

Although the claimant remained away from her floor nurse job for COVID-19 related medical reasons, she was ineligible under G.L. c. 151A, § 24(b), because she was not available to perform any remote work. Despite a knee injury, she was capable of working with restrictions after becoming vaccinated, was available for, and actively sought, full-time work, and thus became eligible for benefits.

**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, and we affirm in part and reverse in part.

The claimant filed a claim for unemployment benefits with the DUA, which was denied from February 7, 2021 through September 15, 2021, in a determination issued on July 20, 2021. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by the claimant and her legal representative, the review examiner modified the agency's initial determination and denied benefits beginning February 7, 2021, and indefinitely thereafter, in a decision rendered on December 11, 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 full-time in her regular occupation as a nurse and was not actively seeking full-time work, 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 about the claimant's medical restrictions and ability to work after February 7, 2021. The claimant and her legal representative 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 actively seeking, full-time work due to her medical restrictions, 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 an initial claim for unemployment insurance benefits, effective 3/29/20.

2. Prior to filing her initial claim, the claimant worked full-time as a floor nurse. The claimant stopped working because her physician advised her to refrain from work due to reasons that are related to COVID-19. The claimant provided the employer a letter from her physician, [A], dated 9/25/20, that recommends the claimant refrain from work due to reasons that are related to COVID-19. On 4/15/21, the claimant was fully vaccinated against COVID-19. After the claimant was fully vaccinated against COVID-19, the claimant was medically cleared to return to work on 4/15/21. The physician, [A], provided the claimant a letter dated 8/19/21 indicating that he recommended the claimant not return to work until she was fully vaccinated and that after receiving her second dose in April, it was safe for her to return to work.
3. The claimant last worked for the employer on 3/13/20. The claimant asked the employer to hold her job, explaining that she would not return to work until her physician cleared her to return. The employer confirmed that the claimant's job would be held while she was on a leave of absence. The claimant did not attempt to return to work in April 2021 because she was being treated for a knee injury that occurred on 2/7/21. The claimant did not attempt to return because she could only stand and walk for four hours due to a partial ACL tear and was not able to stay on her feet for a full shift, which she concluded would be necessary for her in a staff nurse position. The claimant did not feel competent or skilled enough to work from home. In June, the claimant spoke with the employer's human resources staff, informing the employer that she could not return to work full-time on her feet but was capable of returning if they had a position where she could remain seated. Beginning in October, the employer had a position available for the claimant where she could perform work at a desk. The claimant attended two interviews and an orientation session on performing admissions and discharges computer skills with the employer and returned to work full-time in early October, 2021; she began working shifts during the second week of October, 2021. The claimant subsequently left for work with a new employer in December, 2021.
4. On 6/21/21, the claimant completed a DUA fact-finding questionnaire, indicating that she was not able to work during the week beginning 6/13/21 due to COPD and a partial tear of the left [ACL]. The claimant wrote that she was attending physical therapy and expected to be able to return to work on 9/15/21.
5. After filing her initial claim for benefits, the claimant did not search for new work until approximately 6/17/21, after being notified by a DUA employee that she could not receive benefits unless she sought work. After 6/13/21, the claimant sought full-time work where she could work at a desk. The claimant sought work as a school nurse; a visiting nurse; assisting elderly individuals in their homes; and performing treatments and desk work as a charge nurse or unit manager at a long-term care facility. Between 2/7/21 and the present, the claimant was capable of performing any job that she could be trained for and that would require no more than 4 hours on her feet. The claimant did not seek

jobs that would allow her to work from home because she does not own a computer and does not feel competent or capable of working from home. To search for work, the claimant has visited facilities but was told that she needed to apply online. The claimant has made calls and looked online.

6. On 1/4/22, the claimant's physician, [B], issued a letter stating in part, "Between February and now, January 2022, (Claimant) has been capable and able to do work that does not require standing or continued walking." (Entered as Remand Exhibit 4)

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 consolidated findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is indefinitely ineligible for 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 physically capable of, available for, and actively seeking full-time work, and they may not turn down suitable work. In this case, because the claimant seeks benefits from March 29, 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 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) 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 adopted temporary policies relaxing its definition of suitable work and the standards for work search for individuals in certain circumstances, as set forth below.

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).

Here, the review examiner disqualified the claimant from receiving benefits beginning February 7, 2021, and indefinitely thereafter, after concluding that the claimant was not capable of working full-time as a nurse due to the knee injury she had sustained on that date. However, we believe that the review examiner construed G.L. c. 151A § 24(b), too narrowly, where it appears that she did not consider whether the claimant met the law's requirements by demonstrating an ability to perform work in "any other occupation" for which she is "reasonably fitted." G.L. c. 151A, § 24(b).

In addition, the weight of the evidence necessitates a different outcome. As the review examiner noted in her decision, the claimant had initially reported to DUA in at least one weekly certification and her fact-finding questionnaire that she had been unable to work due to injury. *See Consolidated Finding # 4.* At both the initial and remand hearings, the claimant explained that she reported that she was incapable of working because she believed the questions posed to her referred only to her occupation as a floor nurse and not her overall ability to perform other jobs. However, prior to the initial hearing, the claimant had also submitted medical documentation that consistently reported she was capable of working in a seated position, and that she could stand at work for four (4) hours at a time. *See Consolidated Finding # 5 and Exhibits 2–5.*³ Additionally, a letter from the claimant's treating physician, dated January 4, 2022, was entered into the record as evidence during the remand hearing. *See Remand Exhibit 4.* In that letter, the claimant's treating physician expounded on her earlier June 29, 2021, statement and wrote that, between February, [2021], and January, 2022, the claimant "has been capable and able to do work that does not require standing or continued walking." *See Consolidated Finding # 6.* As a result, we are satisfied that the medical documentation contained in the record establishes that the claimant was capable of working with restrictions, as of February 7, 2021.

We next consider whether the claimant was available for work. The review examiner did not specifically address the claimant's availability in her decision.

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 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 announced temporary policy changes pertaining to the availability and work search requirements under G.L. c. 151A, § 24(b). The DUA had announced that employment would not be considered suitable, and a claimant would not be subject to disqualification under G.L. c. 151A, § 24(b), if the employment would pose a substantial risk to the claimant's health or safety due to an underlying medical or other condition, and that a claimant who must remain at home for reasons related to COVID-19 may be considered available for work if the claimant could work from home

³ Exhibit 2 consists of the claimant's weekly certifications between June 13, 2021, and July 14, 2021. Exhibits 3 and 4 are two Health Care Provider Statements of Capability submitted by different providers. The first is from the claimant's physical therapist, which was signed and dated on July 1, 2021, and the other is from the claimant's treating physician, which was signed and dated on June 29, 2021. Exhibit 5 is the claimant's completed fact-finding questionnaire. While not explicitly incorporated into the review examiner's findings, these exhibits and the portion of the claimant's testimony referenced above, 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).

⁴ UIPL 10-20, 4(b).

via a teleworking or remote set-up.⁵ These temporary policies and considerations remained in effect until September 4, 2021.⁶

Consolidated Finding # 2 establishes that the claimant stopped working as a floor nurse in a nursing home and filed for unemployment benefits because her physician advised her to refrain from work due to reasons that are related to COVID-19. *See Exhibit 9.*⁷ This evidence establishes that the claimant's nursing job was no longer suitable for her.

On April 15, 2021, the claimant was fully vaccinated against COVID-19 and medically cleared to return to work. Consolidated Finding # 2. Thus, after April 15, 2021, the claimant was available to work full-time, but in a position where she could remain seated. *See Consolidated Finding # 3.*

However, there is insufficient evidence showing that the claimant was available for work between February 7, 2021, and April 15, 2021. As noted earlier, UIPP 2020.12 provides that claimants who are out of work for COVID-19 related reasons may be considered available for work if they could work from home. Here, there is nothing in the record showing that the claimant made herself available for any kind of work during this timeframe. Additionally, the claimant testified that she did not "feel competent or skilled enough" to work from home, and that it was for this reason that she did not pursue any positions that involve this type of work. *See Consolidated Finding # 3.* Because the claimant effectively removed herself from the labor force, she does not meet the modified availability requirements for the period between February 7, 2021, and April 15, 2021.

The review examiner also found that the claimant was not actively seeking work within the meaning of G.L. c. 151A, § 24(b), because the claimant's testimony confirmed that she was seeking work that is less than full-time, as she planned to accept temporary assignments until she was able to work full-time. Given the effective date of her claim for unemployment benefits, and the nature of her work search activities after June 13, 2021, we disagree.

Ordinarily, under federal and Massachusetts law, claimants are only eligible for benefits if they are actively seeking full-time work. However, in accordance with the EUISSA and the DOL guidance, effective November 2, 2020, the DUA temporarily waived work search requirements from March 8, 2020, until June 14, 2021.⁸ 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 March 29, 2020, until the week ending June 12, 2021.

While the review examiner acknowledged the work search waiver in her decision, she concluded that the claimant was not entitled to the work search waiver because she was not deemed capable

⁵ DUA UI Policy and Performance Memo (UIPP) 2020.12 (Oct. 8, 2020), p. 2–3.

⁶ UIPP 2021.08 (Sept. 9, 2021), pp. 1-2.

⁷ Exhibit 9 contains a letter dated September 25, 2020, from the claimant's pulmonologist. Specifically, the doctor noted that the claimant had an underlying medical condition, and that she could become seriously ill if she were to return to her job as a nurse. The doctor also advised the claimant to refrain from returning to work until she could become vaccinated against COVID-19. The physician had subsequently submitted a letter dated August 19, 2021, stating that the claimant had received her second COVID-19 vaccination dose in April 2021, and was cleared to return to work at that time. This evidence is part of the unchallenged record as well.

⁸ *See* UIPP 2021.02 (Jan. 22, 2021), p. 2 and UIPP 2021.04 (May 20, 2021).

of working for a reason unrelated to COVID-19. Inasmuch as the waiver policy makes no such distinction among claimants' circumstances, this was a legal error.

Nonetheless, as of the week beginning June 13, 2021, the claimant has been obligated to actively search for work pursuant to G.L. c. 151A, § 24(b). Moreover, she is also subject to disqualification if she turns down suitable work. *See* G.L. c. 151A, § 25(c).

The review examiner's original conclusion regarding the claimant's work search efforts is unsupported by the record. There is no indication in the record that the claimant was available for, or searched for, anything other than full-time work. Further, Consolidated Finding # 5 and Exhibit 2 establish that the claimant has actively searched for work since June 13, 2022. In addition, the claimant testified that her work search efforts included reaching out to colleagues, friends, going in person to various hospitals and facilities to apply for work, conducting online searches, and, in early October, 2021, she returned to work in a desk position. *See* Consolidated Finding # 3. The record contains no evidence suggesting that the claimant has ever turned down suitable work. Taking these facts into consideration, we believe the claimant satisfied the work search requirements after June 13, 2021.

We, therefore, conclude as a matter of law that the claimant was not available for full-time or part-time work from February 7, 2021, through April 15, 2021. We also conclude that the claimant was capable of, and available for, full-time work within the meaning of G.L. c. 151A, § 24(b), beginning April 17, 2021. We further conclude that, because the work search requirement was waived for all claimants until June 13, 2021, any failure on the claimant's part to conduct an active work search prior to that date is not disqualifying, and that, after June 13, 2021, she conducted an active work search pursuant to G.L. c. 151A, § 24(b).

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the week beginning February 7, 2021, through the week ending April 16, 2021. The claimant is entitled to receive benefits from the week beginning April 17, 2021, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 19, 2022



Paul T. Fitzgerald, Esq.
Chairman



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