

The claimant did not present sufficient medical documentation to establish that she was capable of, and available for, work in the weeks following her wrist surgery, and was therefore ineligible for benefits under G.L. c. 151A, § 24(b). However, during the period when the claimant was not capable of any work, she was eligible for three weeks of benefits pursuant to G.L. c. 151A, § 24(c).

**Board of Review
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Issue ID: 0056 5443 55

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 the DUA, effective August 16, 2020. On November 6, 2020, the agency issued a Notice of Disqualification under G.L. c. 151A, § 24(b), which indefinitely disqualified the claimant beginning on October 4, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, the review examiner affirmed the agency's determination in part, and reversed it in part, and denied benefits for the period beginning October 2, 2020, through January 25, 2021, in a decision rendered on March 12, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not capable of working between October 2, 2020, and January 25, 2021, 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 allow the claimant to provide additional evidence regarding her capability of, and availability for, work during the relevant timeframe. 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 incapable of working from October 2, 2020, to January 25, 2021, due to wrist surgery, is supported by substantial and credible evidence and is free from error of law, where, following remand, the review examiner found the claimant was able to work part-time after the surgery.

Findings of Fact

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

1. The claimant opened a claim for unemployment benefits with an effective date of August 16, 2020.
2. The claimant is employed as an attendant at a laundromat. The claimant's position requires that the claimant be able to lift 100–200 pounds of laundry, lift and fold laundry.
3. For the period beginning October 2, 2020, the claimant was medically restricted from working due to wrist surgery. The claimant could not have worked with restrictions because she had stiches on her wrist.
4. As of October 16, 2020, the claimant attended weekly physical and occupational therapy.
5. On November 9, 2020, the claimant was unable to perform work as a laundry attendant due to the condition of her wrist.
6. In or about late November to December 2020, when her stiches were removed and her wrist placed in a splint, the claimant made a request to the employer to return to light duty work. The employer denied the claimant's request because she had not yet been medically released to return to work.
7. The claimant has not been diagnosed with a permanent or temporary disability.
8. The claimant has not received disability payments.
9. The claimant mistakenly indicated in a questionnaire to the Department of Unemployment Assistance that she applied for disability benefits.
10. The claimant worked 25 to 30 hours per week prior to her surgery on October 2, 2020.
11. From at least January 26, 2021, the claimant works 8 to 12 hours per week according to her medical restriction.
12. The claimant was medically released to return on January 25, 2021, with a limitation to work 4 hours per day and a limit of 10 pounds for lifting, pushing, and pulling with her right hand.
13. The claimant returned to work at the laundromat on January 26, 2021.
14. After her stiches were removed in late November to December 2020 through January 25, 2021, the claimant believed she was able and available to perform other work such as clerical/receptionist work, apart from her regular job at the laundromat, as long as she did not have to use her right hand/wrist.

15. The claimant was able to work part-time.
16. Between October 2, 2020, and January 25, 2021, the claimant searched for work by visiting potential employers and searching job postings on the internet. The claimant's work search was limited by COVID-19 related business closures and hiring freezes.
17. In December 2020 or January 2021, the claimant received a job offer to work for a new employer as a home health aide with duties that included bathing a patient. The new employer required a CORI report for the claimant.
18. The CORI report was not completed prior to January 25, 2021.
19. The claimant did not accept the offer because she returned to work at the laundromat.

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 conclude that the claimant is ineligible to receive benefits pursuant to G.L. c. 151A, § 24(b), commencing the week of October 18, 2020.

At issue in this case is the claimant's eligibility under 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

Under this section of the law, the claimant bears the burden of proving that she is able, available for, and actively seeking employment.¹

In her decision, the review examiner applied G.L. c. 151A, § 24(b), in a straightforward manner. She reasoned that, since the claimant was not capable of working from October 2, 2020, through January 25, 2021, the claimant was not eligible for benefits under the statute. According to the

¹ The claimant's work search efforts are not at issue here. In accordance with federal guidance relating to the COVID-19 public health emergency, effective November 2, 2020, the DUA had waived "work search requirements until such time as the COVID-19 emergency measures have been lifted." DUA UI Policy and Performance (UIPP) Memorandum 2020.15 (Nov. 25, 2020), p. 2. This temporary policy was in effect from March 8, 2020, until June 14, 2021. As such, the claimant's work search requirement under G.L. c. 151A, § 24(b), was waived from the beginning of her claim, effective the week beginning August 16, 2020, until the week ending June 12, 2021. As of the week beginning June 13, 2021, the claimant has been obligated to make a reasonable, good faith effort to find new employment. Evancho v. Dir. of Division of Employment Security, 375 Mass. 280, 282 (1978).

Health Care Provider Statement of Capability provided by the claimant's surgeon, dated October 30, 2020, the claimant was not capable of working full-time or part-time from October 18, 2020, with or without restrictions. *See* Remand Exhibit 3.² Consolidated Finding # 12 establishes that the claimant's doctor released her to return to work on a schedule of four hours per day with limited use of her right hand, as of January 25, 2021. *See* Remand Exhibit 1. As a result, the evidence presented does not demonstrate that the claimant was capable of working during the weeks in question.

While the issue before us relates to the claimant's capability of working, as it stems from a medical condition, the claimant's capability and availability for work overlap in this case. Therefore, we believe it is appropriate to also consider the claimant's availability for full-time work.

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

² Remand Exhibit 3 is a completed DUA Health Care Provider's Statement of Capability from the claimant's surgeon. Although not explicitly incorporated into the review examiner's findings, the contents are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

In this case, the claimant testified that she worked 25 to 30 hours per week prior to her surgery on October 2, 2020, and that her employer considers these hours to constitute full-time employment. *See Consolidated Finding # 10.* The review examiner found that, after surgery, the claimant was only able to work part-time and that she had been cleared by her doctor to return to work on a schedule of four hours per day. *See Consolidated Findings ## 12 and 15.* Since the claimant has not shown a history of working part-time, she does not meet the exception under 430 CMR 4.45(1)(a) to limit her availability to part-time work. Moreover, as the claimant has not separated from her employer, the claimant has not established an urgent, compelling, and necessitous reason to limit her availability to part-time work within the meaning of 430 CMR 4.45(1)(b). Additionally, there is no medical evidence to show when the claimant could return to full-time employment. Therefore, pursuant to this regulation, the claimant is not eligible for benefits when she was restricted to part-time employment during her benefit year.

However, we must also consider G.L. c. 151A, § 24(c), which states:

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.

Pursuant to this paragraph, the claimant may still be eligible for benefits for up to three weeks if: (1) she was not able to work, available for work, or actively looking for work due to an illness; (2) she was not offered any suitable work; and (3) she is otherwise eligible for benefits.

As noted above, the review examiner found that the claimant was medically restricted from working in the weeks addressed by her decision. The consolidated findings do not indicate that the claimant was offered any work during the first few weeks after her surgery, or that she had received any job offer until December, 2020, or January, 2021. *See Consolidated Finding # 17.*

We also note that there is no indication in DUA records that the claimant had been disqualified for benefits, pursuant to any other provision of the law. Thus, the claimant was otherwise eligible for benefits. Consequently, the claimant was eligible for the three weeks of benefits while she was unable to work for medical reasons.

We, therefore, conclude as a matter of law that the claimant did not show that she was able and available to work since October 2, 2020, a requirement for eligibility 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.

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 September 25, 2020, October 4, 2020, and October 11, 2020. The claimant is denied benefits beginning the week October 18, 2020, and for subsequent weeks, until she meets the requirements of G.L. c. 151A.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 22, 2021



Michael J. Albano
Member

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)**

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