

The claimant failed to present substantial evidence to support her testimony that she was physically capable of working during her pregnancy, searching for work in the two months after giving birth, and actively seeking full-time work thereafter. She is disqualified under G.L. c. 151A, § 24(b).

**Board of Review
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Issue ID: 0025 5340 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. Benefits were denied on the ground that the claimant failed to show that she was capable of, available for, and actively seeking full-time work, as required under G.L. c. 151A, § 24(b).

The claimant had filed a claim for unemployment benefits, which was denied in a determination issued by the agency on May 15, 2018. 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 30, 2018. The claimant sought review by the Board, which denied the appeal, 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 obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence concerning the claimant's physical capability to work and her work search efforts during each week of her unemployment claim. The claimant participated in the remand hearing and, thereafter, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether the review examiner's decision to disqualify the claimant under G.L. c. 151A, § 24(b), is supported by substantial and credible evidence and is free from error of law, where the record after remand does not include sufficient evidence to show that in each week that the claimant sought benefits, she had been physically capable of, available for, or actively seeking full-time work.

After reviewing the entire record, including the recorded testimony and evidence from the original and remand hearing, the review examiner's decision, the claimant's appeal, the District Court's Order, and the consolidated findings of fact, we affirm the review examiner's decision.

Findings of Fact

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

1. The claimant filed an initial claim for unemployment insurance benefits, effective 12/3/17. Prior to filing the claim, the claimant worked full-time as a specimen processor for approximately five years. The claimant worked third shift hours and became separated from her work after her vehicle was repossessed during a leave of absence from her work. The claimant did not have public transportation available that would have enabled her to return to work during third shift hours after her leave ended on 12/31/17.
2. The claimant lives in [Town A], Massachusetts and has access to public transportation that is available during daytime hours. The buses travel to [Town B], [Town C], [Town D], [Town E], and other cities and towns within the [Town A] area.
3. The claimant commenced a medical leave of absence in October 2017. The claimant took the leave because she was pregnant and wanted to focus on her health. The claimant delivered her baby on 4/15/18.
4. During the week of 1/2/18 through 1/7/18, the claimant sought work with one prospective employer on an unknown date(s).
5. During the week of 1/7/18 through 1/14/18, the claimant sought work with two prospective employers on an unknown date(s).
6. During the week of 1/14/18 through 1/21/18, the claimant sought work with two prospective employers on an unknown date(s).
7. During the week of 1/21/18 through 1/28/18, the claimant sought work with three prospective employers on an unknown date(s). The employers are located in [Town C], [Town E], and [Town F].
8. During the week of 1/29/18 through 2/5/18, the claimant sought work with three prospective employers on an unknown date(s). One of the employers is located in [Town G]. The locations of the other two are unknown.
9. During the week of 2/5/18 through 2/12/18, the claimant sought work with three prospective employers on an unknown date(s). One of the employers is located in [Town E]; one is located in [Town H]; the location of the third business is unknown.
10. During the week of 2/12/18 through 2/19/18, the claimant sought work with three prospective employers on an unknown date(s). The employers are located in [Town F], [Town I], and [Town J].

11. During the period of 2/19/18 through 2/28/18, the claimant sought work with three prospective employers on an unknown date(s). The employers are located in [Town F], [Town C], and [Town E].
12. During the week of 3/1/18 through 3/7/18, the claimant sought work with three prospective employers on an unknown date(s). The locations of the employers' businesses are unknown.
13. During the week of 3/7/18 through 3/15/18, the claimant sought work with three prospective employers on an unknown date(s). The locations of the employers' businesses are unknown.
14. During the week of 3/15/18 through 3/22/18, the claimant sought work with three prospective employers on an unknown date(s). The locations of the employers' businesses are unknown.
15. During the week of 3/25/18 through 4/1/18, the claimant sought work with three prospective employers on an unknown date(s). The locations of the employers' businesses are unknown.
16. During the week of 4/2/18 through 4/9/18, the claimant sought work with three prospective employers on an unknown date(s). The locations of the employers' businesses are unknown.
17. The claimant did not seek work during the period of 4/10/18 and 6/15/18.
18. After 6/15/18, the claimant began seeking part-time work. The claimant sought only part-time work because she had a baby and babysitting issues. The claimant relied upon her mother to watch her baby. The claimant's mother was available for only part-time childcare due to other issues she needs to take care of. The claimant was available to work from 9:00 a.m. until 3:00 p.m.
19. During the period of 6/16/18 through 6/23/18, the claimant sought work with three prospective employers on an unknown date(s). The locations of the employers' businesses are unknown.
20. During the period of 6/23/18 through 6/30/18, the claimant sought work with two prospective employers on an unknown date(s). The employers are located in [Town B] and [Town C].
21. During the period of 7/1/18 through 7/8/18, the claimant sought work with three prospective employers on an unknown date(s). The locations of the employers' businesses are unknown.

22. During the period of 7/8/18 through 7/15/18, the claimant sought work with three prospective employers on an unknown date(s). The locations of the employers' businesses are unknown.
23. During the period of 7/15/18 through 7/22/18, the claimant sought work with three prospective employers on an unknown date(s). The locations of the employers' businesses are unknown.
24. During the period of 7/22/18 through 7/31/18, the claimant sought work with three prospective employers on an unknown date(s). The locations the employers' businesses are unknown.

Credibility Assessment:

The claimant's overall credibility was diminished by inconsistencies in her testimony.

First, the claimant testified during the initial hearing on June 20, 2018 that she was seeking only part-time work and that she was available to work only from 9:00 a.m. until 3:00 p.m. because she had a baby, and because her mother was available for only part-time childcare. The claimant did not offer any testimony to suggest that the restriction on her mother's availability was temporary. Likewise, had the claimant been aware in June that her mother's limited availability was only temporary, it would not have been logical for the claimant to restrict her work search to only part-time work, assuming she would be available to work a full-time schedule in the future.

In her written appeal, the claimant wrote in part: "For a short period of time I was seeking part time work due to babysitting issues." In her testimony during the February 26, 2019 hearing, the claimant testified that her mother was available for part-time childcare during only one week, that being the week in which the hearing was held. The claimant testified that the mother was responsible for providing care for other grandchildren for that one-week period. The inconsistencies in the claimant's testimony and written statements detracted from her credibility.

During the initial hearing in June, the claimant testified to having sought work at two local hospitals and that she had not been keeping work search logs. At that time, the Review Examiner explained that the claimant was required to engage in work search activities on at least three days per week and it was recommended that she make a written record of her activities, in anticipation of being required to produce such records for the Department of Career Services. In her written appeal to the Board of Review, the claimant wrote: "I did not have ALL places listed in front of me at that moment and at the top of my head since there have been so many. When applying to these jobs, an email has always been sent to me stating thank you for applying to this position, etc. I have **WROTE** down all of these jobs with the dates in which I have applied. I will be more than happy to

provide this if necessary. My emails were my log I should have clarified that, but I have also written them down as HANDWRITTEN LOG...” On 1/3/19, the claimant submitted a fax transmission containing work search log forms. Contained in the forms are names of companies and positions. The claimant did not provide dates on which she engaged in any work search activities. The logs list multiple positions with a single employing unit; they reflect repeated attempts with the same prospective employers. During the February hearing session, the claimant was informed of this missing information and was requested to provide additional information, specifically the dates on which she engaged in work search activities. The claimant requested a period of one week to submit additional information. The hearing record was held open; however, the claimant did not submit any additional evidence.

It is also worth noting that during the initial hearing, the claimant testified that she commenced a medical leave of absence after learning that she was pregnant. The claimant testified that she took the leave in order to focus on her health. During the second hearing, the claimant offered more detailed testimony, indicating that she was ordered to seek bedrest during the first trimester of her pregnancy, due to diabetes and high blood pressure. The claimant testified that hers was a high-risk pregnancy. The claimant was asked to provide medical documentation to establish that she was medically capable of returning to full-time work on 1/1/18, as she contended in her testimony. The claimant expressed uncertainty as to her ability to obtain such medical documentation because the physician who provided her care during the period in question was a cosmetic-type surgeon; she was uncertain of his title. The claimant testified to having subsequently “switched” physicians. The credibility of the claimant’s testimony in this regard is questionable since it is not likely that a cosmetic surgeon would assume responsibility for providing care to a woman with a high-risk pregnancy. Likewise, the claimant failed to provide any medical documentation, from any health care provider, sufficient to support her testimony that she was medically able to work prior to the delivery of her baby in April 2018.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner and 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. Upon such review, the Board adopts the review examiner’s consolidated findings of fact and deems 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. As discussed more fully below, we believe the additional evidence after remand is insufficient to reverse the review examiner’s original legal conclusion that the claimant is ineligible for benefits.

At issue is whether the claimant met the 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 claimant is responsible for demonstrating that she meets each statutory requirement under the provision above. For each week that she claims benefits, she must be physically capable of, available for, and actively seeking full-time work.¹ Based upon testimony at the original hearing that indicated that the claimant was seeking only part-time work, the review examiner denied benefits.

During the remand hearing, the claimant testified that she had limited her work search to part-time jobs only during one week of her claim, which happened to be the week of the original hearing when her mother was temporarily unavailable to watch her baby. The review examiner did not believe her. Thus, Consolidated Finding # 18 provides that the claimant began seeking only part-time work after June 15, 2018. A review examiner is not required to believe self-serving, unsupported evidence, even if it is uncontroverted by other evidence. McDonald v. Dir. of Division of Employment Security, 396 Mass. 468, 470 (1986). Her credibility assessment will not be disturbed on appeal unless it is unreasonable in relation to the evidence presented. *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.) In her credibility assessment, the review examiner explained that she did not believe the part-time availability to be limited to a single week because the claimant did not say this at the original hearing, and because it made no sense to seek only part-time jobs if she would be available to work full-time beginning the following week. We think this assessment is reasonable in relation to the evidence presented.

There are a limited number of circumstances under which individuals may limit their availability to part-time work, but none are applicable here. *See* 430 CMR 4.45. Thus, beginning the week of June 17, 2018, the claimant is ineligible for benefits because she failed to meet the full-time availability requirements of G.L. c. 151A, § 24(b).

As for her obligation to prove that she was actively seeking work during the remainder of her claim, the record is mixed. Remand Exhibit 5 includes a completed work search log showing that the claimant applied for three jobs a week from January 2 through April 9, 2018. *See* Consolidated Findings ## 4–16. There is no log showing work search efforts from April 10 through June 15, 2018. The claimant testified that she was looking for work, but did not log it. Although the review examiner kept the record open so that the claimant could supplement her log with emails demonstrating her work search efforts, the claimant failed to produce further evidence. Consequently, the review examiner found that the claimant did not search for work

¹ Although not specifically stated in G.L. c. 151A, § 24(b), other provisions of the Massachusetts Unemployment Statute show that unemployment benefits are intended to assist claimants seek and return to *full-time* work. *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.

during this period. *See Consolidated Finding # 17.* Because the record lacks sufficient evidence to show an active work search from April 10 through June 15, 2018, we believe this finding is reasonable in relation to the evidence presented, and it renders the claimant ineligible for benefits during this period.

Finally, we consider whether the claimant was entitled to benefits during the period beginning the effective date of her claim, December 3, 2017, through April 9, 2018, the week before she gave birth. *See Consolidated Finding # 3.* Because the claimant had been on a medical leave of absence from her prior job until January 1, 2018, the review examiner asked for medical evidence confirming that the claimant had been physically capable of working. Again, the claimant was afforded additional time after the remand hearing to present medical evidence from any health care provider to satisfy this request, but she did not. For the reasons stated in the final paragraph of the credibility assessment, we agree that the claimant has not presented substantial credible evidence that she was physically capable of working from December 3, 2017, until the birth of her baby on April 15, 2018.

We, therefore, conclude as a matter of law that the claimant has failed to meet her burden to show that, in each week of her claim, she met the requirements of G.L. c. 151A, § 24(b), to be capable of, available for, and actively seeking full-time work.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning December 3, 2017, through the end of the benefit year of this claim, which expired on December 1, 2018.

BOSTON, MASSACHUSETTS
DATE OF DECISION – April 29, 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