

**Voluntary residential treatment program did not render claimant unavailable to work under G.L. c. 151A, § 24(b), because she continued to actively search for work, could leave the program at any time, and was willing to do so if she found a job.**

**Board of Review  
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**Issue ID: 0025 1188 61**

## **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 former employer on March 22, 2018. She filed a claim for unemployment benefits with the DUA, but was denied benefits for the period March 25 through June 9, 2018, in a determination issued on April 19, 2018. 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. In a decision rendered on July 14, 2018, the review examiner denied benefits from March 25 through April 21, 2018, awarded benefits from April 22 through May 26, 2018, and denied benefits indefinitely thereafter. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not able and available for full-time work, 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 make further subsidiary findings of fact from the record pertaining to the claimant's work search efforts, and her capability and availability to work full time during the relevant period. 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 decision, which concluded that the claimant's participation in a residential treatment program rendered her ineligible for benefits under G.L. c. 151A, § 24(b), is supported by substantial and credible evidence and is free from error of law, where the record shows that the claimant continuously sought and was capable of full-time work, and she could voluntarily leave the program if she obtained employment.

### **Findings of Fact**

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

1. Prior to filing for unemployment insurance benefits, the claimant's last date of work was March 22, 2018. The claimant was working fulltime as a pharmacist intern for a pharmacy company. The claimant worked for this company from September 16, 2017 through March 22, 2018. The claimant was discharged from this job.
2. On March 30, 2018, the claimant filed an initial claim for unemployment insurance benefits (Exhibit 3). The claim is effective the week beginning March 25, 2018.
3. The claimant suffers from anxiety issues.
4. On April 5, 2018, the claimant submitted a Health Care Provider's Statement of Capability form to the Department of Unemployment Assistance (hereinafter the Department) which was completed by her phycologist [sic] (Exhibit 7). On this form, the claimant's psychologist responded "no" to the following question: "Has the patient been able (or capable of working) since 3/25/2018 (Exhibit 7)." On the form, the phycologist [sic] listed that the claimant has the following medical issues: severe obsessive compulsive (anxiety) disorders (Exhibit 7).
5. The claimant did not look for work at all from the week beginning March 25, 2018 through the week ending April 14, 2018.
6. The claimant started looking for work weekly during the week beginning April 15, 2018 and maintaining a work search activity log. The claimant continues to look for work weekly. The claimant looks for work 3-4 times per week. The claimant is looking for fulltime work and part-time work. The claimant is looking for work as a home health aide and pharmacy internship jobs.
7. The claimant was not able and available to work from the week beginning March 25, 2018 through April 20, 2018 due to suffering from mental health issues involving anxiety.
8. On April 21, 2018, the claimant's psychologist advises in a letter:

"This is to address the matter of my client, [claimant's name omitted] whom I've been treating for anxiety disorder. It was my understanding that she was planning to miss some work time for an intensive anxiety program at [Hospital A], but she has been informed that there is a delay in her admission because the program is full. Given this fact and her desperate financial circumstances, she cannot afford missing work or at least qualifying for her unemployment benefits. Therefore, as of the date of this letter I recommend that she seek gainful employment while she pursues her treatment. In my

opinion, she has been capable of working and agreed to seek work (Exhibit 12).”

9. The claimant’s medical provider’s assessment of her capability to work has not changed since the letter dated April 21, 2018.
10. The claimant was able and available to work fulltime from April 21, 2018 through the week ending May 5, 2018.
11. On Monday May 7, 2018, the claimant entered the residential program at [Hospital A] for an intensive anxiety program. The claimant is living at the hospital. This is the same program the claimant’s psychologist described in the April 21, 2018 letter. The claimant does not have an end date to complete this program. The maximum amount of weeks the claimant can remain in this program is 12 weeks. The claimant is not allowed to work and simultaneously and [sic] remain in this program.
12. The claimant continued maintaining her work search efforts after entering the program at [Hospital A] on May 7, 2018.
13. In the residential program at [Hospital A], the claimant can leave the program when the claimant wants to leave and enter an outpatient program instead.
14. If the claimant left the treatment program in question to accept an offer of work, her anxiety would not prevent her from actually performing such work.
15. The Department issued a Notice of Disqualification denying the claimant benefits under Section 24(b) of the Law from the week beginning March 25, 2018 through June 9, 2018 (Exhibit 9).
16. The claimant appealed the Notice of Disqualification (Exhibit 10).

### 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. We reject the portion of Consolidated Finding # 10, which provides that the claimant was able and available to work full time only through the week ending May 5, 2018. This statement is inconsistent with Consolidated Finding # 13, and it is also a mixed question of law and fact. “Application of law to fact has long been a matter entrusted to the informed judgment of the board of review.” Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979). 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 did not meet the eligibility requirements of G.L. c. 151A, § 24(b), while in the hospital.

At issue in this case is whether the claimant has met the eligibility requirements 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 . . . .

The review examiner's decision divides the claimant's eligibility under G.L. c. 151A, § 24(b), into three periods. We shall address each separately.

From March 25 through April 21, 2018, the review examiner disqualified the claimant, concluding that she was not able and available for work during these weeks. We agree. First, Consolidated Finding # 5 provides that the claimant did not search for work until the week beginning April 15, 2018. Second, written statements from her treating psychologist indicate that the claimant was not capable of working until April 21, 2018. *See* Consolidated Findings ## 4 and 8. Because she was not capable of working during this period, she was ineligible under G.L. c. 151A, § 24(b).

The review examiner awarded benefits during the period April 22 through May 26, 2018. The claimant's psychologist confirmed her capability of working beginning April 21, 2018. *See* Consolidated Finding # 8. Consolidated Finding # 6 also provides that, beginning the week before, the claimant was actively looking for full and part-time work three to four times per week in jobs for which she was qualified. As for the claimant's availability to work, the review examiner had concluded that the claimant stopped being available upon admission to the residential treatment program, which began on May 7, 2018, but granted her three more weeks of benefits under a separate statutory provision.<sup>1</sup> *See* Consolidated Finding # 11. We do not agree that this residential treatment program rendered the claimant ineligible for benefits.

It is true, as the review examiner found in Consolidated Finding # 11, that the claimant was not allowed to work while she participated in the residential program. However, this was a *voluntary* admission, which the claimant could leave at any time. *See* Consolidated Finding # 13. The claimant was willing to leave her residential program to accept a full-time job offer.<sup>2</sup> Moreover, if she left in order to take a job, her disability would not prevent her from performing that work, as she could have access to outpatient treatment. *See* Consolidated Findings ## 13 and 14. These circumstances are analogous to an individual going to school full-time while unemployed, but who is willing to quit school to accept a job that conflicts with her school schedule. In that instance, we have held that the individual is available for work under G.L. c.

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<sup>1</sup> In her original decision, the review examiner awarded benefits for the three weeks following May 7, 2018, not because she determined the claimant to be available for work, but due to a separate provision under G.L. c. 151A, § 24(c), which allows the payment of up to three weeks of benefits to an individual who cannot comply with G.L. c. 151A, § 24(b), due to illness.

<sup>2</sup> Part of Finding of Fact # 12 in the review examiner's original decision stated, "The claimant is willing to leave the [hospital] program . . . to work fulltime." *See* Remand Exhibit 1. It was based upon the claimant's undisputed testimony. Because there is no explanation for omitting this fact in the consolidated findings and the rest of Finding of Fact # 12 is included in Consolidated Findings ## 13 and 14, we attribute this omission to an oversight.

151A, § 24(b). *See, e.g.*, Board of Review Decision 0022 4136 82 (January 29, 2018)<sup>3</sup>. Similarly, we conclude that the claimant's participation in this voluntary residential treatment program did not render her unavailable for work.

For the final period, beginning May 27, 2018, we also decline to disqualify the claimant because the review examiner's only reason for denying benefits during this period was the claimant's participation in the residential treatment program.

We, therefore, conclude as a matter of law that while incapable of working due to anxiety, the claimant did not meet the requirements of G.L. c. 151A, § 24(b). Further, we conclude that, once the claimant became capable of working, her participation in a voluntary residential hospital program did not render her unavailable for work under G.L. c. 151A, § 24(b).

The portion of the review examiner's decision that denied benefits from March 25 through April 21, 2018, is affirmed. The portion of the review examiner's decision that awarded benefits from April 22 through May 26, 2018, is affirmed. The portion of the review examiner's decision that denied benefits, beginning May 27, 2018, is reversed. The claimant is denied benefits from March 25 through April 21, 2018. She is entitled to receive benefits for the week beginning April 22, 2018, and for subsequent weeks, if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - December 21, 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)

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<sup>3</sup> Board of Review Decision 0022 4136 82 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

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