

While the claimant was unavailable for any type of work while ill with COVID-19, she was ineligible for benefits under G.L. c. 151A, § 24(b), but she qualified for up to three weeks of illness benefits pursuant to G.L. c. 151A, § 24(c).

Board of Review
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Issue ID: 0047 6860 75

ORDER TO RESCIND AND RE-ISSUE FINAL DECISION

Introduction

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny unemployment benefits because the claimant was not capable of or available for work. On March 31, 2021, the Board of Review issued a final decision to affirm the review examiner's decision. The Board hereby RESCINDS its Final Decision and concludes that, although the claimant is disqualified from April 12, 2020, through July 11, 2020, pursuant to G.L. c. 151A, § 24(b), the claimant is entitled to receive three weeks of illness benefits pursuant to G.L. c. 151A, § 24(c).

As reasons therefor, we note that, ordinarily, approved illness weeks may be used only for continued weeks claimed, not for the initial week claimed due to the separate statutory requirement under G.L. c. 151A, § 23, to serve a waiting period during that initial week. Since issuing the Board's original decision, the DUA has recognized that, while the waiting period has been temporarily waived due to the COVID-19 public health emergency, claimants may be granted the illness weeks regardless of whether those weeks fall during continued weeks claimed or the initial waiting period. *See* Chapter 40 of the Acts of 2020; *see also* UIPP 2021.03 (Jan. 29, 2021), p. 5. The Board agrees. Consequently, we are re-issuing this decision to allow for the award of the illness week benefit under G.L. c. 151A, § 24(c). Pursuant to our authority under G.L. c. 151A, § 41, the review examiner's original decision is affirmed in part and reversed in part.

Procedural History of this Appeal

The claimant filed a claim for unemployment benefits with the DUA, effective April 12, 2020, which was denied in a determination issued on July 31, 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, concluding that the claimant was ineligible for benefits from the week beginning April 12, 2020, through July 11, 2020, but eligible for benefits thereafter, in a decision rendered on November 20, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not capable of or available for work from April 12, 2020, through July 9, 2020, and thus, she was ineligible for

benefits under G.L. c. 151A, § 24(b), during this period. 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 additional information on the claimant's ability to work from April 12, 2020, through July 9, 2020. 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 decision, which concluded that the claimant was not eligible for benefits from the week beginning April 12, 2020, through July 11, 2020, because she was not capable of or available for 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. On 06/25/20, the claimant filed a claim for unemployment benefits with an effective date of 04/12/20.
2. The claimant lived in El Salvador most of her life. She came to the United States about eight (8) years ago. She speaks little English. She has an elementary education, having attended school through 5th grade.
3. The claimant's work history consists almost entirely of cleaning/janitorial type work. She also worked as an assembler in a factory for a very short time.
4. When the claimant filed her claim, she worked as a cleaner/janitor in a hospital for elderly individuals. She cleaned floors and windows and took out the trash.
5. Beginning 04/12/20, the claimant was unable to work because she felt ill. She was suffering from a fever, vomiting, cough, eye pain, and a headache.
6. The claimant was diagnosed with COVID-19.
7. On 07/10/20, the claimant's physician released her to return to work full duty.
8. From 04/12/20 through 07/09/20, the claimant was not physically capable of working full-time or part-time due to her illness.
9. From 04/12/20 through 07/09/20, the claimant was not immediately available for work due to her illness.
10. Since 07/10/20, the claimant has been immediately available for full time work.

11. Since 07/10/20, the claimant has been looking for full time work a minimum of three days per week. She does not use a computer, but she calls friends to ask if they are aware of open positions.
12. On 07/23/20, the DUA sent the claimant a Notice of Disqualification stating she was disqualified from receiving unemployment benefits from the period beginning 04/12/20 because she did not meet the requirements of Section 24(b) of the Law.

Credibility Assessment:

The claimant's testimony is considered credible because it [sic] clear and consistent. She testified she was not physically able to work either part-time or full-time for the period of April 12, 2020, through July 9, 2020, because she suffered from COVID-19 symptoms. Her work history involves only physical work that is done in person and not remotely.

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 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. Upon review of the entire record, while we agree with the review examiner's legal conclusion that the claimant was disqualified under G.L. c. 151A, § 24(b), the claimant is still eligible for three weeks of benefits.

Our decision in this case is governed by 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

Ordinarily, under federal and Massachusetts law, claimants are only eligible for benefits if they are capable of, available for, and actively seeking full-time work. In this case, because the period in question began on April 12, 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.¹ The U.S.

¹ See EUISAA, Pub. Law 116-127 (Mar. 18, 2020), § 4102(b).

Department of Labor (DOL) has also advised states that they have significant flexibility in implementing the able, available, and work search requirements.²

Pursuant to the temporary flexibilities authorized by the federal government during the pandemic, the DUA is temporarily allowing claimants to limit their availability to part-time employment during the pandemic if they are doing so because they are unable to work full-time due to COVID-19. DUA Unemployment Insurance Policy and Performance Memorandum (UIPP) 2020.14 (Nov. 25, 2020), p. 3. But, it is important to note that the requirement to be able and available for work is not waived completely. The federal government has stated that an individual's availability for work may not be so limited as to constitute a withdrawal from the labor market.³

During the hearing, the review examiner carefully questioned the claimant about her availability for work during the time she was ill. The claimant's symptoms from COVID-19 were so severe that she was unable to return to work until July 9, 2020. Consolidated Findings ## 5-8. As the evidence indicates the claimant could not perform any work during the period between April 12, 2020, and July 9, 2020, because of her illness, she had effectively withdrawn from the labor market. As such, she did not meet the eligibility requirements under G.L. c. 151A, § 24(b), during this period.

However, for periods of unemployment when she was not capable or available for work due to severe COVID-19 symptoms, she is entitled to received up to three weeks of illness benefits under a different section of law, G.L. c. 151A, § 24(c).

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 that she was unable to perform any work. We further conclude that she was eligible for three weeks of illness benefits pursuant to G.L. c. 151A, § 24(c).

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the weeks beginning April 19 through June 20, 2020. She is entitled to receive benefits for the weeks beginning April 12, 2020, and June 21, 2020, and for subsequent weeks thereafter, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 5, 2021



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

² See U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 10-20 (Mar. 12, 2020), 4(b).

³ See UIPL 10-20, 4(b), p. 3.

Member Charlene A. Stawicki, 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)**

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 apply at: <https://ui-cares-act.mass.gov/PUA/>. The claimant may also call customer assistance at 877-626-6800 (select the number for your preferred language, then press #2 for PUA).

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.

LSW/rh