

**Despite unexplained conflicting dates on forms completed by the claimant's physician's office, other substantial medical evidence shows that the claimant was capable of returning to work by the time she opened her unemployment claimant. She became eligible under G.L. c. 151A, § 24(b), upon obtaining child-care and making herself available for full-time work during the second week of her claim.**

**Board of Review  
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**Issue ID: 0023 8112 50**

## **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 we affirm in part and reverse in part.

The claimant separated from employment and filed a claim for unemployment benefits with the DUA, effective November 5, 2017, which was denied in a determination issued on December 1, 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 February 16, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not capable of working, and, thus, she 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 obtain further evidence pertaining to the date that the claimant was able to return to work. The claimant attended the remand hearing and, 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 decision, which concluded that the claimant was not capable of working and, therefore, is ineligible for benefits, is supported by substantial and credible evidence and is free from error of law, where a sworn statement from her treating physician states that the claimant could perform full-time work as of October 30, 2017.

### **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 November 5, 2017.
2. The claimant gave birth on September 3, 2017.
3. The claimant was on maternity leave from her employer.
4. On October 23, 2017, the claimant attended a 7 week post-partum appointment with her physician.
5. The claimant was scheduled to return to work on October 26, 2017.
6. The claimant requested an extension to her leave of absence to obtain childcare for her 2 year old and her infant and to acclimate to pumping sufficient breastmilk for her baby.
7. The employer extended the claimant's leave of absence until November 2, 2017.
8. The claimant could not find childcare for her children.
9. On October 30, 2017, the claimant resigned from her job.
10. The Department of Unemployment Assistance (the DUA) issued the claimant a Health Care Provider's Statement of Capability to be completed by her physician. The form was dated December 19, 2017. On the second page of the form it stated, "Patient is responsible for returning this form to DUA by 12/14/17."
11. The claimant provided her physician's office with the form to be completed.
12. The physician's office has an employee assigned to complete the Health Care Provider's Statement of Capability forms for patients. The physician reviews and signs the forms.
13. The physician's office typically releases patients without complications to return to work 8 weeks post-partum.
14. The original Health Care Provider's Statement of Capability was sent to the claimant via U.S. Mail from her physician's office. The claimant received the form from the physician's office on or about January 12, 2018. The form was completed in blue ink. One question on the form is: "Has the patient been able (or capable) to work since 11/5/2017?" Neither the yes or no box was checked on this question. The next question on the form is: "Is the patient currently able to work in a full time capacity with no restrictions?" The Yes box is checked. The follow up question on the form is: "If yes, when did the

- patient become able to return to work full-time?” The answer to the question was “11/26/17.” The form is dated January 9, 2018. There is a stamped physician/practitioner signature on the form. The form states the claimant was last seen by the physician on October 23, 2017.
15. Because the question, “Has the patient been able (or capable) to work since 11/5/2017?” wasn’t answered on the original form, the claimant called her physician’s office and requested a revised form.
  16. The physician’s office sent the claimant a revised form. One question on the form is: “Has the patient been able (or capable) to work since 11/5/2017?” The YES box was checked on the form. There is an outline of a check in the NO box, which appears to have been whited-out. The next question on the form is: “Is the patient currently able to work in a full time capacity with no restrictions?” The Yes box is checked. The follow up question on the form is: “If yes, when did the patient become able to return to work full-time?” The original date written was whited-out. The date of 10/30/2017 was written over the whited-out date. On the second page, the information was added “patient seen for post-partum appointment on 10/23/17.” The form is dated January 9, 2018.
  17. The revised form she received was a copy and not an original. The claimant provided the form to her attorney.
  18. The claimant did not submit the Health Care Provider’s Capability to the DUA until the initial hearing because she did not know when the form was due and she wasn’t sure if her physician had forwarded the document to the DUA.
  19. The claimant did not ask her physician’s office who completed the Health Care Provider’s Statement of Capability.
  20. The claimant’s physician’s office has a record of the original Health Care Provider’s Statement of Capability form dated January 9, 2018 releasing the claimant to work November 26, 2017, but does not have a record of the revised form dated January 9, 2018 releasing the claimant to work October 30, 2017.
  21. The claimant’s physician’s office has a record of a Health Care Provider’s Statement of Capability form dated April 2, 2018, which states that the claimant was able to return to full time work with no restrictions as of October 30, 2017.
  22. The claimant’s physician’s office has a record of an Affidavit by her physician, which stated she was a licensed medical physician and the claimant was capable to return to work on October 30, 2017. It also stated the Health

Care Provider's Capability Statement dated January 9, 2018 was true and correct.

23. As of November 9, 2017, one of the claimant's friends agreed to care for the claimant's children at a rate of \$30.00 per day. The friend provided the claimant with a note that she was available to care for the children "Monday thru Friday or on an as needed basis." The note had a date of 2/14/2018 written on it.
24. Since the week beginning November 12, 2017, the claimant has been available to work 40 hours a week anytime Sunday through Saturday.
25. Since November 8, 2017, the claimant has sought part time and full time work as a lab assistant and as a funeral director 3 or 4 days each week. The claimant seeks work on line, in person and through networking.
26. On December 1, 2017, the Department of Unemployment Assistance issued the claimant a Notice of Disqualification under Section 24(b) of the Law for the week beginning November 5, 2017 and for an indefinite period of time thereafter.
- [27.] The claimant testified that she did not make changes to the original Health Care Physician's Statement of Capability form dated January 9, 2018, which changed the claimant's release to work date from November 26, 2017 to October 30, 2017. The claimant testified the changes were made by her physician's office. Unfortunately, the employee who completes the forms was not available to testify at the time of the hearing. However, another employee of the physician's office was available to testify as to the records held in the office relative to the claimant's capability to work. The claimant's physician's office maintains records of the claimant being released to work on both November 26, 2017 and October 30, 2017. However, the most recent document they have on record is an affidavit by the claimant's physician, which states the claimant was capable of full time work without restrictions as of October 30, 2017.

#### 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 except as follows. Consolidated Finding # 14, which refers to Remand Exhibit 8, a Health Care Provider's Statement of Capability, states that the form was completed in blue ink. To the extent this observation infers that the claimant had in her possession an original document with blue

ink, such an inference is unsupported by the evidence in the record.<sup>1</sup> Additionally, we reject the portion of Consolidated Finding # 16, which suggests that an entry in the “NO box” was whited out. This statement is unreasonable in relation to the other evidence presented. 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 ineligible for benefits.

At issue in this case is whether the claimant has shown that, while seeking unemployment benefits under her claim, she met the requirements of G.L. c. 151A, § 24(b). This provision states, in relevant part:

[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 . . . .

Since November 5, 2017, is the effective date of the claim, we consider whether the evidence shows that the claimant was capable of, available for, and actively seeking full-time work as of this date.

The first issue we consider is whether, following the birth of her second child on September 3, 2017, the claimant was medically capable of working full-time on November 5, 2017. *See* Consolidated Finding # 2. We remanded this case to try to understand conflicting medical evidence as to the date she became able to work.

There are two Health Care Provider’s Statements of Capability signed by the claimant’s physician, both dated January 9, 2018. The one entered into evidence at the original hearing as Exhibit 10 (and re-entered during the remand hearing as Remand Exhibit 4), states that the claimant was able to return to work on October 30, 2017. Because a portion of the line on which this date is written appears to have some white space and there are extraneous vertical lines under the written entry of 10/30/17, the review examiner concluded that the original date entry was altered. She further found that an outline of a check in the “NO box” following the question as to whether the patient has been capable of working since November 5, 2017, appeared to have been whited-out.<sup>2</sup> On that basis, she disregarded both this document, as well as the claimant’s testimony, as probative of the claimant’s medical capability of returning to work, and disqualified the claimant indefinitely from receiving benefits.

Following remand, the record is more complete. We do not have a full explanation as to why one Health Care Provider’s Statement of Capability (Remand Exhibit 8) provides that November

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<sup>1</sup> During the remand hearing, the claimant testified that she only received a photocopy of what has been marked Remand Exhibit 8 from her physician’s office. While not explicitly incorporated into the review examiner’s findings, this testimony 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).

<sup>2</sup> *See* Finding of Fact #16 in the original hearing decision, entered into evidence as Remand Exhibit 1. This statement is again included in Consolidated Finding #16. However, now that we have Remand Exhibit 8 to examine, there is no indication that the “NO box” had been checked originally. Therefore, we reject any finding that the box had been altered.

26, 2017, is the date that the claimant became able to return to work full-time, while another Health Care Provider's Statement of Capability (Remand Exhibit 4) provides a date of October 30, 2017. *See* Consolidated Findings ## 14 and 16. Nonetheless, we know that both forms were prepared and provided by the claimant's physician's office.<sup>3</sup> *See* Consolidated Findings ## 11, 12, 14, 15, 16, and 17. Although the claimant endeavored to have her physician's office explain what happened, the witness who actually filled out the forms had left for lunch when the review examiner called for her testimony during the remand hearing. That testimony would have been the best evidence, but it is not the only evidence in the record. "If the proponent has presented the best available evidence, which is logically adequate, and is neither contradicted nor improbable, it must be considered." New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 471 (1981), *quoting* L.L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 598, 608 (1965).

Instead, we have Remand Exhibit 3, a sworn affidavit from the claimant's treating physician, dated March 14, 2018. *See* Consolidated Finding # 27. This is the physician who treated the claimant during the pregnancy at issue, saw the claimant for a postpartum examination on October 23, 2017, and whose signature appears on both Health Care Provider's Statements of Capability. *See* Remand Exhibits 4, 8, and 9.<sup>4</sup> Most importantly, the affidavit clarifies that the claimant was capable of working full-time since October 30, 2017. *See* Consolidated Finding # 27 and Remand Exhibit 3. This is consistent with the physician's office's typical practice to release postpartum patients to return to work eight weeks after delivery. *See* Consolidated Finding # 13.<sup>5</sup> Based upon this evidence, we are satisfied that the claimant was capable of working within the meaning of G.L. c. 151A, § 24(b), as of October 30, 2017.

However, the review examiner found that the claimant was not available for full-time work until the week beginning November 12, 2017. *See* Consolidated Finding # 24. This is supported by the subsidiary findings, which explain that the claimant could not return to her old job on November 2, 2017, because of a problem finding day-care. *See* Consolidated Findings ## 6, 7, and 8. She did not find day-care for her infant until November 9, 2017. *See* Consolidated Finding # 23. For this reason, we agree that the claimant was not available for work pursuant to G.L. c. 151A, § 24(b), until the next full week, beginning November 12, 2017.

As to the claimant's final obligation to show that she was actively seeking work, Consolidated Finding # 25 establishes that she was actively seeking work since November 8, 2017.

We, therefore, conclude as a matter of law that, beginning November 12, 2017, the claimant was capable of, available for, and actively seeking work within the meaning of G.L. c. 151A, § 24(b).

The portion of the review examiner's decision that disqualified the claimant from receiving benefits during the first week of her claim is affirmed. The claimant is not eligible for benefits during the week beginning November 5, 2017.

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<sup>3</sup> The claimant testified unequivocally that she did not alter any forms.

<sup>4</sup> Remand Exhibit 9 is medical office notes from the claimant's October 23, 2017, postpartum examination.

<sup>5</sup> We note that eight weeks after the claimant's delivery would have been October 29, 2017.

The portion of the review examiner's decision that disqualified the claimant indefinitely thereafter is reversed. She is entitled to receive benefits for the week beginning November 12, 2017, and for subsequent weeks, if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - September 24, 2018**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Michael J. Albano 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](http://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