

Claimant, who was unable to work due to complications with her pregnancy, had been disqualified under G.L. c. 151A, § 24(b), from the effective date of her claim through the date she gave birth. However, the claimant became capable of work upon giving birth, and she was available for work from home. Because the claimant was required to stay home while her eight-year old daughter attended school remotely, she was available for work pursuant to temporary policy changes adopted in response to the COVID-19 pandemic.

**Board of Review
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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. We affirm the denial of benefits from June 20, 2020, through August 8, 2020. However, we reverse and award benefits as of August 9, 2020.

The claimant filed a claim for unemployment benefits with the DUA on July 2, 2020, which was denied in a determination issued on July 10, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on September 5, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not available to work full-time because she chose "to spend time with her son" while on a leave of absence from her employer and, thus, 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 take additional evidence regarding the claimant's capability of and availability for work. The claimant attended two remand hearing sessions. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. 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 available for work while on a leave of absence from her employer, 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 worked full-time as a manager of a fast-food restaurant until about 03/01/20. At that time, she reduced her schedule to part-time (20-25 hours per week) due to complications with her pregnancy. She was four months pregnant and suffering from early contractions.
2. The claimant has an 8-year-old daughter. Since mid-March 2020, the child has been remote learning from home due to the COVID-19 pandemic.
3. The claimant's mother watched her daughter while she was remote learning from home through June 2020, but then she moved out of state.
4. On 06/23/20, the claimant was treated by her OBGYN. Her physician indicated she should remain out of work because she was suffering from more serious contractions.
5. The claimant last worked on 06/19/20.
6. On 07/02/20, the claimant filed a claim for unemployment benefits with an effective date of 06/28/20.
7. The claimant was not physically able to work full-time from 06/20/20 until she gave birth on 08/06/20.
8. The claimant's next appointment with her OBGYN doctor was scheduled for 10/06/20.
9. Although the claimant's OBGYN physician did not document her ability to return to work until her appointment on 10/06/20, the claimant was physically able to work fulltime immediately after she gave birth as long as she was able to work from home so she could care for her children.
10. The claimant has to watch her child while she is remote learning because she has no family or friends that can babysit and she cannot put her daughter in a childcare facility because she suffers from asthma which places her at greater risk for harm if she catches COVID-19.
11. When her daughter's school reopens, the claimant intends to find a safe daycare for her infant so she can return to work. At that time, the claimant intends to return to her job with the instant employer if she does not find a better opportunity.
12. Since she filed her claim, the claimant has been looking 3-4 days per week for a new fulltime job. She is searching for jobs she can do from home.
13. The claimant has experience selling beauty products. Since she filed her claim, she has applied for two jobs selling weight loss products, which she can do from home.

14. The claimant also has experience in the cosmetology field, but she is unable to have clients come to her home for treatments due to COVID-19 concerns.
15. She has also looked for retail jobs. She has applied for 2 retail positions, but she has not received any interview requests.
16. The claimant requested and was approved for a personal leave of absence through 01/11/21. The claimant remains in contact with her employer and her job continues to be available to her.
17. On 07/10/20, the DUA sent the claimant a Notice of Disqualification stating she was disqualified from receiving unemployment benefits from the period beginning 06/28/20 and for an indefinite period because she did not meet the requirements of Section 24(b) of the Law.

Credibility Assessment:

Although there is a language barrier, it is clear from the collective testimony from the claimant during the past three hearings, that she has been capable of working full-time remotely from home since she gave birth to her child on 08/06/20. The claimant's testimony also established that she intends to return to work for her instant employer, if she does not obtain a better opportunity, as soon as her daughter returns to school. The claimant's testimony is considered credible because it is logical that, due to the COVID-19 pandemic, she is only available to work from home while her young child is remote learning and that she would only search for daycare for her infant when her daughter can return to in-person schooling.

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 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was not available for work after she gave birth, and thus was not entitled to benefits, while she was on her leave of absence.

The review examiner's initial decision to deny benefits was based on 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; . . .

Because the review examiner found that the claimant was physically capable of working but not available for full-time work because she “chose” to spend time with her child, the review examiner initially disqualified her from benefits and concluded that she did not fulfill the three requirements of G.L. c. 151A, § 24(b).

The review examiner’s initial conclusion, however, did not consider the reason the claimant was not available for work in view of the COVID-19 pandemic, as well as emergency regulations promulgated by the DUA to alleviate hardships caused by the pandemic.

Ordinarily, under federal and Massachusetts law, claimants are only eligible for benefits if they are physically capable of, available for, and actively seeking full-time work, and they may not turn down suitable work. Here, because the claimant seeks benefits from June 28, 2020, the effective date of her claim, through the present, 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 laws 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. Department of Labor (DOL) has also advised states that they have significant flexibility in implementing the able, available, and work search requirements, as well as flexibility in determining the type of work that is suitable given an individual’s circumstances.² In response, the DUA promulgated COVID-19 Emergency Regulations relaxing its definition of suitable work and the standards for work search for individuals in certain circumstances.³

After remand, the review examiner found that the claimant was not physically capable of working from June 20, 2020, until she gave birth on August 6, 2020. *See* Consolidated Finding of Fact # 7. Thus, from the effective date of this claim on June 28, 2020, through August 6, 2020, the claimant was not medically capable of working for reasons unrelated to the COVID-19 pandemic and, thus, was not eligible for unemployment benefits during this period pursuant to G.L. c. 151A, § 24(b).

However, the review examiner found that, immediately after the claimant gave birth, she was physically capable of working. *See* Consolidated Finding of Fact # 9. Since there is no indication from the record that the claimant was medically precluded from work as of August 6, 2020, we conclude that she was capable of work within the meaning of G.L. c. 151A, § 24(b), as of the week beginning August 9, 2020.

We next consider whether the claimant was available for work after she gave birth on August 6, 2020. The review examiner had initially concluded that she was not. We disagree.

In response to the COVID-19 pandemic and, as authorized by the EUISSA, the DOL has stated, with regard to availability, that an individual may be considered available for work if they are

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

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

³ *See* 430 CMR 22.00, effective Mar. 16-June 14, 2020; and 430 CMR 22.00, effective Aug. 4- Nov. 2, 2020.

available for any work for all or a portion of the week claimed, provided any limitation upon her availability does not constitute a withdrawal from the labor market.⁴

Based upon this guidance, the DUA has announced temporary policy changes pertaining to the availability and work search requirements under G.L. c. 151A, § 24(b). The DUA has announced that a claimant who must remain at home because they are unable to secure childcare for a dependent unable to attend school due to COVID-19 may be considered available for work if the claimant could work from home via a teleworking or remote set-up. DUA UI Policy and Performance Memo (UIPP) 2020.12 (Oct. 8, 2020), pp. 2–4.

Here, the review examiner found the claimant must remain at home while her eight-year-old daughter attends school remotely. She has no family or friends who can babysit, and she cannot put her daughter into a daycare facility because she suffers from asthma, which places her at greater risk of harm from exposure to COVID-19. *See Consolidated Finding of Fact # 10.* The review examiner also credited the claimant’s testimony that she will look for a safe daycare for her infant after her older daughter returns to school and will return to her job with her former employer if she does not find a better opportunity. *See Consolidated Finding of Fact # 11.* The claimant has been searching for work she can do from home, consistent with her prior training and work experience. *See Consolidated Findings of Fact ## 12-15.*

The review examiner issued a credibility assessment detailing why she accepted the claimant’s testimony regarding her availability for work. 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). We believe that her assessment is reasonable in relation to the evidence presented.

Because the claimant has been available to work remotely since she became capable of working again on August 6, 2020, she meets the modified availability requirements as of the week beginning August 9, 2020.⁵

We, therefore, conclude as a matter of law that the claimant may not be disqualified under G.L. c. 151A, § 24(b), as of August 9, 2020, because, pursuant to temporary DUA policy and emergency regulations, she has met the eligibility requirements adopted in response to the COVID-19 pandemic.

⁴ UIPL 10-20, 4(b).

⁵ We also note that, in accordance with the EUISSA and the DOL guidance, effective November 2, 2020, the DUA is waiving “work search requirements until such time as the COVID-19 emergency measures have been lifted.” DUA UI Policy and Performance Memo (UIPP) 2020.15 (Nov. 25, 2020), p. 2. Although the DUA announced this policy in November of 2020, it is authorized by the EUISSA and DOL guidance released in March of 2020. To disqualify a claimant under a more rigid reading of law prior to November 2, 2020, seems arbitrary and against public policy. As such, we further believe the claimant’s work search requirements were waived.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits from June 28, 2020, through August 8, 2020. The claimant is entitled to receive benefits beginning on August 9, 2020, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 26, 2021



Michael J. Albano
Member

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.

JPCA/rh