

COMMONWEALTH OF VIRGINIA  
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Sangeeta Sikka  
████████████████████

Caterair International Corp.  
Clifton, New Jersey

Date of Appeal

to Commission: February 6, 1995

Date of Review: March 20, 1995

Place: RICHMOND, VIRGINIA

Decision No.: 47602-C

Date of Mailing: March 22, 1995

Final Date to File Appeal

with Circuit Court: April 11, 1995

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This case comes before the Commission on appeal by the claimant from Appeals Examiner's decision UI-9501395, mailed February 2, 1995.

**ISSUE**

Is the claimant receiving a governmental or other pension, retirement or retired pay, annuity or other similar periodic payment under a plan maintained or contributed to by a base period or chargeable employer as provided in Section 60.2-604 of the Code of Virginia (1950), as amended?

**FINDINGS OF FACT**

The claimant filed a timely appeal from the Appeals Examiner's decision, which held that her weekly benefit amount of \$136, should be reduced by \$104, the weekly amount of her social security disability benefit payments for the period of December 4, through December 17, 1994.

The claimant filed a claim for benefits, effective December 4, 1994, showing Caterair International as her last 30-day employer. The claimant also indicated that she was receiving \$450 per month in social security benefits.

A monetary determination was issued to the claimant on December 6, 1994, showing Caterair International Corporation as her only base period employer. Based upon the wages earned from that employer during her base period, she was entitled to a weekly benefit amount of \$136, for a duration of 23 weeks. The claimant also gave a statement to the Deputy on December 5, 1994, indicating that she was receiving \$450 per month in social security disability benefits. The Deputy then issued a determination which reduced the claimant's weekly benefit amount by the amount of social security benefits she was receiving.

Although duly notified of the Appeals Examiner's hearing, the claimant did not appear or otherwise respond to the notice. In her letter of appeal, dated February 6, 1995, and in follow-up letters dated March 7, 1995, and March 15, 1995, the claimant is attempting to present additional evidence.

#### OPINION

The Commission must first comment upon the additional information submitted by the claimant. When such evidence is presented in this fashion, the Commission is guided by the following rule.

Regulation VR 300-01-8(3)B of the Regulations and General Rules Affecting Unemployment Compensation provides:

Except as otherwise provided by this rule, all appeals to the Commission shall be decided on the basis of a review of the evidence in the record. The Commission, in its discretion, may direct the taking of additional evidence after giving written notice of such hearing to the parties, provided:

1. It is affirmatively shown that the additional evidence is material, and not merely cumulative, corroborative, or collateral; could not have been presented at the prior hearing through the exercise of due diligence; and it is likely to produce a different result at a new hearing; or
2. The record of proceedings before the appeals examiner is insufficient to enable the Commission to make proper, accurate, or complete findings of fact and conclusions of law.

The claimant has not shown why the additional information she now wishes to present could not have been presented at the Appeals Examiner's hearing through the exercise of due diligence, or that the evidence is likely to produce a different result at a new hearing. Furthermore, the record of proceedings before the Appeals Examiner is sufficient to enable the Commission to make proper, accurate, and complete findings of fact and conclusions of law. Therefore, the claimant's additional information will not be considered as evidence in the case, and the decision will be based solely on the existing record.

Section 60.2-604 of the Code of Virginia provides as follows:

The weekly benefit amount payable to an individual for any week which begins in a period for which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment under a plan maintained or contributed to by a base period or chargeable employer based on the previous work of such individual, including payments received by such individual in accordance with Section 65.2-500 or Section 65.2-502, shall be reduced, but not below zero, by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week.

In this case, there is no question that the claimant received social security disability benefits in the amount of \$450 per month during the same period in which she was declared eligible to receive unemployment insurance benefits in the amount of \$136 per week. The claimant contends that social security disability payments should not be offset against her unemployment compensation benefits because they are not based on her previous work, but on a disability. The Commission disagrees with this contention. Section 423 of Title 42 of the United States Code deals with disability insurance benefit payments which are administered by the Social Security Administration.

A review of the statute shows that both disability and old age payments are based on contributions made to the social security trust fund by both employers and employees. Furthermore, Section 423 provides that every individual who is insured for disability insurance benefits, has not obtained retirement age, has filed an application for disability insurance benefits, and is under a disability, is eligible for disability insurance benefits. Basically, the benefits which an individual receives under that program are based on the primary insurance amount that individual would be entitled to receive had she attained the age of 62. In

other words, an individual is treated as if she had reached retirement age for the receipt of social security benefits. Therefore, it is essentially a retirement program based on disability as opposed to age. Nevertheless, benefits which are paid to such individual are based on the prior work of such individual, and on contributions made to the social security trust fund by both employers and employees. Accordingly, for purposes of the application of Section 60.2-604 of the Code of Virginia, there is no distinction between social security retirement benefits and social security disability benefits.

Furthermore, in the case of Watkins v. Cantrell, 736 F.2d 933 (4th Cir. 1984), the court held that Section 60.2-604 of the Code of Virginia was constitutional, and did not contravene the federal offset requirement of 26 USC Section 3304.

Based on the above, the Commission concludes that the social security disability benefits paid to the claimant constitute retirement pay under a plan maintained or contributed to by her base period employer based on her previous work as contemplated by the statute. Therefore, the amount of those benefits was correctly offset against the unemployment compensation benefits to which she was entitled. As a result, her weekly benefit amount was correctly reduced by the amount of such benefits she received, computed on a weekly basis. Therefore, the claimant's weekly benefit amount should be reduced to \$32, based on her receipt of social security disability benefits.

#### DECISION

The decision of the Appeals Examiner is hereby affirmed.

It is held that the claimant is eligible for a weekly benefit amount of \$32 between December 4, 1994, and December 17, 1994, based upon her receipt of social security disability benefits.



Willie C. Thompson, Jr.  
Special Examiner