F.R. § 404, subpart P, Appendix 1. For those who do not meet a listing, the SSA may use a "grid" of medical-vocational guidelines to determine, based on such things as medical condition, age, education, and work experience, whether an applicant for benefits has sufficient "residual functional capacity" to work that he or she is not eligible for benefits. 20 C.F.R. § 404, subpart P, Appendix 2. Therefore, as the Cleveland Court held, an "SSA representation of total disability differs from a purely factual statement," 526 U.S. at 802, and it should not be applied as a *per se* bar on receipt of UIB.

In AB 478816A, the Board cited AB 94,995 stating "[a]pplicants who have certified that they are totally disabled cannot in the same breath hold themselves out for unemployment insurance purposes to be capable for work." That position is inconsistent with the implicit holdings of Roehsler and Katzen, which specifically provide that it would have been erroneous for the Board to have held that "the mere filing of the application established disability and consequent

[5] The Social Security Administration defines "substantial gainful activity" (SGA) as not being able to perform work that involves significant and productive physical or mental activity where earnings are over $1,010.00 per month in 2012. See 20 CFR §§ 404.1510, 404.1572 and 416.910, 416.972; Update Publication No. 05-10003 available at http://www.ssa.gov. In calculating SGA, the SSA deducts "impairment-related work expenses" from earnings, so actual gross earnings could be higher than $1,010.00 per month. See SSR 84-26 available at http://www.socialsecurity.gov/OP_Home/rulings/di/03/SSR84-26-di-03.html. In addition, the determination of whether work performed constitutes SGA takes into consideration whether the work was performed under "special conditions" that take into account a claimant's impairment, 20 C.F.R. § 404.1573(c). See also http://www.ssa.gov/disabilityresearch/wi/detailedinfo.htm. Therefore, an SSDI recipient could be working and earning even more than the standard level of SGA.

disqualification from unemployment insurance benefits as a matter of law." Roehsler, 19 A.D.2d at 927. As the Supreme Court held in Cleveland:

> "if an individual has merely applied for, but has not been awarded, SSDI benefits, any inconsistency in the theory of the claims is of the sort normally tolerated by our legal system. Our ordinary Rules recognize that a person may not be sure in advance upon which legal theory she will succeed, and so permit parties to "set forth two or more statements of a claim or defense alternately or hypothetically," and to "state as many separate claims or defenses as the party has regardless of consistency." Fed. Rule Civ. Proc. 8(e)(2). We do not see why the law in respect to the assertion of SSDI and ADA claims should differ."

Cleveland, 526 U.S. at 805. This reasoning is no less applicable to applications for UIB and SSDI. As the SSA acknowledges:

> "it is often uncertain whether we will find a person who applies for unemployment benefits ultimately to be disabled under our rules, and our decisionmaking process can be quite lengthy.
>
> Therefore, it is SSA's position that individuals need not choose between applying for unemployment insurance and Social Security disability benefits."

http://www.socialsecurityinsider.com/wp-content/uploads/20100809-SSA-memo-unemployment-insurance-ui-soical-security.pdf.

Finally, the facts in AB 94,995 are readily distinguishable from AB 478816A, where the claimant, despite her impairments, was still able to perform light duty work. Throughout the period that she certified for UIB, she believed she was capable of performing light duty work as a registered nurse and looked for that type of work but was unsuccessful in actually getting a light duty job. In addition, she did not know she was eligible for SSDI benefits until six months after her application. In contrast, the claimant in AB 94,955 was a 62-year-old concrete worker who applied for UIB and SSDI and was approved for SSDI. It is significant that there were no other facts in the decision regarding any other work that he could perform. The key difference between AB 94,955 on the one hand and AB 478816A, McGavin and Lockwood on the other hand, is that the latter claimants contended they were capable of light duty work or some form of work despite their impairments. In any event, under the precedents cited above, an individual inquiry is required, and should not be replaced by a *per se* rule. There is no reason now to deviate from Roehsler, Katzen and AB 113,369 and adopt the line of reasoning set forth in the recent Board decisions in Lockwood and McGavin, which is erroneous as a matter of law.

Conclusion

For the reasons set forth above, we respectfully request the Board to reconsider and nullify its decision in Lockwood and McGavin.

Very truly yours,

Bernadette Jentsch
MFY Legal Services, Inc.

Richard Blum
Legal Aid Society

David Raff
Raff & Becker LLP

Julia Price Rosner
Manhattan Legal Services

Robert Gruenwald
Legal Services NYC-Bronx

Jacob Korder
Unemployment Action Center

Dave Fillingame
Volunteers of Legal Service

Hana Kim
MinKwon Center for Community Action

Nicole Salk
South Brooklyn Legal Services

Julie Salwen
Abbey Spanier Rodd & Abrams, LLP

Shana Khader
New York Legal Assistance Group

Seeta Persaud
Legal Aid Bureau of Buffalo

Rachel S. Baldassaro
ECBA Volunteer Lawyers Project, Inc.

cc: Leonard Polletta, Chairman, Unemployment Insurance Appeal Board (by e-mail)
Members of the New York Unemployment Insurance Coalition (by e-mail)