

Where the claimant asked her former employer to reduce her hours to part-time because it had hired other estheticians, this was not good cause to limit her availability to part-time employment during her benefit year, and she was ineligible for benefits under G.L. c. 151A, § 24(b). However, during the period when she was not capable of any work following ankle surgery, she was eligible for three weeks of benefits pursuant to G.L. c. 151A, § 24(c).

**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: 0053 8134 62

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 filed a claim for unemployment benefits with an effective date of March 8, 2020. On October 14, 2020, the agency issued a Notice of Disqualification under G.L. c. 151A, § 24(b), for the period beginning July 12, 2020, and indefinitely thereafter. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant and her attorney, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on January 5, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not able and available for full-time work, and, thus, she was ineligible for benefits under G.L. c. 151A, § 24(b). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant is indefinitely ineligible for benefits pursuant to G.L. c. 151A, § 24(b), from the week beginning July 12, 2020, is supported by substantial and credible evidence and free from error of law, where the medical evidence in the record shows that the claimant was not medically capable of working beginning the week of May 24, 2020.

Findings of Fact

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

1. Prior to filing an initial claim for unemployment benefits, the claimant's last date of work for her prior employer, a spa, was on March 18, 2020. The claimant

worked as an esthetician for this employer. The claimant initially worked fulltime [sic] for this employer. The claimant started working part-time for this employer in 2019 at the request of the claimant due to the employer hiring more estheticians. This employer's establishment was shut down due to the COVID-19 pandemic. The claimant was discharged for a lack of work.

2. The claimant also is a business owner. She owns her own commercial cleaning company. The claimant runs this business out of her home. The claimant performs the management portion of the business. The claimant has not performed work for the business since March 2020 as many workers are now working from home due to the COVID-19.
3. In March 2020, the claimant filed an initial unemployment claim.
4. On May 26, 2020, the claimant had a surgery on her left ankle.
5. The claimant was not able and available to work after her surgery for a period of time due to having to recover from her surgery.
6. In a Health Care Provider's Statement of Capability form dated October 20, 2020, the claimant's doctor responded 'no' to the following questions regarding the claimant: "Has the patient been able (or capable) to work since 7/12/2020" "Is the patient currently able to work in a fulltime capacity with no restrictions?" "Is the patient currently able to work in a part-time capacity with no restrictions?"
7. On the Health Care Provider's Statement of Capability form dated October 20, 2020, the claimant's doctor wrote "5-26-2020" in response to the following question: "If no, on what date did the patient become unable to work full-time?"
8. On the Health Care Provider's Statement of Capability form dated October 20, 2020, the claimant's doctor wrote: "Patient ankle is still soar [sic] and swollen. Sensitivity around incision still needs time off her foot" in response to the following question: "If no, list why the patient cannot work full-time without restrictions, or if the patient can work with restrictions explain the restrictions."
9. On the Health Care Provider's Statement of Capability form dated October 20, 2020, the claimant's doctor wrote: "Right now she is still recovering from ankle surgery. Patient will be able to return to work part-time with no restrictions beginning 11/09/20" in response to the following question "If no, list why the patient cannot work part-time or explain what restrictions the patient has in his/her ability to work in apart-time [sic] capacity?"

10. On the Health Care Provider's Statement of Capability form dated October 20, 2020, the claimant's doctor wrote: "After 11/09/20 she will be able to return to work part time with no restrictions" in response to the following question "If the patient is unable to work, when do you anticipate the patient will be able to return to work?"
11. On the Health Care Provider's Statement of Capability form dated October 20, 2020, the claimant's doctor wrote: "Recovery takes up to 1 year. Patient should be able to work full time with no restrictions beginning 05/26/2021."
12. The claimant was not able and available to work from the date of her surgery on May 26, 2020 until November 9, 2020.
13. The claimant has been able and available to work part-time since November 9, 2020. The claimant has only been available to work part-time instead of fulltime [sic] as she is still recovering from her ankle surgery.
14. The claimant has been looking for work weekly since the week beginning July 12, 2020 and maintain [sic] a work search activity log. The claimant looks for work 3 times per week. The claimant has been looking for jobs in the inventory and training fields.
15. On October 14, 2020, the Department of Unemployment Assistance issued a Notice of Disqualification denying the claimant benefits under Section 24(b) of the Law commencing the week beginning July 12, 2020, and until she met the requirements of the Law. The claimant appealed the Notice of Disqualification.

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 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 findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we conclude that the claimant is disqualified pursuant to G.L. c. 151A, § 24(b), commencing the week of May 24, 2020.

To be eligible to receive benefits, claimants must meet the specific eligibility criteria set forth in 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. . . .

Also relevant in this appeal is G.L. c. 151A, § 24(c), which provides, in pertinent part, as follows:

. . . . No individual shall be considered ineligible for benefits because of failure to comply with the provisions of said clause (b) if such failure is due to an illness or disability which occurs during a period of unemployment after he has filed a claim and registered for work, and has been determined to be otherwise eligible; provided, that no work which would have been considered suitable but for such illness or disability was offered to him after he became ill or disabled; provided further, that the exception granted under this paragraph shall apply to three weeks only within a benefit year.

Under G.L. c. 151A, § 24(b), the claimant has the burden to show that she is eligible for benefits. According to the claimant's Health Care Provider, the claimant was not capable of working at all from May 26, 2020, until November 9, 2020, when she could return to work in a part time capacity. *See Findings of Fact ## 7–10.* The claimant, however, could not return to full time employment until May 26, 2021. *See Finding of Fact # 11.* In her decision, the review examiner specifically focused on the claimant's inability to return to full time employment.

Although not specifically stated in G.L. c. 151A, § 24(b), other provisions of the Massachusetts Unemployment Statute show that unemployment benefits are intended to assist claimants in seeking and returning to full-time work. *See, e.g.,* G.L. c. 151A, §§ 29 and 1(r), which provide for the payment of benefits only to those who are unable to secure a full-time weekly schedule of work. Thus, a claimant must generally be capable of, available for and actively seeking full-time work while requesting unemployment benefits. However, there are a limited number of circumstances, which are set forth under 430 CMR 4.45, when a claimant is permitted to restrict that availability to part-time work. In relevant part, 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

In this case, the claimant requested that her hours be changed to part-time in 2019, when the employer began hiring more estheticians. *See* Finding of Fact # 1. Because we are not told why the hiring of more estheticians caused her to seek fewer hours, the claimant has not established either good cause or an urgent, compelling, and necessitous reason to limit her availability to part-time work within the meaning of 430 CMR 4.45(1). Therefore, pursuant to this regulation, the claimant is not eligible for benefits when restricting herself to part-time employment during her benefit year, commencing November 9, 2020.

We also consider recent changes to the law as a result of 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 has 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 adopted several policies, including a policy relaxing its definition of suitable work and expanding the circumstances under which claimants may limit their availability to part-time work.³ Under this policy, employment is not suitable if it poses a substantial risk to the claimant's health or safety, the claimant's health or safety would be compromised due to an underlying medical or other condition if the claimant accepted the employment, or the claimant has a reasonable belief that one of the above factors applies. Additionally, claimants may limit their availability to part-time employment for COVID-19 related reasons. These policies are effective retroactively to the beginning of the pandemic emergency on March 8, 2020.⁴

Under these temporary flexible policies, the claimant could restrict her employment to part time hours when she was medically cleared to return to work on a part-time basis, commencing November 9, 2020, if the reason for restricting her hours had been related to COVID-19. In this case, it was not. The claimant's medical restrictions were solely the result of her ankle surgery and follow-up care.

We, therefore, conclude as a matter of law that the claimant has not shown that she is able and available to work, as required under G.L. c. 151A, § 24(b). We further conclude that, pursuant to G.L. c. 151A, § 24(c), the claimant is entitled to three weeks of benefits due to illness.

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 DUA UI Policy and Performance Memo (UIPP) 2020.14, p. 2-3.

⁴ DUA UI Policy and Performance Memo (UIPP) 2021.02, p. 2.

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to three illness weeks of benefits for the weeks beginning May 24, 2020, May 31, 2020, and June 7, 2020. The claimant is denied benefits beginning the week June 14, 2020, and for subsequent weeks until she meets the requirements of G.L. c. 151A.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 21, 2021



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

**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.

JMO/rh