

0014 7197 91 (Dec. 17, 2015) – Work search requirements waived retroactively where the claimant’s Section 30 application was initially denied but then approved as a result of the appeal process.

Board of Review
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Issue ID: 0014 7197 91
Claimant ID: 10269320

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was separated from employment and filed a claim for unemployment benefits with the DUA on July 1, 2014, which was subsequently approved. The claimant submitted an application for training benefits with DUA on October 22, 2014, and began her program on November 24, 2014. DUA initially issued a determination denying the claimant’s request for training benefits on November 7, 2014. That determination was reversed after a hearing, in a decision issued on January 20, 2015.

On December 13, 2014, between the DUA’s initial determination denying the claimant’s request for training benefits and the hearings decision reversing and awarding said benefits, the DUA issued the instant determination disqualifying the claimant from benefits, concluding (in the absence of an approved G.L. c. 151A, § 30, application) that the claimant was ineligible while in school, pursuant to G.L. c. 151A, § 24(b), because she had no prior history of both studying and working full-time. The claimant also appealed that determination to the DUA hearings department. Following a hearing on the merits, attended by the claimant, the review examiner affirmed the agency’s initial determination and denied benefits in a decision rendered on March 30, 2015. We accepted the claimant’s application for review.

Benefits were denied for the period between the date the claimant began school and the date of the review examiner’s decision reversing the denial of her request for training benefits, *i.e.*, from the week beginning November 23, 2014, through the week ending January 10, 2015. The review examiner concluded that, during this period of time, the claimant was required to satisfy availability and work search requirements and did not do so because she was attending school full-time. Thus, the review examiner disqualified the claimant, pursuant to G.L. c. 151A, § 24(b).

After considering the recorded testimony and evidence from the hearing, the review examiner’s decision, the claimant’s appeal, and the claimant’s file on DUA’s UI Online computer database,

we remanded the case to the review examiner for a subsidiary finding as to whether the claimant would have left school if she had been offered employment. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, and information in the claimant's UI Online file.

The issue before the Board is whether the review examiner's conclusion that the claimant was unavailable for full-time work while she was attending school on a full-time basis, before the denial of her application for training benefits was reversed on appeal, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

The review examiner's consolidated findings of fact are set forth below in their entirety:

1. The claimant's appeal is from a determination which denied her benefits under Section 24(b) of the Law for the week-beginning 11/23/14 through 2/28/15.
2. The claimant began attending a fulltime program on 12/1/14 at the Production Line Support School for soldering from 8:00 AM until 4:30 PM, Monday through Friday, each week.
3. The claimant is slated to complete the program and receive her certificate on 2/27/15.
4. The claimant's application for Section 30 was initially denied. The claimant appealed the denial and was granted a hearing on the matter. The hearing resulted in an approval of the claimant's Section 30 application on 1/14/15.
5. The claimant does not have a history of working and going to school fulltime.
6. The claimant actively searched for work each week except the week beginning 12/21/14.
7. If the claimant had been offered a job prior to the decision to award her training benefits on 1/14/15 she would have left school to accept employment.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, however, we do not believe these findings sustain the review examiner's decision to deny the claimant benefits.

The review examiner initially denied benefits pursuant to G.L. c. 151A, § 24(b), which provides, in pertinent part, as follows:

An individual, in order to be eligible for benefits under this chapter, shall . . . (b)
Be capable of, available, and actively seeking work in his usual occupation or any
other occupation for which he is reasonably fitted

Under G.L. c. 151A, § 24(b), the claimant has the burden to prove that she meets each requirement of this statute. There is nothing in the record suggesting that the claimant was not capable of working since filing her claim on July 1, 2014.

The review examiner initially disqualified the claimant on the ground that the claimant was not available for work from November 23, 2014, through the week ending January 10, 2015.¹ The review examiner's decision to deny benefits relied upon regulations governing the implementation of training benefits. 430 CMR 9.06(2)(b) provides:

A claimant who begins a training program prior to final approval of an application shall not be eligible for waiver under 430 CMR 9.07(2) of the requirements for work search or availability for suitable work from the first date of such attendance until the date claimant's application is approved.

430 CMR 9.07(2) provides:

Participants approved under M.G.L. c. 151A, § 30(c) shall not be required to engage in work search activities, and shall be deemed available for suitable work during any week in which the participant is in attendance at the approved training program, or during an approved break in training pursuant to 430 CMR 9.08.

The review examiner's conclusion also relied on the DUA's underlying determination in this case, which specifically cited the claimant's lack of prior history of working full-time while simultaneously attending school full-time as the basis for this disqualification. *See* Hearings Exhibit # 5. We disagree with the review examiner as to both conclusions.

First, even if the claimant was required to meet the availability requirement of G. L. c. 151A, § 24(b), the findings after remand indicate that she in fact met that requirement. While a history of working full-time while attending school full-time can be an indication that a person could meet the requirements of G.L. c. 151A, § 24(b), even while in school, we have previously held that having such a history is not the only way a claimant can meet this burden. Attending school full-time does not result in a *per se* disqualification or a presumption that a person cannot be available for full-time work. Each case must be considered individually. *See* Board of Review Decision # 0011 9491 62 (Feb. 19, 2015).

When asked during the hearing how she would have been available to accept full-time employment if she were in school full-time, the claimant replied she would have quit school to

¹The review examiner's decision acknowledged the claimant's approval for training benefits by reducing the disqualification from November 23, 2014 through February 28, 2015 to November 23, 2014 through January 10, 2015.

go to work. Although the claimant's testimony was not disputed, we were obligated to consider whether it was credible in view of all of the testimony and evidence presented at the hearing. Because the question of credibility is within the scope of the fact-finder's role, we remanded the case to the review examiner for a finding responsive to a single question:

If the claimant had been offered a job prior to the decision to award her training benefits on January 14, 2015, would she have left school to accept employment?

By issuing Consolidated Finding #7, the review examiner accepted as credible the claimant's testimony that she would have quit school had she been offered a job. "The responsibility for choosing between conflicting evidence and for assessing credibility rests with the examiner." Zirelli v. Dir. of Division of Employment Security, 394 Mass. 229 (1985) (citation omitted). Unless it is unreasonable in relation to the evidence presented, it will not be disturbed on appeal. See School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). Our review of the record in its entirety indicates the review examiner's credibility assessment and findings derived from said assessment are reasonable. Consequently, we decline to disturb the review examiner's findings.

As to the work search requirement — again, assuming the claimant in this case was required to comply with that requirement while attending a program that was ultimately approved — the record after remand includes a copy of the claimant's work search log and a finding that the claimant actively sought employment for every week at issue except the week of December 21–27, 2014. Thus, except during that holiday week, the claimant was actively seeking full-time employment while she was attending school.

In addition, we do not believe that the review examiner applied the G.L. c. 151A, § 30, waiver regulations properly in this case. The review examiner concluded that 430 CMR 9.06(2)(b), quoted above, entitled the claimant to a waiver of work search requirements only prospectively from the date of the review examiner's decision, and not retroactively to the effective date of the G.L. c. 151A, § 30, approval. This interpretation effectively penalizes a claimant because the agency made an erroneous decision to deny her G.L. c. 151A, § 30, approval in the first place.

430 CMR 9.06(2)(b) appears designed to encourage claimants not to begin training programs until the agency has had an opportunity to determine whether or not such programs satisfy the various criteria for G.L. c. 151A, § 30, approval. However, once the agency has reviewed the application and reached a decision, this purpose has been served. At that point, if the agency's decision is to deny approval, the claimant has a right to appeal the denial. During the period of appeal, a claimant who stays in the program certainly takes a risk that the appeal will be unsuccessful. To minimize that risk, the claimant could do what the claimant did here: seek work even while attending school. Or, if claimant opts to continue in the training program without being available for or seeking work, she will lose any right to benefits if she loses her G.L. c. 151A, § 30, appeal. If the claimant wins her appeal — if she establishes that the agency should have granted Section 30 benefits from the outset — it serves no legitimate purpose to penalize her by withholding benefits during the time it takes the agency to process her appeal, simply because she was required to appeal in order to obtain the correct decision.

For these reasons, we conclude that a successful appeal has the legal effect of eliminating the previous incorrect determination and replacing it, retroactively, with a decision to approve those benefits. Pursuant to 430 CMR 9.07(2), above, the claimant is therefore relieved (retroactively) of the duty to comply with availability and work search requirements. We note that this result is consistent with several previous decisions of this Board. *See, e.g.*, Board of Review Decisions 0002 1461 25 (May 2, 2014), 0011 6413 57 (August 26, 2014), and 0014 3796 00 (March 5, 2015)².

Here, the claimant was both available for work and actively sought work between November 23, 2014, and January 10, 2015, except for the week ending December 27, 2014. Thus she would be eligible for benefits for all but that one week even if we did not relieve her retroactively of the obligation to fulfill those requirements during her period of approved G.L. c. 151A, § 30, training. Since we have interpreted the regulations to relieve her of that requirement retroactively to the legally effective date of her approval for the program, she is also entitled to benefits for the week ending December 27, 2014.

The review examiner's decision is reversed. The claimant is entitled to receive benefits from the week beginning November 23, 2014, through the week ending January 10, 2015, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 17, 2015



Paul T. Fitzgerald, Esq.
Chairman



Judith M. Neumann, Esq.
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT* OR TO THE BOSTON MUNICIPAL COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

² These Board of Review decision are unpublished decisions, available upon request. For privacy reasons, identifying information is redacted.

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

JN/rh