

Because the claimant was medically precluded from working in an environment that put her at high risk of exposure to COVID-19 due to her pregnancy, the work the employer offered to her was not suitable. As she was medically cleared to perform remote work, or lower-risk work, she met the temporary flexible requirements under § 24(b). Since there is no indication the claimant was medically precluded from any form of work after she gave birth, she cannot be denied benefits under § 24(b) following the birth of her child.

**Board of Review
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Issue ID: 0048 8292 21

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award the claimant unemployment benefits from the week beginning June 28, 2020, through August 5, 2020, and to deny unemployment benefits thereafter. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part.

The claimant filed a claim for unemployment benefits with the DUA, effective June 28, 2020, which was denied in a determination issued on August 4, 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 awarded the claimant benefits from the week beginning June 28, 2020, through August 5, 2020, and denied benefits thereafter in a decision rendered on October 17, 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 full time work as of August 6, 2020, 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 obtain additional information relating to the claimant's availability for work following August 5, 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 capable of or available for work beginning August 6, 2020, 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 are set forth below in their entirety:

1. The claimant filed a claim for unemployment benefits with an effective date of June 28, 2020.
2. On June 28, 2020, the claimant was pregnant.
3. The claimant delivered her baby on November 28, 2020.
4. From June 28, 2020, through August 5, 2020, the claimant was not medically restricted from working.
5. From June 28, 2020, through August 5, 2020, the claimant was available to work.
6. From June 28, 2020, through August 5, 2020, the claimant searched for work by visiting online job sites, and filing job applications.
7. During the claimant's employment with her last employer, the employer continued to schedule the claimant to work locations where other employees tested positive for COVID-19.
8. As of August 6, 2020, the claimant's doctor instructed the claimant not to return to work due to her high risk of severe illness due to COVID-19.
9. The claimant's doctor would have cleared the claimant for work if she was not at risk of infection from COVID-19 while at work.
10. During the period beginning August 6, 2020, the claimant was available to work full time.
11. The claimant gave her last employer a two weeks-notice that she was quitting. During the two weeks period, the Division Manager instructed the claimant to give him a call when she was ready to return to work. The claimant thought the Division Manager was being nice because he was aware she wanted to work for the employer.
12. After the claimant separated from her last employer, the claimant was not in contact with the employer's Division Manager about her returning to work.
13. During the period beginning August 6, 2020, the claimant searched for work by visiting online job sites, reviewing newspapers, contacting potential employers and filing job applications.
14. The claimant has not contacted her last employer for work since she has given birth.

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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was not capable of or available for work within the meaning of the law as of August 6, 2020.

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 actively seeking full-time work. In this case, because the period in question began on June 7, 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. Department of Labor (DOL) has also advised states that they have significant flexibility in implementing the able, available, and work search requirements.²

In accordance with the EUISSA and the DOL guidance, the DUA has waived the 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. This temporary policy has been made retroactive to March 8, 2020. UIPP 2021.02 (Jan. 22, 2021), p. 2. This means that the claimant may not be disqualified under G.L. c. 151A, § 24(b), for failure to actively search for work.

However, we must also consider whether the claimant has met the able and available components of G.L. c. 151A, § 24(b). Pursuant to the temporary flexibilities authorized by the federal government during the pandemic, the DUA has also adopted the following policies. Employment is deemed not to be suitable if it poses a substantial risk to the claimant's health or safety, the individual's health or safety would be compromised if the claimant accepted the employment, or the claimant has a reasonable belief that one of these factors applies. UIPP 2020.14 (Nov. 25, 2020), p. 2. Moreover, during the pandemic, the DUA is temporarily allowing claimants to limit their availability to part-time employment, if they are doing so because they are unable to work full-time due to COVID-19. UIPP 2020.14, p. 3. 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

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).

individual's availability for work may not be so limited as to constitute a withdrawal from the labor market.³

In the present case, the record shows that the claimant was precluded from working due to the impact of the COVID-19 pandemic. Her doctor instructed her not to return to work due to her high risk from infection with COVID-19. *See Consolidated Findings ## 8 and 9.* As the employer continued to schedule the claimant to work locations where other employees had tested positive for COVID-19, the work offered to her was not suitable work within the meaning of temporary DUA policy. *See Consolidated Findings ## 7 and 8.*

Although the claimant could not work in environments that put her at high risk, the record shows she remained capable of and available for other forms of work. The claimant submitted, and read into evidence, a note from her doctor explaining that she was capable of working remotely or in an environment where she would be at lower risk of exposure to COVID-19.⁴ Under these circumstances, the claimant met the able and available requirements under G.L. c. 151A, § 24(b), during her leave of absence, until she gave birth on November 28, 2020. *See Consolidated Finding # 3.*

Following the birth of her child, the claimant was no longer medically precluded from working in high-risk environments. *See Consolidated Findings ## 3, 8, and 9.* There is no indication from the record that she was otherwise unable to work or unavailable for work as of November 28, 2020. Thus, she is not disqualified from receiving benefits under the provisions of G.L. c. 151A, § 24(b).

We, therefore, conclude as a matter of law that the claimant satisfied the eligibility requirements of G.L. c. 151A, § 24(b), beginning June 28, 2020, and indefinitely thereafter.

However, we do note that claimant's employment status changed following her resignation. *See Consolidated Finding # 11.* The only issue before the Board is whether the claimant was capable of, available for, and actively seeking work during the time on appeal. The DUA has issued a separate determination pertaining to the claimant's change in employment status.

³ *See* UIPL 10-20, 4(b), p. 3.

⁴ While the substance of this doctor's note was not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence before the review examiner, 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 entitled to receive benefits for the week beginning June 28, 2020, and for subsequent weeks if otherwise eligible.



Charlene A. Stawicki, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 15, 2021



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. 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.

LSW/rh