

Where the claimant had a prior history of only working part-time during the weekends because she cares for her grandchildren on weekdays, and she continues to be available to that same extent, the claimant is not required to be available for full-time work pursuant to 430 CMR 4.45(1)(a) and G.L. c. 151A, § 24(b).

**Board of Review
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Issue ID: 0021 2200 93

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Richard Conway, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits for the week ending March 4, 2017. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant filed a claim for unemployment benefits with the DUA, which was determined to be effective January 22, 2017. She then certified for benefits on that claim. On March 23, 2017, the DUA issued a Notice of Disqualification, informing the claimant that she was not eligible for benefits for the week ending March 4, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by the claimant via telephone, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on August 10, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not available for or actively seeking full-time work and, thus, was disqualified under G.L. c. 151A, § 24(b). 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 make subsidiary findings from the existing record. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon a review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the claimant is not eligible to receive benefits, pursuant to G.L. c. 151A, § 24(b), for the week ending March 4, 2017, 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 filed a claim for unemployment benefits effective 01/22/17.

2. When certifying her claim for the week ending 03/04/17, the claimant informed the unemployment local office that she was not seeking work and would not accept an offer of full-time work in her usual profession of waitressing because she was babysitting her grandchildren during the days Monday through Friday while the children's parents worked full-time jobs.
3. On 03/23/17, the claimant was mailed a "Notice to Claimant of Disqualification". This Notice informed the claimant that she was not eligible for benefits the week ending 03/04/17 because she was allegedly not meeting the minimum work search requirements of the law for the one-week ending 03/04/17.
4. The claimant requested a hearing.
5. For the previous five years, the claimant worked approximately 25 hours per week and only on weekends. The claimant did this because of a need to babysit her grandchildren while her daughter worked full-time on weekdays.
6. All of the grandchildren that the claimant babysits are healthy.
7. The claimant and her husband live in an in-law apartment attached to the claimant's daughter's home. Rather than pay rent, the claimant assists with childcare while her husband, the children's mother and the children's father all work full-time jobs during the day, Monday through Friday.
8. The claimant has partial guardianship of her eight-year-old granddaughter and she is involved in court proceedings currently seeking full guardianship of this one child. This situation is another reason for why the claimant limits her availability to working only on Friday evening, Saturday and Sundays.
9. During the week of 02/26/17 – 03/04/17, the claimant was available to work to the same extent that she previously worked. The claimant typically worked Friday evening after 4:00PM and any available shifts on Saturdays and Sundays.
10. The claimant conducted her job search three or four days of each week during her unemployment claim. The claimant used her cellular telephone to answer her job search questions and, in error, she would sometimes mistakenly note she looked for work only one or two days.
11. The claimant as part of her job search activities would search on-line on Indeed.com, would read job listings in newspapers, would go into stores and restaurants to make in-person inquiries and she would network with her friends about possible job opportunities.
12. The claimant began keeping a paper work search log after the weeks in question.

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 ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we believe that the review examiner's consolidated findings of fact support the conclusion that the claimant is entitled to benefits under G.L. c. 151A, § 24(b), because the claimant was only obligated to be available for part-time work and she actively searched for such work.

In order to be eligible for unemployment benefits, a claimant must be capable of, available for, and actively seeking work for each week in which benefits are claimed. This requirement is taken from 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 this section of law, the burden of proof is on the claimant. *See Evanchio v. Dir. of the Division of Employment Security*, 375 Mass. 280, 282–283 (1978) (“the burden rests on the unemployed person to show that his continued unemployment is not due to his own lack of diligence”). If the claimant fails to show that she meets any one of the three requirements described in G.L. c. 151A, § 24(b), she is disqualified from receiving benefits until such time as she meets all of the requirements. In this case, the review examiner originally concluded that the claimant was neither available for nor actively seeking work during the week in question.

Claimants generally are required to be available for full-time work in each week that they request unemployment benefits. However, there are several exceptions to this. One of these exceptions is addressed by 430 CMR 4.45(1)(a), which provides in pertinent part as follows:

[An individual otherwise eligible for benefits may limit his/her availability for work during the benefit year to part-time employment provided, that the individual] has a prior work history of part-time employment; establishes to the satisfaction of the commissioner good cause for restricting availability during the benefit year to part-time employment and that such good cause reason is the same as, or is related to that which existed during the prior work history of part-time employment; and is available during the benefit year for at least as many hours of work per week as used to establish the prior work history of part-time employment.

In this case, the claimant conceded that she was not available for full-time work due to the need to care for her grandchildren during typical business hours. However, after remand, the consolidated findings clarify that for the previous five years, the claimant has maintained the same schedule. Specifically, the claimant only worked 25 hours per week, and only on weekends. The claimant continues to be available to work these same hours. We conclude that, pursuant to the above regulation, the claimant may limit herself to part-time work as her circumstances constitute good cause and she continues to be available for work as many hours as she previously worked.

However, as clarified by a related regulation, 430 CMR 4.45(4), a claimant who meets the above part-time availability requirement is still required to actively search for suitable work each week. In this case, the review examiner credited the claimant's testimony that she searched for work three or four days every week, as well as her testimony about how specifically she searched for work. See Findings of Fact ## 10–11. "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, 231 (1985) (citation omitted). 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 Mass. 7, 15 (1996). In this case, the review examiner's findings are supported by the record.

We, therefore, conclude as a matter of law that the claimant met all of the requirements of G.L. c. 151A, § 24(b), during the week ending March 4, 2017. The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending March 4, 2017, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 22, 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.

JRK/rh