After presenting medical evidence that he could return to work on February 19, 2018, the claimant presented conflicting evidence on appeal stating that he could actually return on December 10, 2017. The review examiner reasonably rejected this second medical note as fabricated to assist the claimant obtain benefits. It referenced a stress test date that had not yet been scheduled in December, and the handwriting and signature did not match the doctor's first medical statement.

Board of Review
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Issue ID: 0024 7595 64

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 with the DUA. In a determination issued on February 23, 2018, the DUA denied benefits for the period December 19, 2017 through December 22, 2017.[1] 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 and denied benefits for the single week, December 10, 2017 through December 16, 2017, in a decision rendered on March 31, 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, he 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 consider an additional medical note, which the claimant presented in his appeal to the Board. Following a remand hearing attended by the claimant, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

[1] This determination in Issue ID # 0024 7595 64 contained an obvious typographical error in the disqualification period. The February 23, 2018, determination stated, "You are not entitled to receive benefits for the period beginning 12/9/18 through 12/22/18." Inasmuch as the determination referenced medical documentation pertaining to the claimant's ability to work from "12/10/17 to 12/16/17," we believe the disqualification period was meant to be in 2017, not 2018. *See* Exhibit # 2.

The issue before the Board is whether the review examiner's original decision, which concluded that the claimant was not medically capable of working during the relevant period, 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 effective date of the claim is December 10, 2017.

2. The claimant's employment as a Waste Water Operator terminated on or about December 12, 2017, after almost sixteen years with a municipality, as he was not medically cleared to return to work upon expiration of all available leave.

3. The claimant was compelled to retire.

4. On February 12, 2018, the claimant's doctor drafted a medical note (submitted to the DUA prior to the initial determination dated February 23, 2018) stating that the claimant may return to his usual work on (Monday) February 19, 2018 "as per his tolerance" and that a final determination will be made on March 1, 2018 after testing takes place.

Credibility Assessment:

The claimant, on appeal to the Board of Review, after being given ample time post-hearing to produce a note that specified that he was available for some kind of work (other than his usual job) as of December 10, [2017] (as the claimant alleged), submitted a note dated December 6, 2017, which stated that the claimant may return to work on (Sunday) December 10, 2017 "as per his tolerance" and that a final determination will be made following his stress test on April 4, 2018.

The claimant, when asked why this second-produced note was not submitted to the DUA or the Review Examiner prior to March 30, 2018, stated that it was because he had a hard time to see his doctor and it took time to get. The claimant later stated that he was present when both notes were written on the date of the notes and he had the December 6th note in his possession since December 6, 2017. The claimant's answer is contradictory and did not make sense. The claimant also suggested that the DUA simply requested a doctor's note and if the DUA wanted something specific, the DUA should have requested it. It must be pointed out that at the initial hearing, that specific note clarifying what the claimant was alleging, that he was capable of some kind of work from December 10, 2017, was requested. Had the claimant had the December 6th note in his possession as of December 6, 2017, it is unreasonable not to produce anything, adequate or not, by the March 30, 2018 deadline given by the Review Examiner.

> Regarding the conflicting dates for the stress test, the claimant explained that he had an initial stress test scheduled in February of 2018, which was cancelled and rescheduled to March 1, 2018, which was also cancelled and rescheduled to April 4, 2018. The claimant's testimony does not coincide with the purported dates on the notes and when they were written. If, on December 6, 2017, the claimant had a test scheduled in February of 2018, which was then cancelled and rescheduled to March 1, 201[8], seemingly by February 12, 2018, and that test was then rescheduled to April 4, 2018, the April 4, 2018 date would not have made its first appearance until after February 12, 2018 and not on a note dated December 6, 2017. The December 6th note should have mentioned either the February or the March stress test if that was the case. The claimant denies that the note was written after December 6, 2017 and stated that he was present when written on December 6, 2017.
>
> Other issues with the note that are suspect are that the notes, allegedly written by the "one and only" doctor that the claimant has, for which he was present on both occasions, appear to have different handwriting and signatures and the first-produced note references the first day of the work week, a Monday, which would be consistent with the claimant's usual job, as being the day that he could return to work per his tolerance and the later-produced note referenced, supposedly by chance, the effective date of the claim, which is a Sunday. These issues further suggest that the later-produced note was influenced and tailored to the unemployment claim and was pre-dated.
>
> The claimant's testimony and later-produced note lacked credibility and did not allow for any substantive change to the facts as found.

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 second and third paragraphs of the review examiner's credibility assessment incorrectly refer to the claimant stating that the December 6, 2017 note was written on December 6, 2017. This was not the claimant's testimony. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. Moreover, as discussed more fully below, we agree with the review examiner's legal conclusion that the evidence did not show that the claimant was medically capable of working in December, 2017, pursuant to G.L. c. 151A, § 24(b).

On appeal, we must decide whether the claimant met his burden to show that he was capable of working 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 . . . .

In his original decision, the review examiner concluded that the claimant's evidence did not show that he was medically capable of working until February 19, 2018. *See* Remand Exhibit # 1. In the case before us, the review examiner disqualified the claimant for the single week, December 10, 2017 through December 16, 2017. However, in separate issues, the claimant has been disqualified under this section of law for the entire period, from December 10, 2017 through February 17, 2018.[2]

He concluded that the claimant was not medically capable of working until February 19, 2018, based upon Exhibit 1, which is a note from the claimant's physician, dated February 12, 2018. *See* Consolidated Finding of Fact # 4. As the finding provides, this medical note stated that the claimant could return to his usual work on February 19, 2018. During the hearing, the claimant testified that even though he could not perform his old job because it involved heavy labor, he was capable of other types of lighter duty work before that date. The review examiner waited for another doctor's note to support the claimant's testimony, but did not receive one before rendering his decision on March 31, 2018. Because the claimant did produce this second medical note with his appeal to the Board, we remanded it for the review examiner to consider.

This second medical note, Remand Exhibit # 3, states that the claimant could return to his usual job as of December 10, 2017, which is the beginning of the claimant's unemployment claim. However, because the review examiner did not find this second medical note to constitute credible evidence, he rejected the claimant's assertion that he had been capable of working as of the earlier date. Thus, the findings continue to reflect the information from the first medical note, that the claimant was not capable of working until February 19, 2018. *See* Consolidated Finding # 4. 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). "The test is whether the finding is supported by "substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted.) "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627-628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted.)

We believe the review examiner's assessment is reasonable in relation to the evidence presented. In reviewing the transcript, we heard the claimant testify that he saw his doctor on December 6, 2017, and that he was in the presence of his doctor when he wrote the Remand Exhibit # 3, but he never testified that the note was written on December 6, 2017. Rather, the claimant indicated that after the hearing, he went back to his doctor to get a note with the December 10, 2017 date

[2] *See* DUA Issue ID # 0024 0836 86, wherein the DUA disqualified the claimant under G.L. c. 151A, § 24(b), from December 17, 2017 through December 23, 2017. This determination was not appealed to the hearings department. *See also* DUA Issue ID # 0024 7595 80, in which this review examiner disqualified the claimant under the same section of law from December 24, 2017 through February 17, 2018. The claimant did not appeal this last issue to the Board.

on it.[3] Even if the review examiner gets that point wrong, we believe he fairly concludes that Remand Exhibit # 3 is not a reliable piece of evidence concerning the claimant's condition on December 6, 2017. With its reference to a stress test date in April, which had not yet been scheduled in December, and a wholly different signature and handwriting than what appears in the note dated February 12, 2018, the review examiner reasonably concluded that whoever wrote Remand Exhibit # 3, did so after the fact for the sole purpose of helping the claimant obtain unemployment benefits. In light of the previously introduced statement in Exhibit # 3 that the claimant could return to his usual job on February 19, 2018, the review examiner reasonably rejected the new conflicting evidence as not credible. *See* Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984).

We, therefore, conclude as a matter of law that the claimant has failed to establish that he was medically capable of working during the relevant period, as required under G.L. c. 151A, § 24(b).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning December 10, 2017.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 29, 2018

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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

[3] The claimant testified that when he saw the doctor on December 6, 2017, he did not know the dates that the DUA was looking for at the time. He stated that, after the initial hearing, he tried to get the doctor to write a different note with the right dates on it, but he was out of town for a while.

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