

During her benefit year, the claimant was available only for part-time work. For several months, she remained eligible for benefits pursuant to 430 CMR 4.45(3), because a knee injury rendered her unable to work full time. Once that injury resolved, the claimant was ineligible for benefits, because she did not have a reason under 430 CMR 4.45 or the DUA's temporary flexible policies adopted in response to the COVID-19 public health emergency to so limit her availability.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0035 4363 40

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 did not demonstrate that she was available for, or actively seeking, work within the meaning of G.L. c. 151A, § 24(b).

The claimant had filed a claim for unemployment benefits, which the agency denied in a determination issued on May 6, 2020. 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 August 21, 2020. 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 July 15, 2021, the District Court ordered the Board to obtain further evidence. Consistent with this Order, this case was remanded to the review examiner to take additional evidence concerning the claimant's medical condition, caregiving responsibilities, and to incorporate as evidence a decision by a different review examiner in Issue ID # 0033 7257 41, dated November 12, 2020 (Examiner B's decision). The claimant attended the remand hearing with counsel. Thereafter, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant did not establish that she was eligible for benefits because she limited her availability to part time employment during her benefit year, is supported by substantial and credible evidence and is free from error of law in light of the additional evidence produced at the remand hearing.

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

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant worked part time performing data entry until she became separated from employment.
2. The claimant filed a new claim for unemployment benefits effective 01/26/2020.
3. The claimant has never worked full time hours due to caring for her children and her personal home responsibilities.
4. The claimant sustained a torn meniscus which was confirmed on 02/15/2020. The claimant's doctor (doctor B) did not restrict her from working part time hours. As of 06/09/2020, doctor B did not clear the claimant to work in a full time capacity.
5. The claimant had physical therapy two (2) times per week, which would not have prevented her from working part time hours.
6. As of 03/15/2020, the claimant could work any part time hours on the three (3) days per week she did not have physical therapy.
7. The claimant's physical therapy was scheduled to end in June 2020. The office closed for a period because of COVID-19. The claimant's physical therapy ended in November 2020.
8. Once physical therapy ended, the claimant could work hours similar to her prior work: 12:00 p.m. to 5:00 p.m., twenty hours per week.
9. As of 03/15/2020, the claimant was looking for part time work similar to what she has done in the past including retail and online sales.
10. As of 03/15/2020, the claimant was registered with JobQuest. As of 03/15/2020, the claimant was searching indeed.com, searching craigslist.com, and networking with prior employers each week for new part time employment.
11. Since 03/15/2020, the claimant has not had any childcare or caregiving responsibilities.
12. The claimant was diagnosed with fibromyalgia "around 2018" and has been under doctor L's care for this condition for several years.
13. Primary presentation of fibromyalgia consists of diffuse body or muscle achiness as well as morning stiffness. The claimant has reported to doctor L that her stiffness lasts through late morning.

14. Since at least 2018, the claimant has chosen to work part time hours.
15. The claimant is not medically limited to part time employment or medically prevented from working full time hours due to her fibromyalgia.
16. As of 03/15/2020, the claimant was not limiting her own availability to part time employment for any COVID-19 related reason. The claimant could not work her part time job as an assistant timer for races because the races were cancelled due to COVID-19. The claimant could not work at craft fairs or in retail because those events and locations were closed due to COVID-19. The claimant expected to resume part time work as an assistant timer on 09/24/2021.
17. The claimant contacted her former employer for whom she did data entry. The claimant could not return to work for them because they were not hiring.

Credibility Assessment:

During the original hearing, the claimant testified that her physical therapy ended in June 2020. The claimant provided further clarity during the remand hearing that it was supposed to end in June 2020 and ended instead in November 2020 due to an office closure as the result of COVID-19. The claimant's clarifying responses during the remand hearing on this point are credited over her testimony at the original hearing.

During the original hearing, the review examiner asked the claimant "Are you medically restricted at all from working full time hours? You testified you've always worked part time jobs. Has there ever been a medical reason why you have not been working full time?" and the claimant's response was, "No." This response, paired with the claimant's failure to disclose any fibromyalgia diagnosis at the original hearing, was inconsistent with her testimony at the remand hearing that she is diagnosed with fibromyalgia and her assertions that the fibromyalgia 1) is a disability limiting her to part time employment and 2) is a medical condition or restriction that would prevent her from working full time hours.

During the remand hearing, the claimant admittedly did "not presently" have medical documentation establishing that she was medically limited to part time employment and the review examiner held the record open for the claimant to submit such medical documentation.

The claimant's testimony from the remand hearing that she is diagnosed with fibromyalgia is credible given that it was corroborated by doctor L's letter, wherein he confirmed that she has been under his care for the condition for several years.

However, the claimant's assertions about being medically limited to part time employment and medically prevented from working full time hours due to her fibromyalgia are not credible. Doctor L's letter does not corroborate these assertions given that it contains no language of an inability to work full time (nor

does [sic] contain language limiting her to only part time work) because of her condition. Instead, the letter merely identifies that the claimant has been a patient under his care for fibromyalgia for several years, generally identifies the primary presentation of fibromyalgia, and restates what the claimant reported to him about stiffness lasting through late morning. Doctor L's letter does not contain a medical assessment of how fibromyalgia presents in the claimant personally. The claimant has not shown that the stiffness, if true, limits the claimant from working full time hours, particularly when the claimant reported at the original hearing that she had no medical reason why she has not been working full time. The claimant's explanation during the remand hearing that she did not disclose a fibromyalgia diagnosis to the review examiner when testifying at the original hearing because she "didn't think that's what [the original hearing] was about" is not credible. The question during the original hearing asking, "...Has there ever been a medical reason why you have not been working full time?" was clear, as was the claimant's unequivocal response of "No." Again, this original testimony was not consistent with the claimant's later assertions at the remand hearing that the fibromyalgia prevented her from working full time. The claimant was consistent in her testimony during the original and remand hearings that she has no history of working full time at all, the claimant admitted during the original hearing that she never worked full time due to caring for her children and her personal home responsibilities, and the claimant admitted during the remand hearing that she has had no childcare or caretaking responsibilities since 03/15/2020. As such, it was found that it was the claimant's choice, and not a medical directive, to only work part time hours.

During the remand hearing, the claimant also asserted that as of 03/15/2020, she was limiting her own availability to part time employment for a COVID-19 related reason. This assertion is not credited because when the claimant explained further, she testified about the closures that COVID-19 had for races, craft fairs, and retailers and how those closures prevented her from working. The claimant admittedly testified during the remand hearing about having no caretaking or childcare obligations since 03/15/2020, and that she remained available to work part time hours similar to her prior work: 12:00 p.m. to 5:00 p.m., twenty hours per week. This testimony did not demonstrate that she had a COVID-19 related reason to restrict her availability to work to part time.

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. 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, except to note that the last sentence is a legal conclusion, not a credibility assessment, which, at this stage of the proceedings, is for the Board of Review. *See Dir. of Division of Employment Security v. Fingerman*, 378 Mass. 461, 463-464 (1979). As discussed more fully below, we do not agree with

the review examiner's legal conclusion that the claimant is ineligible for benefits for the entire period after March 15, 2020.

At issue in this case is the claimant's eligibility 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 original decision disqualified the claimant because she was not available for, or actively seeking, full-time work. Ordinarily, to be eligible for benefits, a claimant must be available for full-time work.¹ 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. 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:

(a) has a prior work history of part-time employment; establishes to the satisfaction of the commissioner good cause for restricting availability during the benefit year to part-time employment and that such good cause reason is the same as, or is related to that which existed during the prior work history of part-time employment; and is available during the benefit year for at least as many hours of work per week as used to establish the prior work history of part-time employment; or

(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, and

(2) An individual who falls under the provisions of 430 CMR 4.45(1)(b) who obtains suitable part-time employment during the benefit year shall be determined not to be in partial unemployment and will not be eligible to receive partial unemployment benefits while so employed in the benefit year.

(3) Notwithstanding the provisions of 430 CMR 4.45(1), an otherwise eligible individual who does not meet the requirements of 430 CMR 4.45(1) may limit his/her availability for work during the benefit year to part-time employment provided, that the individual is:

¹ See also G.L. c. 151A, §§ 1(r)(1) and (2), 29(a) and (b), which reflect the Legislature's expectation that an unemployed worker will only be eligible for benefits if she is unable to obtain full-time work.

- (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:
- (a) in the case of an individual who meets the requirements of 430 CMR 4.45(1)(a) requires greater hours than those used to establish the individual's prior work history of part-time employment; or
 - (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.

Because the period before us begins on March 15, 2020, we must also consider temporary modifications to the unemployment law brought about by the COVID-19 pandemic.

In March 2020, Congress enacted the Emergency Unemployment Insurance Stabilization and Access Act (EUISAA) which, among other things, permitted states to modify their unemployment compensation law and policies with respect to work search and good cause on an emergency temporary basis as needed to respond to the spread of the COVID-19 pandemic.² The U.S. Department of Labor (DOL) also advised states that they have significant flexibility in implementing the able, available, and work search requirements.³

In accordance with the EUISSA and the DOL guidance, the DUA waived the work search requirement from March 8, 2020, through June 12, 2021.⁴ Since the relevant period before us begins March 15, 2020, the claimant may not be disqualified under G.L. c. 151A, § 24(b), for failure to actively search for full-time work.

However, we must also consider whether the claimant met the able and available components of G.L. c. 151A, § 24(b). The District Court remanded this case to consider whether she was eligible for benefits pursuant to 430 CMR 4.45 or under temporary flexible policies which DUA adopted in response to the COVID-19 pandemic.

² See EUISAA, Pub. Law 116-127 (Mar. 18, 2020), § 4102(b).

³ See U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 10-20 (Mar. 12, 2020), 4(b).

⁴ See DUA UI Policy and Performance Memo (UIPP) 2021.03 (Jan. 29, 2021), p. 7.

In the present case, we consider first whether the claimant was a qualified person with a disability such that she met the requirements to limit her availability pursuant to 430 CMR 4.45(3). The consolidated findings show that, during the benefit year, the claimant had two medical conditions.

The claimant has been diagnosed with fibromyalgia since about 2018. *See* Consolidated Finding # 12. She reported to her physician that it has caused stiffness that lasts through late morning. *See* Consolidated Finding # 13. Nonetheless, the review examiner found that the fibromyalgia does not prevent the claimant from working full-time hours. *See* Consolidated Finding # 15. Rather, she found that the claimant chooses to work only part-time hours. *See* Consolidated Finding # 14. In rendering these findings, the review examiner rejected the claimant’s testimony at the remand hearing as not credible.

The claimant testified during the remand hearing that she was unable to work full-time due to her fibromyalgia. However, as the review examiner points out in her credibility assessment that, during the original hearing, the claimant did not mention her fibromyalgia and testified that there has never been a medical reason why she had not been working full time. “The review examiner bears ‘[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .’” Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980). 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 also note that, during the remand hearing, the review examiner asked the claimant twice for medical documentation of her fibromyalgia diagnosis and how it restricts her to part-time work. The review examiner left the record open for a month to allow the claimant to produce such evidence. The claimant produced Remand Exhibit 11, a letter from her physician, dated September 20, 2021. However, as the review examiner points out in her credibility assessment, the letter states nothing about the claimant’s inability to work full-time because of her fibromyalgia. Given the claimant’s inconsistent testimony and the lack of medical documentation substantiating her inability to work full-time because of this disability, we believe the review examiner’s assessment is reasonable in relation to the evidence presented and see no reason to disturb her findings.⁵

We also consider that the claimant was diagnosed with a torn meniscus in February, 2020, and was required to undergo physical therapy. *See* Consolidated Findings ## 4–6. The consolidated

⁵ Consolidated Finding # 15 in this case is contrary to Finding of Fact # 4 in Examiner B’s Decision. Although different examiners may view the evidence differently, we note that the review examiner in the present case had additional evidence to consider in rendering her consolidated finding than did Examiner B, including the September 20, 2021, medical note, Remand Exhibit 11. Notwithstanding the disparate findings, our decision today does not in any way affect the outcome of Examiner B’s Decision, which rendered the claimant eligible for benefits during the period January 26 through March 14, 2020. Today’s decision pertains to the period beginning March 15, 2020.

findings provide that, due to this condition and its treatment, the claimant was available for part-time work and had not been medically cleared to work full-time as of June 9, 2020. *See Consolidated Findings ## 4–6.* This is supported by Exhibit 7, a Health Care Provider’s Statement of Capability signed by her physician on June 9, 2020, which states that the claimant was unable to work full-time beginning February 15, 2020.⁶ As a result of this injury, the claimant underwent physical therapy treatment until some point in November, 2020. *See Consolidated Finding # 7.*

Although the record as a whole indicates that, with or without this temporary disability, the claimant would not have worked full-time hours, the medical documentation pertaining to her torn meniscus satisfies the requirements for limiting availability to part-time work under 430 CMR 4.45(3).

However, upon completing her physical therapy in November, 2020, the claimant still remained available only for part-time hours. *See Consolidated Finding # 8.* Nothing in the record indicates that, after the physical therapy ended, her knee issue limited her capability to part-time work. At this point, the claimant was required to make herself available for full-time work in order to collect unemployment benefits, unless there was another basis for limiting it to part-time hours.

In addition to temporarily waiving the work search requirements, the DUA temporarily expanded the definition of suitable work and authorized claimants to limit their availability to part-time work for certain COVID-19 related reasons.⁷ There is no exhaustive list of what a COVID-19 related reason is. However, one stated reason is where the claimant must limit her availability for otherwise suitable work because she is the primary caregiver to another and the usual caregiver or caregiver facility is unavailable due to the COVID-19 pandemic. *See UIPP 2020.12*, pp. 2–3. Here, the review examiner found that the claimant did not have any caregiving responsibilities after March 15, 2020. *See Consolidated Finding # 11.* Nor is there anything in the record indicating that the claimant was unavailable for work due to it posing a substantial risk to her health or safety, another stated circumstance for limiting availability. *See UIPP 2020.12*, p. 2.

As for other reasons, UIPP 2020.05 includes as an example of a COVID-19 related reason a claimant who is on temporary layoff because the employer temporarily ceased operations due to COVID-19, with the expectation that employees will return when business resumes.⁸ However, this policy was adopted for individuals who normally maintain a full-time schedule of work.⁹ In this case, the claimant did lose her part-time job as an assistant timer for races, because that employer temporarily shut-down due to the COVID-19 health emergency. *See Consolidated*

⁶ While not explicitly incorporated into the review examiner’s findings, the entries in Exhibit 7 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).

⁷ *See UIPP 2020.05* (Mar. 13, 2020); *UIPP 2020.12* (Oct. 8, 2020); and *UIPP 2020.14* (Nov. 25, 2020).

⁸ *See UIPP 2020.05*, p. 2.

⁹ *UIPP 2020.14* states that individuals on unpaid indefinite leaves of absence are not subject to disqualification under § 24(b), “so long as the reason for the claimant’s inability to work *full-time* is related to COVID-19. For example, a claimant who had been working two part time jobs but lost one of them for a COVID-19 related reason, may be approved for partial benefits . . .” (Emphasis added.) *UIPP 2020.14*, p. 3.

Finding # 16.¹⁰ However, the record as a whole indicates that that the claimant did not lose full-time work because of this layoff. Throughout these proceedings, the claimant has been quite candid that she does not have any recent history of working full-time, and once physical therapy ended, she was available only for part-time work. *See* Consolidated Findings ## 3, 8, and 14.

Thus, after November, 2020, the claimant's inability to work full-time was not due to the COVID-19 related shutdown of her part-time work as an assistant timer for races. Because she did not make herself available for full-time work, she did not satisfy the requirements of G.L. c. 151A, § 24(b), from that point forward.

We, therefore, conclude as a matter of law that, during the period that the claimant was temporarily disabled because of a knee injury, she was available to work, as authorized under 430 CMR 4.45(3). We further conclude that, after her physical treatment ended, the claimant was not available for work within the meaning of G.L. c. 151A, § 24(b).

The review examiner's decision is affirmed in part and reversed in part. The claimant entitled to receive benefits during the period March 15, 2020, through November 28, 2020, if otherwise eligible. The claimant is denied benefits for the week beginning November 29, 2020, and for subsequent weeks, until such time as she meets the requirements of the law.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 23, 2021



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
(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

¹⁰ During the hearing, there was also some vague testimony about also doing craft fairs, but no details were provided as to when that work was, the hours, or frequency of such work. This testimony is also part of the unchallenged evidence in the record.

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