

Claimant, who separated from her job 2 months before having a baby, produced evidence showing that she was capable of, available for, and actively seeking work only for the period beginning 6 weeks after childbirth.

**Board of Review
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Issue ID: 0024 5301 91

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 on January 26, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 28, 2018. 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, but limited the disqualification period to January 21, 2018, through May 19, 2018, in a decision rendered on June 23, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not physically capable of working until May 20, 2018, and, thus, she was disqualified under G.L. c. 151A, § 24(b), for the period preceding that date. 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 consider updated evidence about the claimant's capability to work. 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 decision, which concluded that the claimant was ineligible under G.L. c. 151A, § 24(b), because she was not physically capable of working before May 19, 2018, is supported by substantial and credible evidence and is free from error of law in light of new findings after remand that show the claimant had been both physically capable of working and actively searching for a new job earlier in her claim.

Findings of Fact

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

1. Beginning in March 2017, the claimant worked part time at a doctor's office. The claimant worked until January 26, 2018, when she was told not to return to work until after she delivered her baby. The reason for her separation is unknown.
2. On January 26, 2018, the claimant filed a claim for unemployment benefits effective January 21, 2018.
3. During the period beginning January 21, 2018 through March 12, 2018, the claimant was pregnant. The claimant was capable of working full time with a light duty restriction.
4. During the period beginning January 21, 2018 through March 12, 2018, the claimant was available to work any full time hours Monday through Friday.
5. During the period beginning January 21, 2018 through March 25, 2018, the claimant did not seek work because she was planning to return to her previous employer.
6. When claiming benefits for the week beginning January 21, the claimant erroneously reported she was unable to work. The claimant meant she did not work during that week.
7. On January 31, 2018, the claimant completed a Department of Unemployment Assistance (DUA) questionnaire and accurately reported she did not seek work because she was returning to her previous employer after she delivered her baby.
8. On March 13, 2018, the claimant gave birth to a baby. The claimant's physician told her she could not work for 6 weeks.
9. Since the week beginning April 1, 2018, the claimant has been available to work any full time hours Monday through Friday. The claimant's baby's father works 11:00 p.m. to 7:00 a.m. and is available to watch the baby until 11:00 p.m. The claimant's baby's grandmother lives 5 minutes away from the claimant and is always available to watch the baby.
10. Since the week beginning April 1, 2018, the claimant has sought security and office work at least 5 days each week.
11. On April 24, 2018, the claimant became physically capable of full time work.
12. On May 25, 2018, the claimant requested a letter from her physician regarding her physical capability. A physician at the claimant's doctor's office completed a letter stating, "I can find no reason why she cannot return to work as of May 26, 2018 without restrictions." The physician was not specific as to

when the claimant became physically capable as the author of the letter was not the claimant's direct physician.

13. On June 26, 2018, the claimant's direct physician completed a health care provider's statement of capability indicating the claimant delivered on March 13, 2018, and was released to work on April 24, 2018 after a 6-week recovery period.

Credibility Assessment:

The claimant's original physician letter was not sufficient to assume the claimant was physically capable to work full time prior to the date indicated in the letter. Therefore, this review examiner concluded the claimant became physically capable beginning the date of the letter. The June 25, 2018 health care provider's statement of capability clarified the date of which the claimant was released to work full time. The claimant testified that another physician completed the first letter to submit to the DUA, as her physician was not available to write it at the time she made the request. The June 25, 2018 letter is more credible because the claimant's direct physician who had been treating the claimant completed it. Therefore, the claimant became physically capable of full time work on April 24, 2018.

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. The final sentence of Consolidated Finding # 1 is inconsistent with the first part of the finding, which suggests that the claimant was asked to stop working due to being pregnant. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant was ineligible for benefits during the entire period from January 21, 2018, through May 19, 2018.

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 January 21, 2018, 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.

First, we consider whether the claimant was physically capable of working. Although the claimant was pregnant when she separated from her job on January 26, 2018, the review examiner found that the claimant was capable of working full-time with a light duty restriction from January 21, 2018, until March 12, 2018, the day before giving birth to her baby. Consolidated Finding # 3. As for the period following her baby's birth, the review examiner originally found that the claimant was not physically capable of working until the week beginning May 20, 2018. *See* Exhibit 7, a May 25, 2018, letter from the claimant's physician's office. Based upon updated evidence from the claimant's medical provider, the health care provider's statement of capability entered into evidence as Remand Exhibit 4e and 4f, the review examiner now finds that following childbirth, the claimant was physically capable of working as of April 24, 2018. Consolidated Findings ## 11 and 13. In light of these new findings, we conclude that the claimant was physically capable of working from January 21 through March 12, 2018, and again beginning on April 24, 2018.

In order to be eligible under G.L. c. 151A, § 24(b), however, the claimant must also show that during the periods that she was physically capable of working, she was also actively searching for work. Consolidated Finding # 5 states that the claimant did not seek work in those two months before giving birth. Although the claimant testified that she looked for work every day, she did not present supporting evidence to confirm this. As noted in Consolidated Finding # 7, the claimant had reported to the DUA that she was not looking for work as of January 31, 2018. *See* Exhibit 3. Moreover, Exhibit 8, a rough work search log which lists prospective employers and dates, does not show any activity prior to March 30, 2018.¹ Ultimately, the review examiner found that the claimant began an active work search beginning the week of April 1, 2018. Consolidated Finding # 10. In light of this evidence and the review examiner's findings, we conclude that the claimant has not shown that she was actively searching for work until April 1, 2018.

Finally, the claimant must show that she was available for full-time work. The review examiner found that the claimant was available both before the birth, from January 21 through March 12, 2018, and after the birth, beginning the week of April 1, 2018. *See* Consolidated Findings ## 4 and 9. Thus, for those two periods, she met the availability requirement of G.L. c. 151A, § 24(b).

We, therefore, conclude as a matter of law that, from the beginning of the unemployment claim, the claimant has only established that she was capable of, available, and actively seeking work within the meaning of G.L. c. 151A, § 24(b), beginning April 24, 2018.

¹ While not explicitly incorporated into the review examiner's findings, Exhibit 8 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).

The portion of the review examiner's decision that disqualified the claimant from January 21, 2018, through April 23, 2018, is affirmed. Any further disqualification is reversed. The claimant is entitled to receive benefits beginning April 24, 2018, and for subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 30, 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

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