

Claimant's revised work search log and testimony satisfied the DUA expectation that he search for work from three different employers on three different dates, and that his time was devoted to finding a full-time job rather than finding work for his tree-service business.

**Board of Review
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Issue ID: 0021 1375 28

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Leslie Branco, 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 we affirm in part and reverse in part.

The claimant separated from his employment and filed a claim for unemployment benefits with the DUA, which was approved. However, in a determination issued on February 22, 2017, the claimant was disqualified from receiving benefits, beginning January 22, 2017, for failing to meet the obligation to search for new employment. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, which the claimant attended, the review examiner modified the agency's initial determination, awarding benefits during the three weeks ending February 25, 2017, March 25, 2017, and June 3, 2017, but denying benefits during the remaining 16 weeks between January 22, 2017 and June 10, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant failed to satisfy the minimum work search requirement under G.L. c. 151A, § 24(b), during those 16 weeks. 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 obtain additional information about the claimant's work search efforts during the relevant period of time. The claimant participated in the remand hearing. Thereafter, the review examiner issued her 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 original conclusion, that the claimant is ineligible for benefits in various weeks of his claim because he did not actively search for full-time work a minimum of three days a week, 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 and credibility assessments are set forth below in their entirety:

1. On 01/22/17, the claimant filed a claim for unemployment benefits with an effective date of 01/22/17.
2. Since 01/22/17, the claimant has been physically capable of full time work.
3. On Page 5, Exhibit 1, the claimant said no. This is not accurate.
4. From 01/22/17 through 06/10/17, the claimant has been available for full time work. The claimant has primarily sought work with other employers and spent no hours performing services for his company.
5. The claimant made work search efforts other than those indicated on his initial work search log that he submitted (Exhibit 5, Pages 2-21).
6. From 01/22/17 through 06/10/17, the claimant looked for work on 3 different days each week, via in person visits, phone calls and mailed resumes, for landscaping, tree work and taxi driver occupations (Remand Exhibit 2, Pages 5-8).
7. On 02/27/17, the DUA issued the claimant a Notice of Disqualification determining the claimant was not entitled to receive benefits for the period beginning 01/22/17 and for an indefinite period of time thereafter until he meet[s] the work search requirements of the Law.

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 and credibility assessment except to clarify, as follows. Consolidated Finding # 3, as written, is ambiguous inasmuch as the claimant answered "no" to three separate questions that appear on page 5 of Exhibit # 1, the claimant's completed DUA fact-finding questionnaire. Because the Board's remand order asked specifically about the claimant's answer to the question in Exhibit # 1, page 5 about whether he was looking for a full-time job with other employers, we assume that the review examiner wrote Consolidated Finding # 3 in response. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is disqualified from receiving benefits due to an inadequate work search effort.

The review examiner disqualified the claimant 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

The review examiner concluded that the claimant did not actively search for work, because she relied upon the work search log that he submitted at the original hearing, Exhibit # 5, which indicated that the claimant searched for work on only two days per week in many weeks, and this was less than the DUA's "three and three" guideline (three methods on three different days per week). We recognize that the DUA's "three and three" guideline is a well-known "rule of thumb." It is not a hard-and-fast rule, and there are instances where rigid enforcement would be inappropriate. *See, e.g.*, Board of Review Decision 0018 3756 36 (June 14, 2016) (professional ballet dancer not held to the "three and three" work search guidelines, due to the limited number of jobs in his highly specialized field and evidence showing that he was conducting a work search reasonably designed to lead to his re-employment). Nonetheless, in his appeal to the Board, the claimant asserted that he did, in fact, search on three different dates, but that, in transposing the dates onto the DUA's work search log form for the hearing, he made an error.

We remanded to afford the claimant an opportunity to offer a more accurate log of his work search activities and also to clarify whether he was searching for full-time employment or simply spending time trying to obtain business for his tree-service company. After remand, the consolidated findings show that during all weeks between January 22, 2017, and June 10, 2017, the claimant was searching for full-time employment from three potential employers on three separate days a week. *See also* Remand Exhibit # 2. The consolidated findings further show that these efforts were for new full-time employment and not attempts to acquire work for his own tree service business.

We, therefore, conclude as a matter of law that the claimant has shown that he was able, available, and actively searching for work, as required under G.L. c. 151A, § 24(b), during each week that he certified for benefits between January 22, 2017, and June 10, 2017.

The review examiner's decision is affirmed in part and reversed in part. The portion of the review examiner's decision that found the claimant to be eligible for benefits during the weeks beginning February 19, 2017, March 19, 2017, and May 28, 2017, is affirmed. The portion of the review examiner's decision that disqualified the claimant from receiving benefits during the following periods is reversed: January 22, 2017, through February 18, 2017; February 26, 2017, through March 18, 2017; March 26, 2017, through May 27, 2017; and June 4, 2017, through June 10, 2017. The claimant is entitled to receive benefits for each week between the period January 22, 2017, through June 10, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 31, 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