

While medically unable to work due to COVID-19, the claimant was ineligible for benefits pursuant to G.L. c. 151A, § 24(b). However, during that time, he was entitled to three weeks of benefits due to illness under G.L. c. 151A, § 24(c).

**Board of Review
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Issue ID: 0039 9047 73

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 his prior job on March 30, 2020. He filed a claim for unemployment benefits with the DUA, which was approved, but in a determination issued on May 20, 2020, the claimant was denied benefits from April 19 through May 16, 2020. 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 from March 29 through June 27, 2020, in a decision rendered on September 16, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not medically capable of working 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 more specific information about when the claimant tested positive and became unable to work due to COVID-19. The claimant attended the remand hearing. 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 original decision, which disqualified the claimant for the entire period from March 29 through June 27, 2020, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings after remand indicate that COVID-19 did not impact the claimant's ability to work until mid-April.

Findings of Fact

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

1. The claimant filed an initial claim for unemployment insurance benefits, effective 3/29/20. Prior to filing his claim, the claimant's last day of work was

- 3/30/20. The claimant was discharged from his position; the employer did not provide a reason.
2. When completing the weekly certification process for the week of 4/19/20 to 4/25/20, the claimant indicated that he was not able to work and he was not available for work. The claimant indicated he was unable and unavailable for work when certifying for benefits because there was no work available for him, because the employer removed him, and this was the first time he filed for unemployment benefits and did not know what he was doing. The claimant would have gone to work during this week, had work been available for him. The claimant subsequently called the DUA and he was issued a document asking why he was not available. After receiving the letter, he tested positive for COVID-19.
 3. On or about 4/15/20, the claimant experienced symptoms of a fever, headache, and no sense of taste. The claimant was not hospitalized. The claimant called his physician's office and reported the symptoms. The claimant was told by office staff at the physician's practice that he should seek a COVID-19 test. The office staff provided the claimant a number to call for testing.
 4. The claimant tested positive for COVID-19 on 4/29/20; 5/18/20; and on 6/4/20. The claimant tested negative for COVID-19 on 6/23/20.
 5. On 4/28/20, the claimant completed a DUA factfinding questionnaire. When asked if he was able to work during the week beginning 4/19/20, the claimant responded "No". When he replied: "No work, Covid-19", the claimant meant that he was unable to work because he had COVID-19 and this was the most convenient way for him to respond due to limited English. The claimant replied "No" when asked if he was not able to work due to illness or injury because he had COVID-19. The claimant replied "No work, Covid-19" in response to being asked why he was not available to work full-time, because he had COVID-19. When he replied "No work, Covid-19" in response to being asked why he was not available to work full-time, the claimant meant that he had COVID-19. The claimant replied "Yes" when asked if he was actively seeking full-time work, despite being medically unable to work, because if he wrote no, he would have had no option to continue and would have been asked the same question.
 6. On 7/1/20, the claimant's physician wrote a letter that reads in part: "Please excuse him for 3 months..." The claimant was medically cleared to return to work on 7/1/20. Sometime after his second COVID-19 test, on an unknown date, the claimant spoke with his physician. Prior to 7/1/20, the claimant had not been told that he must remain out of work for three months.
 7. The claimant does not have any contemporaneous medical documentation regarding his diagnosis or treatment because he did not see a physician. The

claimant obtained documentation by calling and requesting it from his physician's office.

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. Based upon these consolidated findings of fact, we do not agree that the claimant is ineligible for benefits for the entire period from March 29 through June 27, 2020, as outlined below.

The relevant section of law on appeal is 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

In her original decision, the review examiner disqualified the claimant because she concluded that he was not medically capable of working due to COVID-19, beginning March 29, 2020, until he was medically cleared to return to work on July 1, 2020. However, the consolidated findings show that the claimant was not ill with COVID-19 until several weeks into April, 2020.

In her original decision, the review examiner disqualified the claimant based upon a note written by his osteopath on July 1, 2020, which stated, "Able to return to full work activities on: 7/1/2020 . . . He had covid 19 positive from 3/30/20 until 6/23/20." See Consolidated Finding # 6; and Remand Exhibits 1 and 6. However, it appears that the date of March 30, 2020, in the doctor's medical note was a mistake, as the claimant's first symptoms and positive COVID-19 test were after March 30th. This is clarified in the consolidated findings. Specifically, Consolidated Finding # 3 states that the claimant had begun experiencing symptoms of fever, headache, and loss of taste on or about April 15, 2020. His first COVID-19 test was on April 29, 2020, when he tested positive. See Consolidated Finding # 4.

Essentially, the review examiner made a credibility assessment accepting the claimant's sworn testimony in lieu of the March 30, 2020, date in the doctor's letter. 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). The evidence shows that the claimant did not even speak with his doctor until after his second positive test, which was on May 18, 2020. See Consolidated Findings ## 4 and 6. Moreover, the doctor's

medical note was not written until July 1, 2020, several weeks after the claimant's illness had run its course. *See Consolidated Finding # 6.*¹ In light of this evidence, we believe the review examiner reasonably attributed the March 30th date to be a mistake.

Because the consolidated findings now show that the claimant was not impacted by COVID-19 until on or about April 15, 2020, he may not be disqualified under G.L. c. 151A, § 24(b), before then.

Although the review examiner discredits the date of onset of the claimant's illness in the doctor's note, the consolidated findings still indicate that the claimant was not able to work for a period of time due to COVID-19. This is based upon the claimant's own statements to the DUA in his fact-finding questionnaires, the symptoms he described, his positive COVID-19 tests, and the fact that his doctor wrote a note excusing him from work. *See Consolidated Findings ## 3–6.* Given these findings, we believe the claimant was not able to work from on or about April 15 through June 30, 2020.

Also relevant to our decision is G.L. c. 151A, § 24(c), which allows for the payment of benefits for up to three weeks, if a claimant is not capable of working due to an illness. Because the record establishes that the claimant was ill with COVID-19 for more than three weeks, he is also entitled to receive three weeks of benefits pursuant to this section of law.

We, therefore, conclude as a matter of law that the claimant was not eligible for benefits pursuant to G.L. c. 151A, § 24(b), during the period of time that he was ill and incapable of working due to COVID-19. We further conclude that, during this period, he was entitled to three illness weeks of benefits pursuant to G.L. c. 151A, § 24(c).

¹ During the hearing, the claimant explained that he had asked for the note to excuse him from work, because, at the time, he did not realize that his former employer had discharged him. While not explicitly incorporated into the review examiner's findings, this testimony is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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).

The review examiner's decision is affirmed in part and reversed in part. The claimant is not eligible for benefits during the weeks May 10 through June 27, 2020. He is eligible for benefits during the weeks March 29 through May 9, 2020², and beginning again on June 28, 2020, as well as for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 18, 2021



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may contact the PUA call center at (877) 626-6800 and ask to speak to a Tier 2 PUA Supervisor.

**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

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

² Illness weeks have been applied to the weeks beginning April 19, 2020, April 26, 2020, and May 3, 2020.