

0020 8648 94 (Nov. 9, 2017) – Under 430 CMR 9.04(1), the claimant has shown that she is unlikely to obtain suitable employment based on her most recently utilized skills and is in need of training to become re-employed. Her bachelor's degree in the hospitality field is 22 years old, she spent the last 13 years in administrative and activity-related jobs in the healthcare field, and she lives in a rural part of the state, where suitable jobs are more scarce.

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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), denying an extension of the claimant's unemployment benefits while she participated in a training program. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant separated from employment, filed an unemployment claim, and was approved for benefits, effective October 30, 2016. She subsequently filed an application with the DUA for an extension of benefits to attend a training program, which the agency denied on March 7, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by the claimant, the review examiner affirmed the agency's determination and denied the extension of benefits in a decision rendered on April 8, 2017. We accepted the claimant's application for review.

The extended benefits were denied after the review examiner determined that because the claimant already had experience in the health care field and a bachelor's degree in another field, she did not show that she was in need of training to become re-employed, as required under G.L. c. 151A, § 30(c), and 430 CMR 9.04(1). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to afford the claimant an opportunity to present additional evidence as to whether she was unlikely to obtain suitable employment based upon her most recently utilized skills and was in need of training to become re-employed. Upon receiving the review examiner's initial consolidated findings of fact, we remanded the case again for further subsidiary findings from the record, asking the review examiner to consider specific material evidence in the record that was omitted from the findings. The review examiner has now issued her revised consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the claimant is not in need of training in order to become re-employed, as contemplated under 430 CMR 9.04(1), is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked most recently as an Activities Director for the employer, an independent living facility, from 9/14/15 until 11/2/16, when she was discharged after the employer received a complaint. The claimant was working full time for the instant employer earning an annual salary of \$50,000. The claimant had not received any discipline by this employer prior to her separation.
2. After her separation, the claimant attempted to get another job in the health care field before enrolling in a nursing program. The claimant never felt she would be unsuccessful in getting a job in this field and believes the reason why she was unable to find a position was because she had applied during the holiday season. The claimant continued to look for work after the 2016 holiday season, she attempted to gain employment in the health care field after January 1, 2017 by sending out "a lot of resumes" but she was unsuccessful in getting interviews.
3. The claimant filed a new claim for unemployment benefits on 11/2/16.
4. The claimant holds a bachelor degree from 1995 in hotel and restaurant management from Johnson & Wales. It has been 15 years since the claimant was employed in the hospitality field.
5. The claimant had worked in the healthcare field over the last 12 [sic] years. Prior to her last position, the claimant had worked from July of 2011 until the end of September of 2014 as a Quality Life Coordinator at an assisted living facility. She had left this job to take employment with her most recent employer because her most recent employer was closer to her home. From January of 2005 until 2008, the claimant worked as a Care Manager for a hospital. And from February of 2003 until 2004, the claimant had been employed as an Implant Coordinator for a dental office.
6. The claimant went back to school at Springfield Technical Community College in July of 2004 to obtain her prerequisites for nursing. She completed her prerequisites in May of 2006.
7. The claimant initially got in to a nursing program in 2007 but had to withdraw her enrollment when her mother took ill. The claimant's mother passed in August of 2008 and three months later her aunt had passed. It is the

claimant's personal desire to become a nurse as a result of her past experiences.

8. On 12/8/16, the claimant, with the assistance of a Career Counselor, performed a Labor Market Index for a Social & Community Service Manager since the claimant had work experience as an Activities Director, Quality Life Coordinator and a Care Manager. The result of the Labor Market Index was a 10% increase in jobs. This result measured the increase in jobs in this field nationally.
9. On 1/20/17, the claimant submitted a Training Opportunities Program (TOP) application to the Department seeking section 30 benefits for a practical nursing program she planned to attend in the fall of 2017.
10. The claimant received her acceptance letter into the program at the Holyoke Community College which began on 9/5/17. The claimant is slated to complete the program and receive her certificate on 6/24/18. The program is considered full time.
11. On 3/7/17, the DUA issued the claimant a Notice of Disqualification finding her ineligible for benefits under Section 30 because it had not been established that she is unlikely to obtain suitable employment based on her current skill level and experience.
12. The claimant appealed this disqualification.

Credibility Assessment:

Although the claimant contended during the hearing that employers in the hospitality field are more likely to hire applicants a few years out of school with less experience than the claimant, who is more than 20 years out of school and last worked in the hospitality field 15 years ago, and that if she searched for a job in the hospitality field, she would not be able to obtain more than an entry level position, her contentions cannot be deemed credible, since the claimant failed to provide any conclusive evidence to substantiate her contentions. The testimony is general statements made by the claimant having no basis or foundation, sufficient to support such a conclusion.

During the hearing, the claimant testified that in the area near where she lives in [City A], Massachusetts, there are very few places where one can perform this type of work she was performing in the healthcare field and that people already in these jobs tend to hang on to them[.] [H]owever, her testimony is not deemed credible since she provided conflicting testimony regarding this contention when testifying at the remand hearing. She testified first that there were not a lot [of] jobs around but then provided testimony that there are a lot of jobs in the medical field. The claimant's testimony was specific to the [City A] area. She failed to

provide any information regarding similar healthcare jobs in the areas surrounding [City A], Massachusetts.

Lastly, although the claimant testified [that] in the health care industry employers want job candidates with bachelors, associates or certificates[,] her testimony cannot be determined as credible without any conclusive evidence to support it. To the contrary, the claimant indicated that she had a lot of experience in the healthcare field as an Activities Director, Quality Life Coordinator and a Care Manager and testified that there were a lot of health care jobs in the medical field. She testified previously that she was surprised she did not land a job when she applied for jobs after being separated and credited this to the timing of her unemployment. Had the claimant not had a personal goal to become a nurse, there is no substantial evidence to support a finding that the claimant is unlikely to obtain suitable employment based on her most recent utilized skills and is in need of training to become re-employed or whether she had separated from a declining occupation or has been involuntarily and indefinitely separated from employment as a result of a permanent reduction in operations and is training for a high demand occupation.

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. After such review, the Board adopts the review examiner's consolidated findings of fact as supported by substantial and credible evidence, except to the extent that, in Consolidated Finding # 5, the claimant's employment in a dental office in 2003 shows that she spent 13 years working in the healthcare field, not 12. We do not accept the review examiner's credibility assessment, as explained more fully below. We also believe that the consolidated findings of fact support the conclusion that the claimant is eligible for benefits under G.L. c. 151A, § 30(c).

The review examiner's decision to deny the claimant's application for training benefits derives from G.L. c. 151A, § 30(c) (Section 30), which relieves claimants who are enrolled in approved training programs of the obligation to search for work and permits extensions of up to 26 weeks of additional benefits. The procedures and guidelines for approving training benefits are set forth in 430 CMR 9.00–9.09. Under Section 30, it is the claimant's burden to prove that she fulfills all of the requirements to receive a training extension.

The question before us is whether the claimant has established that she meets the requirement under 430 CMR 9.04, which states, in relevant part, as follows:

- (1) Claimants may be eligible for approved training if it is determined that they are permanently separated from work, unlikely to obtain suitable employment based on their most recently utilized skills, and in need of training to become re-employed

In her original decision, the review examiner concluded that the claimant did not need further training to become re-employed because she already had a bachelor's degree and work experience in the health-care industry. In promulgating the cited language of 430 CMR 9.04(1), we do not believe the DUA intended to automatically exclude everyone with a bachelor's degree and work experience from participating in the Section 30 program. We believe it calls for an inquiry into the facts and circumstances in each case.

The consolidated findings show that the claimant earned a bachelor's degree in hotel and restaurant management 22 years ago and stopped working in the hospitality field 15 years ago. Consolidated Finding # 4. She spent the last 13 years working in the healthcare industry. 430 CMR 9.04(1) states that, in determining whether the claimant is in need of training to become re-employed, we must consider the claimant's most recently utilized skills. The claimant's most recently utilized skills were in healthcare, not hotel and restaurant management. Therefore, we take a close look at the skills she has been using while employed in the healthcare field.

Consolidated Findings ## 1 and 5 show that she performed administrative and management tasks in a dental office, hospital, and assisted living facility, and most recently directed activities for residents in an independent living facility. Thus, the claimant's most recently utilized skills were performing non-technical work in the healthcare field. She applied for Section 30 benefits in order to obtain technical training in a practical nursing program. The question is whether she needs this technical training in order to become re-employed in the healthcare field, because she is unlikely to become re-employed in an administrative, management, or activity-director type capacity.

The Career Center had the claimant complete a Labor Market Index survey for a Social & Community Service Manager, a position similar to what she had been doing. Remand Exhibit # 5, page 3 indicates that the results of this survey, showing a projected 10% increase in such jobs, formed the basis for the original determination that the claimant was not in need of further training.¹ Consolidated Finding # 8 clarifies that this was a national job survey for this type of position. The claimant lives in a small city in a rural portion of the state. We note that this national job survey would encompass the entire country, including urban areas where there is a high density of healthcare facilities. Consequently, we are not entirely convinced that the results of this survey are necessarily a reliable indicator of the claimant's chances of becoming re-employed in her geographic area.

Consolidated Finding # 2 shows that the claimant did try to get another job in the healthcare field — both before and after the holidays — before seeking Section 30 benefits, but she was unsuccessful. However, by referring to the claimant's testimony that there were a lot of jobs in the medical field, the review examiner's credibility assessment implies that the claimant did not look hard enough. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. See School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423

¹ Remand Exhibit # 5 is a screen shot of the survey results and typewritten notes from the Career Center. While not explicitly incorporated into the review examiner's findings, it is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

Mass. 7, 15 (1996). “The test is whether the finding is supported by “substantial evidence.”” Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted.) “Substantial evidence is ‘such evidence as a reasonable mind might accept as adequate to support a conclusion,’ taking ‘into account whatever in the record detracts from its weight.’” Id. at 627-628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted.) Based upon the record before us, we reject the review examiner’s assessment because it is illogical and internally inconsistent.

First, as the review examiner states, the claimant testified to looking for work in the [City A] *area*, not simply in [City A]. The plain meaning of these words is that she looked in the areas surrounding [City A]. Next, the review examiner uses the claimant’s statement that there were a lot of jobs in the medical field to somehow discredit her testimony that there were very few places in the healthcare field in the area where one can perform the type of work that she had been doing. There is nothing conflicting about these two statements, when you consider that the claimant had been performing administrative, managerial, or activity-related work. She does not have experience performing any of the more technical jobs in the medical field. Thus, it is likely that there would be a lot of jobs in the medical field requiring technical training that she cannot apply for.

Because the claimant has a bachelor’s degree, it is important that we consider whether she re-enters the labor market as a strong job applicant who does not need more training. The consolidated findings show that her degree is 22 years old and in a different field of work than where she has spent the last 13 years. *See* Consolidated Finding # 4. She testified at the initial remand hearing that her degree and job experience would no longer qualify her for anything but an entry level job in the hospitality field, because employers in that field were more likely to hire applicants only a few years out of school with less experience.² We asked the review examiner about this testimony and to explain her reasons, if she did not believe it. In her credibility assessment, the review examiner simply dismisses the testimony as lacking any basis or foundation to support it. We disagree. The claimant worked in the hospitality field for several years. This experience provides a foundation for her perspective on the hiring prospects in that market.

Although we reject the credibility assessment on this point, we are constrained from making an affirmative finding that the claimant’s bachelor’s degree is wholly inadequate in helping her become re-employed.³ However, common sense suggests that a hospitality degree is not the kind of degree that opens doors in the healthcare field, where the claimant was recently employed, or to the vast majority of jobs in the healthcare field that require technical medical training.

Finally, we do not accept the conclusions contained in the last paragraph of the review examiner’s credibility assessment for several reasons. The first sentence misstates the claimant’s testimony, which was that health care employers want job candidates with bachelor’s or associate’s degrees, or a certificate *in the medical field*. The second and third sentences ignore Consolidated Finding # 2. Even after the holidays, the claimant could not get an interview.

² This portion of the claimant’s testimony is also part of the unchallenged evidence in the record.

³ *See Dir. of Division of Employment Security v. Fingerman*, 378 Mass. 461, 463 (1979) (“[I]nquiry by the board of review into questions of fact, in cases in which it does not conduct an evidentiary hearing, is limited by statute . . . to determining whether the review examiner’s findings are supported by substantial evidence.”).

Thus, it was not just timing that prevented her from finding suitable work in the medical field. We also reject the review examiner's last sentence, as it is a legal conclusion and exceeds the scope of her authority on remand. "Application of law to fact has long been a matter entrusted to the informed judgment of the board of review." Fingerman, 378 Mass. at 463–464.

Despite our problems with the credibility assessment, we are loathe to remand this case a third time. We believe the existing consolidated findings provide sufficient material facts to make a decision. The consolidated findings show that the claimant looked for jobs that utilized her most recent skills for two months without success before applying for Section 30 benefits. Her bachelor's degree was 22 years old and in a different field of work. She also lives in a rural part of the state, where it is reasonable to infer that job opportunities for the type of work which the claimant is suitable for are more limited than they would be in the more densely populated urban centers.

Under these circumstances, we conclude as a matter of law that the claimant meets the criterion under 430 CMR 9.04(1). She is unlikely to obtain suitable employment based on her most recently utilized skills, and she is in need of more technical training to become re-employed.

The review examiner's decision is reversed. The claimant is entitled to receive up to 26 times her weekly benefits rate, pursuant to G.L. c. 151A, § 30(c), while she participates in an approved training program if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 9, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

**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

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.

AB/rh