

For a period of time early in his benefit year, the claimant was capable of only working part-time due to the same health condition that caused him to separate under urgent, compelling, and necessitous circumstances from his previous job. After remand, the claimant established that he was otherwise available for and actively seeking full-time employment during his claim. He met the requirements for eligibility under G.L. c. 151A, § 24(b).

**Board of Review
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Issue ID: 0025 0197 53

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. Benefits were denied on the ground that the claimant was incapable of working and, therefore, ineligible under G.L. c. 151A, § 24(b).

The claimant had filed a claim for unemployment benefits, effective March 4, 2018. In a determination issued by the agency on April 7, 2018, he was disqualified from receiving benefits. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on June 8, 2018. The claimant sought review by the Board, which dismissed his appeal due to lack of jurisdiction, and the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On November 8, 2018, the District Court ordered the Board to take jurisdiction and review the case on the merits. Consistent with this order, we reviewed the entire record, including the recorded testimony and evidence from the initial hearing, the review examiner's decision, and the claimant's appeal.¹ Based upon this review, we remanded the case to the review examiner to take additional evidence about the circumstances of the claimant's separation from his prior job and about whether the claimant was able, available for, and actively seeking work during the benefit year. The claimant attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact.

The issue before the Board is whether the review examiner's original decision, which concluded that the claimant was incapable of working during the benefit year and, therefore, disqualified under G.L. c. 151A, § 24(b), is supported by substantial and credible evidence and is free from error of law.

¹ Although we do not agree with the District Court's legal conclusion that the Board has jurisdiction to decide this matter, we have complied with the court's order. See Hamer v. Neighborhood Housing Services of Chicago et al., 138 S. Ct. 13, 17 (U.S. 2017).

Findings of Fact

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

1. The effective date of claim is March 4, 2018.
2. The claimant last worked as a Property Manager from November 1, 2017 to February 23, 2018 on a full-time basis. The claimant quit for medical and domestic reasons. The claimant was found to have quit for urgent, compelling and necessitous reasons in that "the claimant became overwhelmed with the care for his family who joined him in November and December of 2017. The claimant succumbed to depression as a result and began treatment for himself in January of 2018. The claimant's condition caused him to be absent frequently and thus, prevent him from performing his duties satisfactorily. Given the circumstances of the claimant's short tenure with the employer and his indefinite condition and circumstances that prevented him from adequately performing his job, the claimant's separation is considered a medical necessity and that a leave of absence would have been futile."
3. In November of 2017, the claimant's partner arrived from Puerto Rico in the wake of Hurricane Maria. The claimant's three children followed in December of 2017. The four individuals suffer from mental and/or physical conditions, which required the claimant to be absent from work frequently.
4. The claimant became overwhelmed.
5. In January of 2018, the claimant began a regimen of anti-depressant/anti-anxiety medication.
6. On April 18, 2018, the claimant's provider certified that that claimant was not able to work since March 4, 2018 and is not [at that time] able to work in a full-time capacity without restrictions. The provider commented that the claimant may work part-time in a low stress environment and with limited social interactions.
7. The claimant's reasons for limiting to part-time work are directly related to the reasons for his separation from employment prior to the effective date of the claim. Those reasons were mental health related.
8. The claimant since obtained a part-time job performing pizza delivery, but was unable to maintain it due to depression and domestic circumstances. The claimant quit in May of 2018 after less than two weeks of employment.
9. The claimant holds a real estate license and has tried to get into that industry with no success due to his circumstances. The claimant is no longer pursuing a career in real estate.

10. The claimant is focusing on getting better and settling his life.
11. The claimant desires strongly to work, but is uncertain if he is able to maintain employment.
12. The claimant missed certification weeks due to his mental condition.
13. From June 24, 2018 to August 8, 2018, the claimant worked full-time for a benefit year employer and he worked full-time from September 17, 2018 to December 26, 2018 at another benefit year employer.
14. On February 14, 2019, the claimant's provider stated that the claimant was seen on December 27, 2018 and February 14, 2019. That the claimant "has engaged in therapy as treatment for his mental health conditions. These conditions are currently well-managed, so [claimant] is able to return to full-time employment."
15. The claimant presently states that within one month of his separation from the previous employer, he was capable of full-time work.
16. The claimant presently states that he had no time restriction during his claim and his treatment occurred between two and four times a month with his Primary Care Physician and his Therapist.
17. The claimant presently states that he sought and is seeking part and full-time work. The claimant has a psychology degree, but no licensure or other certifications. The claimant believes that his experience in property management is transferrable to the human resources industry. The claimant is seeking something closer to home. The claimant's work search record indicates that since March 9, 2018, the claimant has applied to four or five jobs per week in the customer service, social service, human resources, and property management industries.

[Additional review examiner comments:]²

The claimant provided inconsistent testimony. Today, the claimant testified that within one month of his previous separation (in February of 2018), he was capable of full-time work. This statement is directly contradictory to this provider's statement of capability dated April 18, 2018, which was more than one month after his separation. The claimant also held a part-time job, which he quit in May of 2018 due to mental health and domestic circumstances as he stated at the initial hearing, which is also inconsistent with the information provided to the

² These comments were included with the consolidated findings of fact that were returned to the Board following remand. In the context of the claimant's full testimony, we do not agree that these statements are inconsistent. Nonetheless, because the review examiner failed to draw any conclusion about these purported inconsistencies here or in the consolidated findings, this does not constitute a credibility assessment.

DUA regarding the reasons for the separation being related to transportation. Furthermore, at the initial hearing, the claimant made comments suggesting that he is focusing on getting better and settling his life, but that he strongly desires to work, but is uncertain if he is able to maintain employment. The claimant did, however, start a full-time job in June, which lasted approximately six weeks and another in September of 2018 which lasted approximately three months.

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 date of January, 2018, in Consolidated Finding of Fact # 5 is inaccurate. The claimant testified that he began his medication regimen in February or March, 2018.³ Consolidated Finding of Fact # 8 omits a portion of the claimant's testimony, which stated that car problems were a major factor in leaving this part-time delivery position. Consolidated Finding of Fact # 15 does not accurately reflect the claimant's testimony during the remand hearing that he became capable of full-time work about a month after his therapy and medication treatment were both underway, which was actually several months after his separation. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we believe the claimant has shown that he met the requirements for eligibility under G.L. c. 151A, § 24(b).

At issue in this appeal is whether the claimant met the requirements of 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

The claimant has shown that throughout his benefit year, he actively searched for both full and part time employment, submitting as many as four to five applications per week for a variety of suitable jobs. *See* Consolidated Finding # 17 and Remand Exhibit 9. The fact that he did perform work, including full-time employment for several months at a time, supports his assertion that he was also available for work during the benefit year. *See* Consolidated Findings ## 13 and 16.

In his original decision, the review examiner concluded that the claimant failed to meet the statute's requirement that he be capable of performing full-time work. In fact, the review examiner indicated that he did not think the claimant could perform any work.⁴ After remand, the record proves otherwise. First, we note that the claimant's work history during the benefit

³ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

⁴ *See* page 2 of the original hearing decision, entered into the record as Remand Exhibit 1.

year demonstrates that he was capable of working.⁵ See Consolidated Finding # 13. Second, the claimant presented two medical notes supporting his assertion that he was capable of employment. See Consolidated Findings ## 6 and 14.

To be sure, there is evidence that the claimant was not capable of full-time work at the beginning of his benefit year. Although not specifically stated in G.L. c. 151A, § 24(b), other provisions of the statute show that unemployment benefits are intended to assist individuals return to *full-time* work.⁶ The claimant's April 18, 2018, Health Care Provider's Statement of Capability provided that due to a mental health condition, the claimant had been unable to work full-time since March 1, 2018, but could work part-time in a low stress environment. See Consolidated Finding # 6 and Exhibit 8. Indeed, the claimant testified that he was not capable of full-time work until several months after his separation, when his medication and therapy treatments were fully underway.

There are a limited number of circumstances, set forth under 430 CMR 4.45, when claimants are permitted to restrict their availability to part-time work. In relevant part, these regulations state as follows:

(1) An individual otherwise eligible for benefits may limit his/her availability for work during the benefit year to part-time employment provided, that the individual: . . .

(b) establishes to the satisfaction of the commissioner that the reasons for leaving his or her employment were for such an urgent, compelling, and necessitous nature as to make his or her separation involuntary; and establishes to the satisfaction of the commissioner that the same or related urgent, compelling, and necessitous reasons require the individual to limit availability for work during the benefit year to part-time employment; and such limitation does not effectively remove the individual from the labor force, . . .

Consolidated Finding # 7 shows that the mental health issues that created urgent, compelling, and necessitous reasons for leaving his prior job were also responsible for the claimant having to limit his availability to part-time work early in his benefit year. Again, the fact that he did work demonstrates that this limitation did not remove him from the labor force. (See, e.g., Consolidated Finding # 8.) Thus, pursuant to 430 CMR 4.45(1)(b), the claimant may not be disqualified due to his incapacity to work only part-time during that portion of his claim.

We, therefore, conclude as a matter of law that the claimant has met his burden to show that during his benefit year, he met the requirement to be capable of, available, and actively seeking work within the meaning of G.L. c. 151A, § 24(b).

⁵ To the extent Consolidated Finding # 11 states that the claimant is uncertain if he is able to maintain employment, we note that this finding appear to have been copied and pasted from his original decision, as it is identical to the original Finding of Fact # 10, and it is largely contradicted by the evidence presented during the remand hearing, particularly the claimant's benefit year employment history. Even if this were the claimant's belief at one time, his confidence level is not a criterion for approval under G.L. c. 151A, § 24(b).

⁶ See, e.g., G.L. c. 151A, §§ 29 and 1(r), which provide for the payment of benefits only to those who are unable to secure a full-time weekly schedule of work.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning March 4, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – March 19, 2019



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

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