

Claimant's chronic back pain renders him unable to work full-time, but he has demonstrated that he meets the requirements for limiting his availability to part-time employment under 430 CMR 4.45(3) and (4). Thus, he is eligible for benefits under G.L. c. 151A, § 24(b).

**Board of Review
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Issue ID: 0031 5877 68

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 reverse.

The claimant separated from his last employer on April 18, 2019. He filed a claim for unemployment benefits with the DUA, which denied him benefits from June 30 through July 6, 2019, in a determination issued on August 3, 2019. 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 beginning April 21, 2019, and indefinitely thereafter in a decision rendered on September 11, 2019. 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, 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 obtain further evidence about his physical ability to work part-time and efforts to find suitable work. After a remand hearing, the review examiner issued his 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 was disqualified from receiving any benefits under G.L. c. 151A, § 24(b), because his medical condition rendered him incapable of performing or seeking full-time work, 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 assessment are set forth below in their entirety:

1. The claimant's appeal is from a determination [sic] which he was denied benefits under Section 24(b) of the Law for the period beginning 6/30/2019 through 7/6/2019. The reason provided for the disqualification was due to the claimant stating that he was unable to work.
2. The claimant filed an unemployment claim established with an effective date of 4/21/2019.
3. The claimant was separated from his employer on 4/18/2019. The claimant was discharged because of a mistake made while employed.
4. Prior to being separated, the claimant worked full-time 48 to 50 hours a week.
5. The claimant has had a previous hernia surgery and has [sic] chronic arthritis in his legs and back two years ago and had returned to full-time for his last two years of employment.
6. The claimant worked full-time and needed to take pain medication while working due to his chronic arthritis.
7. After being terminated, the claimant went to his doctor regarding pain in his legs because of the pain with his chronic arthritis.
8. The claimant's doctor informed the claimant that he could only work 4 hours a day with no lifting over 40 pounds.
9. Two weeks after his termination, the claimant filed for Social Security Disability due to arthritis in his legs.
10. The claimant remains on this medical restriction and is seeking further medical treatment.
11. The claimant has not been declared disabled.
12. The claimant is not seeking full-time employment.
13. The claimant is seeking part-time employment within his physical limitations of no more than 4 hours a day.
14. The claimant is seeking any type of work a [sic] such as driving and specifically applied for a driving position with Demoulas Supermarket.
15. The claimant is capable of driving work based upon his medical restrictions.
16. The claimant's medical restrictions have not changed since 4/21/2019.
17. The claimant is unsure how long the medical restrictions will remain.

18. Beginning approximately October 2019, the claimant began receiving Social Security Disability payments.

Credibility Assessment:

Although, the claimant contended that he worked part-time the last two weeks of employment, the claimant also contended that he was terminated when he asked to reduce his hours and also contended that he worked full-time on pain medication up to his separation. Given the claimant's Finding of Facts from the hearing held on the claimant's separation from the employer [sic] did not make any medical restriction or any medical issues whatsoever, the contention that the claimant worked full-time until his separation is considered credible.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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 Consolidated Finding # 11, as it is unclear what the review examiner means by "declared disabled," and the statement is generally inconsistent with Consolidated Findings ## 8, 10, 13, and 18. 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.

The question we must decide in this case is whether the claimant met the eligibility requirements under G.L. c. 151A, § 24(b), which provides, in relevant 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

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. Because the claimant has only been seeking part-time work, the review examiner's original decision denied him benefits.

However, there are a limited number of circumstances, set forth under the DUA regulations at 430 CMR 4.45, that permit a claimant to restrict his availability to part-time work. In relevant part, these regulations state as follows:

(3) . . . [A]n otherwise eligible individual . . . may limit his/her availability for work during the benefit year to part-time employment provided, that the individual is:

- (a) a qualified individual with a disability;
- (b) provides documentation to the satisfaction of the commissioner substantiating an inability to work full-time because of such disability; and
- (c) establishes to the satisfaction of the commissioner that such limitation does not effectively remove himself/herself from the labor force.

(4) Any individual who meets the requirements of either 430 CMR 4.45(1) or (3) must be actively seeking and available for suitable work to be eligible for benefits. An offer of employment will not be considered an offer of suitable employment and the individual will not be disqualified for refusing such offer where such offer: . . .

- (b) in the case of an individual who meets the requirements of 430 CMR 4.45(3) requires greater hours than the individual is capable of working.

We believe the claimant meets the criteria under 430 CMR 4.45(3) and (4) to limit his availability to part-time employment.

The record shows that the claimant has a disability, defined under the regulations at 430 CMR 4.44 as including a physical impairment that substantially limits a major life activity, such as working. *See Consolidated Findings ## 7–10.* Inasmuch as he qualifies for Social Security Disability payments, we are satisfied that he meets the regulation’s definition as a “qualified individual with a disability.” *See 430 CMR 4.44 and Consolidated Finding # 18.* The claimant has also provided the DUA with documents from his family doctor, which state that his chronic back pain limits his ability to work to part-time employment. *See Exhibits 6 and 7.*¹ Pursuant to the claimant’s testimony about his doctor’s instructions, the review examiner further found that the claimant could still perform four hours of work per day, as long as he did not lift over 40 pounds. *See Consolidated Finding # 8.* Finally, the consolidated findings indicate that the claimant has been actively seeking suitable work as a driver. *See Consolidated Findings ## 14 and 15.*²

Under these circumstances, the claimant has demonstrated that he is a qualified individual with a disability that renders him incapable of working full-time, but that his limitation does not effectively remove him from the labor force. He has also shown that he is available for and actively seeking suitable work. We, therefore, conclude as a matter of law that the claimant may not be disqualified under G.L. c. 151A, § 24(b), due to his inability to work full-time.

¹ Exhibits 6 and 7 are completed DUA Health Care Provider’s Statements of Capability from the claimant’s physician. Although not explicitly incorporated into the review examiner’s findings, the contents are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. *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).

² Although also not in the findings, we note that in the claimant’s completed fact-finding questionnaire, he reported to DUA that he was looking for work four days per week. *See Exhibit 2.*

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning April 21, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 29, 2019



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