

Claimant did not present detailed evidence showing that he engaged in an active work search. His work search log included no dates, addresses, phone numbers, or outcomes. Emails showed only one job application per week. An invitation to apply for a job is not proof of claimant activity.

**Board of Review
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Issue ID: 0021 9221 22

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 affirm.

The claimant separated from employment and filed a claim for unemployment benefits, effective May 21, 2017. DUA denied the payment of benefits in a determination issued on June 13, 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 initial determination and denied benefits in a decision rendered on July 26, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not capable of obtaining 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 afford the claimant an opportunity to present updated medical evidence showing his ability to work and also to obtain information about both his availability for work and his job search efforts. The claimant attended 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 conclusion that the claimant is ineligible for benefits under G.L. c. 151A, § 24(b), because he is not physically able to work 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. The claimant filed a new claim for unemployment benefits on 5/25/17.

2. On 5/21/17, the effective date of the claim, the claimant was not capable of working.
3. The claimant was not capable of working from the time of filing until 8/1/17. As of 8/1/17, the claimant has been capable of full time employment in an occupation for which he is reasonably fitted.
4. The claimant was not capable of working between 5/25/17 and 8/1/17 because of diabetes, neuropathy and Peripheral Vascular Disease. He was also not available because he was caring for his wife who was sick.
5. The claimant's wife experienced fainting spells from 12/31/16 to 4/29/17.
6. The claimant's wife[s] condition required the claimant to provide care and supervision until the first week of August 2017.
7. The claimant needed to help his wife to the bathroom and provide her with her meals during this time.
8. The claimant was available for full time work as of 8/1/17.
9. The claimant's wife has applied for disability but has not yet been approved.
10. The majority of the documentation provided by the claimant as his work search log in Exhibit 5 show solicitation by recruiters who have viewed the claimant's resume online and have reached out to him to apply. No testimony or evidence was provided sufficient to show that the claimant made an active search on at least three days during each week he certified for benefits.

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. As discussed more fully below, we also agree with the review examiner's legal conclusion that the claimant has not met all of the requirements under G.L. c. 151A, § 24(b).

In her original decision, the review examiner concluded that the claimant was ineligible for benefits because he did not show that he was capable of working, as required under 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 burden of proof is on the claimant. See Evancho v. Dir. of 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”) (citation omitted).

With his appeal to the Board, the claimant attached a letter from his physician indicating that since the date of the hearing, he has become physically able to work. Consistent with his doctor’s statement, Consolidated Finding # 3 provides that the claimant became capable of full-time work on August 1, 2017. See Remand Exhibit # 2. Until then, he was not able to work due to his medical conditions. Consolidated Finding # 4. Although the claimant also had been caring for his wife, who had her own medical limitations, the review examiner found that this care no longer interfered with the claimant’s availability for work as of the first week of August. Thus, as of the first week of August, 2017, the claimant was able and available for full-time work.

However, the claimant has not demonstrated that he has made a reasonable good-faith effort to search for new employment. See Evancho, 375 Mass. at 282. The DUA asks claimants to maintain a log of their job search, including a list of all contacts made, the dates of such contacts, the names, addresses, and phone numbers of any individuals contacted, and the results of each contact. See DUA Service Representative Handbook, § 1015(C). The claimant produced a work search log listing companies and job search websites that includes a note, “started applying from 05-30-17.”¹ The log does not state when he contacted these entities, the addresses or telephone numbers of the listed companies, nor does it indicate what the results were for each contact.² The log does not have enough detailed information to show that the claimant was actively searching for work in each week after he became able and available for work.

Remand Exhibit 5 does include a number of email communications demonstrating job search activity, and each email is dated. Nonetheless, the review examiner found that the claimant did not actively search for work on at least three days during each week that he certified for benefits. See Consolidated Finding # 10. She appears to have been applying the DUA’s “three and three” guideline (three methods of work search on three different days per week). This guideline is a well-known “rule of thumb” demonstrating a good faith effort to find work. See DUA Service Representative Handbook, § 1050(A). After carefully reviewing these emails, we must agree. Emails show that the claimant was informed of a job opening during the week of August 6, 2017, notified of a job fair during the week of August 13, 2017, and invited to a meeting with other interested candidates during the week of August 20, 2017.³ An invitation to attend or apply does not demonstrate that the claimant took any action. Therefore, it does not count as evidence of a work search activity for that week. While other emails in Remand Exhibit 5 do show that the claimant submitted a job application or resume in each week between August

¹ Remand Exhibit # 5 is a handwritten “Job Log” that the claimant presented at the remand hearing. Although 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).

² The log does have four telephone numbers with company names, presumably for telephone interviews, as his notes suggest. One of these interviews has a June date, when he was not capable of working. Two more entries are for interviews that had not yet taken place as of the date of the remand hearing.

³ The emails contained in Remand Exhibit # 5 are also part of the unchallenged evidence in the record.

6, 2017, and September 16, 2017, a single application a week falls far short of the “three and three” DUA guideline for a robust job search.

We, therefore, conclude as a matter of law that although the claimant has shown that he became capable and available for full-time work, beginning the first week of August, 2017, he has not established that he actively searched for work, as required by G.L. c. 151A, § 24(b).

The review examiner’s decision is affirmed. The claimant is denied benefits for the week beginning May 21, 2017, and for subsequent weeks, until such time as he meets the requirements of the law. If the claimant can provide detailed information demonstrating that he is engaging in more active work search activities during the remaining weeks of his claim, he may submit a detailed record of his work search to the DUA.

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