

Because there is nothing in the record to support a finding that the CNA, PCA, and day care positions sought by the claimant required her to lift 10 lbs. or more, we reject that finding, as well as the review examiner's conclusion that the claimant was not seeking suitable work.

**Board of Review
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Issue ID: 0024 6266 98

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 her position with the employer and filed a claim for unemployment benefits with the DUA. In a determination, dated March 2, 2018, the DUA denied benefits, beginning December 3, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by the claimant, the review examiner modified the agency's initial determination by disqualifying the claimant only during the period December 3, 2017, through February 28, 2018, in a decision rendered on May 12, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant did not satisfy the requirement to be capable of, available for, and actively seeking work for an occupation that she was reasonably fitted, and, thus, she was disqualified under G.L. c. 151A, § 24(b). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was ineligible under G.L. c. 151A, § 24(b), because she did not seek jobs that she was suited for, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. On November 30, 2017, the claimant physician completed a letter restricting her from lifting greater than 10 lbs. due to pregnancy complications.

2. The claimant was discharged from her full time job as a nursing assistant because her job required her to lift more than 10 lbs. and the employer could not accommodate her restriction.
3. On December 6, 2017, the claimant filed a claim for unemployment benefits effective December 3, 2017.
4. During the period beginning December 3, 2017 through the week ending January 13, 2018, the claimant was capable of working full time with the restriction of lifting 10 lbs. per her doctor's order.
5. During the period beginning December 3, 2017 through the week ending January 13, 2018, the claimant did not have any limitations on her schedule and was available to work any full time hours Monday through Friday each week.
6. During the period beginning December 3, 2017 through the week ending January 13, 2018, the claimant sought CNA, PCA, and day care work three days each week.
7. CNA, PCA, and day care work require lifting 10 lbs. or more.
8. On January 18, [2018], the claimant had a Cesarean delivery. The claimant was restricted from working until February 28, 2018.
9. During the period January 14, 2018, through February 28, 2018, the claimant was not capable of working nor was she available to work due to her doctor's restriction.
10. During the period January 14, 2018, through February 28, 2018, the claimant did not seek work.
11. Since the week ending March 3, 2018, the claimant has been capable of working full time without any restrictions.
12. During the week beginning March 3, 2018, the claimant was available to work any full time hours Wednesday, Thursday, Friday and Saturday.
13. Since the week beginning March 4, 2018, the claimant has been available to work any full time hours, Monday through Friday. The claimant's husband has been available to watch the baby, as he does not go to work.
14. Since the week beginning March 4, 2018, the claimant has sought CNA, daycare, and server work at least 3 days each week by going in person and direct outreach to potential employers.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the 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 findings of fact except as follows. We reject Finding of Fact # 7, as it is not supported by any evidence in the record. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits during the entire period from December 3, 2017, through February 28, 2018.

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

There is no question, and the claimant does not challenge on appeal, the review examiner's disqualification from January 14 through February 28, 2018. During this period, the claimant had a baby and was recovering from her Cesarean delivery. By doctor's orders, she was incapable of working. *See* Findings of Fact ## 8 and 9. At issue is whether she should have been disqualified from December 3, 2017, through January 13, 2018.

Findings of Fact ## 4 and 5 provide that, between December 3, 2017, and January 13, 2018, the claimant was available for and capable of working a full-time job that did not require her to lift more than 10 lbs. Finding of Fact # 6 shows that, during this period, she was actively seeking work three days a week as a CNA, PCA, or in day care. We see nothing in the record which establishes that the job requirements for the positions that the claimant was seeking required lifting 10 lbs. or more. Therefore, we reject Finding of Fact # 7 as unsupported by substantial evidence. Without this finding, we see no reason to question the suitability of the CNA, PCA, or day care positions which the claimant sought, particularly in light of her experience as a nursing assistant.

We, therefore, conclude as a matter of law that the claimant has shown that she was capable of, available for, and actively seeking work within the meaning of G.L. c. 151A, § 24(b), during the few weeks before and after the temporary disability from her medical procedure.

The portion of the review examiner's decision that disqualified the claimant from January 14 through February 28, 2018, is affirmed. We also affirm the review examiner's decision to award benefits, beginning March 1, 2018. However, we reverse the disqualification from December 3, 2017, through January 13, 2018.

The claimant is denied benefits only for the weeks beginning January 14 through February 28, 2018. She is entitled to receive benefits for the weeks beginning December 3, 2017, through January 13, 2018, and again beginning March 1, 2018, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 30, 2018



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. 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