

The claimant, who has a history of only working part-time hours due to childcare obligations, had good cause to limit her availability during her benefit year to part-time work pursuant to 430 CMR 4.45(1)(a). However, because the employer offered the claimant work during the mornings the children were in school and she did not accept that work, she is disqualified due to refusing suitable work. Board held that during those weeks, she was not in unemployment and ineligible for benefits pursuant to G.L. c. 151A, §§ 29 and 1(r).

**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, effective October 30, 2022, which was approved in a determination issued on November 23, 2022. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on June 22, 2023. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment pursuant to G.L. c. 151A, §§ 29(b) and 1(r). 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 testimony regarding how the claimant obtained her work and if work was available and offered to the claimant. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 in total unemployment from October 30, 2022, through January 14, 2023, because she was an on-call employee who was offered suitable work, 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. On May 3, 2016, the claimant was hired as a home health aide by the employer, a home health care agency.
2. The employer pays the claimant \$16.00 per hour.
3. The employer has an application that sends employees notices of available work shifts daily via text and email, to which employees can respond to accept a shift.
4. Employees receive daily notifications of available shifts, which range from 3 to 12 hours, depending on client needs. Some shifts are flexible, allowing employees to choose the time frame (morning or afternoon) for performing work.
5. The employer offers shifts in time blocks or flexible schedules. For example, shifts could be from 8:30 a.m. to 12:30 p.m. or 10:00 a.m. to 12:00 p.m., with employees and clients agreeing on the specific time frame for services.
6. Available shifts are offered to all employees via text, email, or application, with employees contacting the employer to accept shifts based on their availability and client needs. These shifts cover different clients and locations.
7. Email addresses of employer contacts: [Contact A] and [Contact B]. [Contact A] still works for the employer, while [Contact B] left in March 2023.
8. The employer has the claimant's correct phone number and email address to send notifications about available morning shifts.
9. The claimant provided services for one client on a fixed schedule (Tuesday, Thursday, and Friday) until October 20, 2022, when the client stopped receiving services.
10. The claimant's schedule for this client was Tuesday, Thursday, and Friday. This long-term assignment did not require daily or weekly sign-ups for shifts.
11. The client's schedule was arranged by the employer's registered nurse manager, and the claimant accepted and was available for these shifts until the assignment ended in the week of October 20, 2022.
12. The claimant typically accepted morning shifts, such as from 9:00 a.m. to 12:00 p.m. or 9:00 a.m. to 1:00 p.m., accommodating her children's school schedule.
13. The claimant is a single mother with two children, ages 8 and 15. The older child is in a specialized program due to learning needs.
14. The children's school schedule is from 7:45 a.m. to 3:30 p.m. and 8:30 a.m. to 4:00 p.m. The claimant drops them off and picks them up daily, with no alternative transportation available.

15. The claimant is unavailable for evening and weekend work due to a lack of childcare options, as her older child, who has ADHD [attention-deficit hyperactivity disorder] and PTSD [post-traumatic stress disorder], requires constant supervision and attends therapy sessions.
16. During school and summer vacations, the children's father or other family members occasionally provided childcare in the mornings, but their availability was limited, leading the claimant to work only three mornings a week.
17. The children did not attend after-school programs.
18. During the week of October 30, 2022, the employer had shifts available on Tuesday and Thursday from 9:00 a.m. to 12:00 p.m.
19. On November 2, 2022, the claimant emailed [Contact A] (employer's liaison) at 5:28 p.m., following up on a prior phone call to confirm her availability for work with another client.
20. On November 3, 2022, the claimant worked a morning shift.
21. During the week of November 6, 2022, the employer had a shift available on Monday from 9:00 a.m. to 1:00 p.m., but the claimant did not work that week.
22. During the week of November 13, 2022, no shifts were available.
23. During the week of November 20, 2022, the employer had shifts available on Monday from 9:00 a.m. to 1:00 p.m., and Friday from 8:00 a.m. to 10:00 a.m., 8:30 a.m. to 12:30 p.m., and 9:00 a.m. to 1:00 p.m. The claimant did not work that week.
24. During the week of November 27, 2022, shifts were available on Monday from 8:30 a.m. to 12:30 p.m., and Tuesday from 9:00 a.m. to 1:00 p.m. The claimant did not work that week.
25. During the week of December 4, 2022, shifts were available on Monday from 10:00 a.m. to 12:00 p.m., Tuesday from 10:00 a.m. to 12:00 p.m., Wednesday from 10:00 a.m. to 2:00 p.m., and Thursday from 9:00 a.m. to 1:00 p.m. The claimant did not work that week.
26. On or about December 5, 2022, the claimant emailed [Contact A] at 9:38 a.m., inquiring if there were any clients available for her.
27. During the week of December 11, 2022, shifts were available on Monday from 8:30 a.m. to 12:30 p.m. and 9:00 a.m. to 1:00 p.m., and Friday from 8:30 a.m. to 12:30 p.m. The claimant did not work that week.

28. During the week of December 18, 2022, shifts were available on Monday from 8:30 a.m. to 12:30 p.m., Tuesday for a flexible 2–3-hour shift (morning or afternoon), and Friday for a flexible 2–3-hour shift. The claimant did not work that week.
29. During the week of December 25, 2022, shifts were available on Tuesday from 8:30 a.m. to 1:30 p.m., and 9:30 a.m. to 12:30 p.m., Wednesday for a flexible 2–3-hour shift, Thursday from 8:00 a.m. to 8:00 p.m. (10- to 12-hour shifts), and Friday from 8:00 a.m. to 10:00 a.m. The claimant did not work that week.
30. During the week of January 1, 2023, shifts were available on Tuesday from 10:00 a.m. to 12:00 p.m. and Friday from 10:00 a.m. to 12:00 p.m. and 9:00 a.m. to 12:00 p.m. The claimant did not work that week.
31. During the week of January 8, 2023, shifts were available on Monday for three flexible shifts (2-3 hours), and from 9:00 a.m. to 2:00 p.m., Tuesday from 10:00 a.m. to 12:00 p.m. and 12:00 p.m. to 3:00 p.m. The claimant did not work that week.
32. During the week of January 15, 2023, shifts were available on Tuesday from 10:00 a.m. to 12:00 p.m., and Wednesday from 10:00 a.m. to 12:00 p.m. and 10:00 a.m. to 2:00 p.m. The claimant did not work that week.
33. On or about April 11, 2023, the claimant worked part-time as a home care aide for another employer (new employer), one day a week for a morning 3-hour shift, making \$19.00 per hour. The claimant worked for this employer for about one month.
34. The claimant stopped working for the new employer due to conflicts between shift availability and her children's schedules.
35. The claimant was capable of working with no medical restrictions.
36. The claimant was usually available for shifts between 9:00 a.m. and 12:00 p.m./1:00 p.m.
37. On January 19, 2023, the employer inactivated the claimant's account because she had not accepted any shifts since November 3, 2022.
38. On November 3, 2022, the claimant filed a claim for unemployment benefits, effective October 30, 2022.
39. The claimant's weekly benefit rate is \$77.00, with an earnings disregard of \$25.67.

Credibility Assessment:

The claimant testified that she was available for work after her year-long assignment with a client ended on October 20, 2022, and she accepted a shift on November 3, 2022. She claimed she did not receive any work shifts from the employer from November 6, 2022, through January 15, 2023. However, this testimony is not credible, as the employer provided reliable evidence that work was available during this period, except for the week of November 13, 2022. The employer stated it offered shifts to all employees, including the claimant, many of which matched her preferred Tuesday, Thursday, and Friday schedule. When asked why she did not accept or respond to the available shifts, the claimant testified that she was unaware of them. This examiner does not find her statement credible, given that she accepted a shift on November 3, 2022, but claimed unawareness of available shifts thereafter. The claimant acknowledged that the employer primarily contacted employees about available shifts through text messages and emails via the employer's work application.

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 conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject Consolidated Finding # 14 insofar as it provides the claimant's children were in school until 3:30 p.m. and 4:00 p.m., as the undisputed evidence was that their school sessions ended at 2:00 p.m. and 3:30 p.m.¹ In adopting the remaining findings, we deem them to be supported by substantial and credible evidence.

G.L. c. 151A, § 29, authorizes benefits be paid only to those in "total unemployment" or "partial unemployment." These terms are in turn defined by G.L. c. 151A, § 1(r), which provides, in relevant part, as follows:

(1) "Partial unemployment", an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week; provided, however, that certain earnings as specified in paragraph (b) of section twenty-nine shall be disregarded. . . .

(2) "Total unemployment", an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable and available for work, he is unable to obtain any suitable work.

Thus, claimants are only eligible for benefits if they are capable of, available for, and actively seeking full-time work, and they may not turn down suitable work.

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. 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 relevant period on appeal is from the effective date of the claimant's unemployment claim, October 30, 2022, through January 14, 2023, during which the review examiner concluded that the claimant did not meet the definition of being in unemployment pursuant to the above provisions.²

The findings indicate that, during this period, the claimant limited her work availability to part-time hours. *See Findings of Fact # 12.*

There are a limited number of circumstances, set forth under the DUA regulations at 430 CMR 4.45, that permit a claimant to restrict her 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; . . .

(4) Any individual who meets the requirements of either 430 CMR 4.45(1) or (3) must be actively seeking and available for suitable work to be eligible for benefits. . . .

A claimant's domestic responsibilities, such as child-care may rise to good cause for limiting one's availability to part-time work. *See Conlon v. Director of the Div. of Employment Security*, 382 Mass. 19, 22–24 (1980).

The record shows that the claimant is a single mother of two school age children and the older child has ADHD and PTSD. *See Consolidated Findings ## 13 and 15.* Since the start of her employment with the instant employer, the claimant has limited her work availability to three to four days a week (3–4 hours each day), due to her childcare responsibilities. *See Consolidated Findings ## 1 and 12–17.* Specifically, she could only work on weekdays while her children were in school, as her older child requires constant supervision and must attend therapy sessions. *Consolidated Findings ## 12–16.* The claimant accepted morning shifts from 9:00 a.m. until 12:00 p.m. or 1:00 p.m., Monday through Friday excluding Wednesdays. *See Consolidated Findings ## 12, 16 and 36.*³ Thus, she was available to work between nine and fourteen hours per week.

² We reject the review examiner's characterization of the claimant as an on-call employee, as the consolidated findings reflect that she had been working a fixed schedule during her base period. *See Consolidated Finding # 9.*

³ During the remand hearing, the claimant testified that she was available to work Monday through Friday with the exception of Wednesdays because it was the children's schools' early release day. This testimony is also part of the unchallenged evidence introduced at the hearing and placed in the record.

Since the claimant has a history of working only part-time due to childcare obligations, and she restricted her availability to the same hours due to these childcare issues during her benefit year, the claimant meets the good cause requirement to limit her availability to part-time work pursuant to 430 CMR 4.45(1)(a).

However, to be eligible for benefits, G.L. c. 151A, §§ 29 and 1(r), also require that a claimant not turn down suitable work.

During the week of October 30, 2022, the same week that the claimant filed for benefits, the employer offered two shifts to the claimant within her availability parameters, yet she only accepted one of those shifts. *See Consolidated Findings ## 18, 20, and 38.* Because the employer offered the claimant work that she declined, and there is nothing in the record that indicates that the work offered was unsuitable, the claimant was not in partial unemployment for the week of October 30, 2022.

Because the employer did not have any work available to offer the claimant during the week of November 13, 2022, she was in total unemployment and eligible for benefits during this week. *See Consolidated Finding # 22.*

Apart from the week of November 13, 2022, the employer offered the claimant work, within her availability limitations, from November 6, 2022, through January 21, 2023. However, the consolidated findings reflect that the claimant did not accept any of this work. *See Consolidated Findings ## 21–32, and 36.*

During the remand hearing, the claimant denied receiving any notifications of available shifts from the employer. The review examiner made a credibility assessment rejecting that argument, inasmuch as the employer had shown that work was offered to the claimant via text and email communications, and she had previously accepted shifts via those communications. *See Consolidated Findings of Fact ## 3–8, 19, and 20.* 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). “The test is whether the finding is supported by ‘substantial evidence.’” *Lycurgus v. Dir. of Division of Employment Security*, 391 Mass. 623, 627 (1984) (citations omitted). “Substantial evidence is ‘such evidence as a reasonable mind might accept as adequate to support a conclusion,’ taking ‘into account whatever in the record detracts from its weight.’” *Id.* at 627–628, *quoting New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 466 (1981) (further citations omitted). This assessment and the corresponding findings are reasonable in relation to the evidence presented.

We, therefore, conclude as a matter of law that the claimant met the eligibility requirements to limit her availability to part-time work during her benefit year under 430 CMR 4.45(1)(a). We further conclude that the claimant was in total unemployment pursuant to G.L. c. 151A, §§ 29 and 1(r), during the week beginning November 13, 2022, but she was not in total or partial unemployment during the remainder of the weeks before us.

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits for the week beginning November 13, 2022, if otherwise eligible. The claimant is denied benefits for the period October 30, 2022, through November 12, 2022, and for period November 20, 2022, through January 21, 2023.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 30, 2024



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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.

DY/rh