The claimant requested to have her hours reduced because her medical conditions were impacting her ability to work a 12-hour shift. She did not meet the conditions to limit her availability under 430 CMR 4.45(3) until the week she provided medical documentation to support that. Thereafter, her childcare responsibilities further prevented her from working the same number of hours as she had previously, as required under 430 CMR 4.45(1)(a). Subsequently, the claimant transitioned to relief status, because she disagreed with some of the program director's actions. This was not good cause to decline suitable work. Held she was not in unemployment under G.L c. 151A, §§ 29 and 1(r), during the pendency of her claim.

Board of Review
100 Cambridge Street, Suite 400
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: 0079 7459 20

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 affirm.

The claimant filed a claim for unemployment benefits with the DUA, effective April 9, 2023, which was approved in a determination issued on April 22, 2024. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on July 15, 2023. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in total or partial unemployment and, thus, was disqualified under G.L. c. 151A, §§ 29 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 information about the claimant's unemployment status during the period at issue. Only 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 in total or partial unemployment because the claimant chose to reduce her own hours and refused 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 20, 2019, the claimant began working part time for the employer, a health and human services agency, as a counselor. When she was hired, she was expected to work 20 hours per week.

2. On September 3, 2022, the claimant moved to a different program and began working 3 days, 24 hours, per week (3 days). She reports to the program director. Her rate of pay is $17.00 per hour. She receives $17.00 per hour for shifts worked and time off due to sickness or vacation.

3. The employer posts all available shifts at the program house. Employees can also reach out to their managers and ask about available shifts.

4. The claimant's scheduled hours were Fridays, 3:00 p.m. – 9:00 p.m., Saturdays 9:00 a.m. – 9:00 p.m., and Sundays 9:00 a.m. – 9:00 p.m.

5. The employer pays their employees biweekly. The pay period runs from Saturday to Friday.

6. The claimant suffers from fibromyalgia, among other maladies. She sometimes experiences pain to the level of not being able to walk.

7. The claimant did not have a positive relationship with the program director. She felt that the program director was nasty to her during staff meetings and in notes left for the claimant.

8. In January of 2023, the claimant informed her employer that she was feeling ill and was having difficulty working 12-hour shifts. She informed the employer that she would no longer be able to work from 9:00 a.m. to 9:00 p.m. on Saturdays.

9. The employer asked the claimant for a doctor's note. The claimant did not immediately provide a doctor's note.

10. The employer informed the claimant that she could decrease her Saturday shifts to 6 hours and could pick up other shifts during the week, if there were shifts available. The employer had additional shifts available if other employees had to call out and the program was out of ratio.

11. In March of 2023, the claimant stopped working her full 9:00 a.m. – 9:00 p.m. Saturday shift. She worked 9:00 a.m. – 3:00 p.m. on Saturdays.

12. The claimant informed the employer that she would pick up additional shifts if she could, based on her health issues and how she was feeling.

13. The claimant occasionally picked up additional shifts during the week.

14. The claimant has a 7-year-old grandson who needs to be picked up at his bus stop at 3:00 p.m. on weekdays.

15. If the claimant was working a 9:00 a.m. – 3:00 p.m. weekday shift, she would sometimes leave work 15 minutes early in order to pick up her grandson. She did so when she was allowed to by her supervisor and if her absence would not put the program out of ratio. Occasionally, the claimant was not able to leave early.

16. Sometimes the claimant could not pick up an offered shift because she was feeling poorly.

17. Due to the pain she felt because of her fibromyalgia, the claimant would sometimes not be able to work all the shifts she accepted. She would call out sick.

18. The claimant occasionally took vacation time off.

19. The claimant filed a claim for unemployment benefits effective April 9, 2023. Her weekly benefit amount is $240.00, and her earnings disregard is $80.00.

20. The claimant's wages and hours in her pay periods beginning February 4, 2023, until June 9, 2023, are represented in the following table. This information is taken from her paystubs entered as Exhibit 15:

Pay Period Beginning	Pay Period Ending	Regular Hours	Sick Hours	Vacation Hours	Total Wages
2/4/2023	2/10/2023	22.5	7		501.50
2/11/2023	2/17/2023	19.5			331.50
2/18/2023	2/24/2023	20.5			348.50
2/25/2023	3/3/2023	20			340.00
3/4/2023	3/10/2023	22.25			378.25
3/11/2023	3/17/2023	23.5			399.50
3/18/2023	3/24/2023	12.75		12	420.75
3/25/2023	3/31/2023	6.5		12	314.50
4/1/2023	4/7/2023	18.5			314.50
4/8/2023	4/14/2023	18			306.00
4/15/2023	4/21/2023	18.25			310.25
4/22/2023	4/28/2023	11.75	6		301.75
4/29/2023	5/5/2023	18			306.00
5/6/2023	5/12/2023	18			306.00
5/13/[2023]	5/19/2023	6	6	6	306.00
5/20/[2023]	5/26/2023	18	6		408.00
5/27/[2023]	6/2/2023	12	12		408.00

6/3/[2023]	6/9/2023	6	18		408.00

21. The claimant's daily breakdown of hours from April 1, 2023, until June 2, 2023, are represented in the following table. The table is missing the information from some weeks. This information is taken from the timesheets entered as Exhibit 12:

Day	Day of the Week	Hours	Type	Note
4/1	Sat	6.25	Regular	
4/2	Sun	6.25	Regular	
4/7	Fri	6	Regular	
4/15	Sat	6	Regular	
4/16	Sun	6.25	Regular	
4/21	Fri	6	Regular	
4/22	Sat	6	Sick	
4/23	Sun	6.25	Regular	
4/28	Fri	5.50	Regular	Came in at 3:30 p.m.
4/29	Sat	6.25	Regular	
4/30	Sun	6.25	Regular	
5/5	Fri	5.75	Regular	Came in at 3:15 p.m.
5/13	Sat	6	Vacation	
[5/14]	Sun	6	Holiday	
5/19	Fri	6	Personal	
5/27	Sat	6	Regular	
5/28	Sun	6	Regular	
6/1	Thu	6	Sick	
6/2	Fri	6	Sick	

22. When the claimant certified for benefits for the week beginning April 9, 2023, she reported that she did not work and did not earn wages.

23. During the pay period from April 8, 2023, until April 14, 2023, the claimant worked 18 hours and earned $306.00.

24. On April 15, 2023, the claimant worked 6 hours and earned $102.00.

25. On May 19, 2024, the claimant took a personal day. She was paid for 6 hours of personal time off.

26. On June 1, 2023, and June 2, 2023, the claimant was seriously ill. She was paid for 12 hours of sick time.

27. On June 6, 2023, the claimant provided the employer with a doctor's note stating that she could not work longer than 6 hours per day due to her fibromyalgia.

28. On June 16, 2023, the program director met with the claimant to ask her if she wanted to pick up some extra shifts on other days of the week to get to 24 hours. She was offered morning and afternoon shifts.

29. On June 23, 2023, the employer sent the claimant a text message offering shifts the next week on Monday, Tuesday, Wednesday, and Thursday, from either 3:00 p.m. until 9:00 p.m. or from 9:00 a.m. to 3:00 p.m.

30. The claimant refused the offered shifts. She gave the employer a letter requesting to move to relief status effective July 1, 2023.

31. The claimant requested to move to relief status because she did not like working with the program director. The claimant was not happy that the program director continued to ask for doctor's notes from her and would sometimes try to make her come into work when she was sick, stating that if the claimant did not come into work, the program would be out of ratio.

32. Beginning July 1, 2023, the claimant moved to relief status. She accepts up to 18 hours of work per week.

33. The employer never reduced the claimant's hours.

34. On April 22, 2023, the Department of Unemployment Assistance issued a Notice of Approval granting the claimant benefits under Sections 29(b) & 1(r)(2) of the Law commencing the week beginning April 9, 2023, and subsequently thereafter if otherwise eligible.

35. The employer appealed the Notice of Approval.

Credibility Assessment:

The claimant, the employer's witness (the director human resources), and the employer's representative attended an initial hearing on June 16, 2023. Two witnesses for the employer (the director of human resources and the program director) along with the employer's representative attended a continued session of the initial hearing on July 12, 2023. The claimant did not attend the continued session. The claimant attended a remand hearing held on June 20, 2024. The employer did not attend the remand hearing.

Firstly, it should be noted that the remand hearing was held a year after the initial hearing. During the hearing, the claimant testified that she did not remember a lot about the events of a year ago, including hours worked, shifts offered, shifts accepted, and time off requested. The claimant did not dispute information provided by the timesheets (Exhibit 12) or the paystubs (Exhibit 15) and believed that they were accurate.

During the remand hearing, the claimant admitted that she reduced her hours in March of 2023 from 24 hours to 18 hours per week due to a medical condition. She also admitted that she requested to move to relief status on July 1, 2023, because of her poor relationship with her supervisor. The claimant disputed the employer's previous testimony that she had refused additional offered shifts and that she had called out of accepted shifts. The claimant maintained that she was able to work 18 hours a week but that she was not offered enough shifts and that the employer made up the difference by using the claimant's sick time, vacation time, and personal time, essentially taking away her benefits. She contended that when she moved to 6-hour shifts, a full day was cut from her schedule, putting her at only 12 hours a week, and that no other days were offered to her.

Here, the documentary evidence, specifically the timesheets, the claimant's paystubs, and text messages, support the employer's testimony that the employer did not reduce her hours, but rather that the claimant had reduced her own hours by calling out sick and taking time off. These documents show that the claimant regularly worked around 18 hours a week. For the weeks where the claimant had sick time or vacation time recorded, text messages submitted by the employer and the claimant's own testimony support the employer's testimony that the claimant was taking personal time and calling out sick. One text message showed that on May 19, 2023, the claimant took a personal day, which was reflected in the timesheets. In addition, the claimant testified that during the last week of May and the first week of June, she did take time off because she was seriously ill, which again is supported by the paystubs and timesheets. In addition, a text message from June 23, 2023, shows that the employer did offer the claimant daytime shifts during the week. The claimant did not remember whether or not she accepted and worked any of these shifts but did not dispute that they were offered.

As a final note, during the remand hearing, the claimant requested that the hearing be completed within 45 minutes so she could go into surgery. The review examiner completed questioning, including allowing the claimant to add anything she believed was relevant that had not been discussed, within 45 minutes. The review examiner was satisfied that there were no major issues left undiscussed.

The overall testimony of the employer is assigned more weight than the overall testimony of the claimant based on the documentary evidence, the consistencies between the claimant and the employer's testimony regarding times when the claimant was sick, and the claimant's inability to speak to details of the events of April, May, and June of 2023.

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. 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. We further believe that the review

examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant is not entitled to benefits.

To be eligible for unemployment benefits, the claimant must show that she is in a state of unemployment within the meaning of the statute. G.L. c. 151A, § 29, authorizes benefits to be paid to those in total or partial unemployment. Those terms are 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 generally 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. However, there are a limited number of circumstances set forth under the DUA regulations at 430 CMR 4.45, that permit claimants to restrict their 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 . . . .
>
> (3) . . . [A]n otherwise eligible individual . . . may limit his/her availability for work during the benefit year to part-time employment provided, that the individual is:
>
> (a) a qualified individual with a disability;
> (b) provides documentation to the satisfaction of the commissioner substantiating an inability to work full-time because of such disability; and
> (c) establishes to the satisfaction of the commissioner that such limitation does not effectively remove himself/herself from the labor force.

> (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. . . .

430 CMR 4.44 sets out the definitions pertinent to 430 CMR 4.45:

> Disability means a physical or mental impairment that substantially limits a major life activity of such individual. . .
>
> Major Life Activities means functions including but not limited to caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, the operations of major bodily functions, and working.

Following remand, the review examiner rejected as not credible the claimant's contentions that the employer had reduced her hours. *See* Consolidated Findings ## 8, 10, 12, 30, and 31. 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). As the employer provided documentary evidence verifying its witness' testimony that the claimant had requested to reduce her hours, and as the claimant conceded that she requested a change to relief status because of a conflict with the employer's program director, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence.

Prior to filing her claim for benefits, the claimant requested to alter her part-time 24-hour a week schedule so that she was no longer working a 12-hour shift on Saturdays. Consolidated Findings ## 8 and 11. While the claimant asserted that her health conditions began impacting her ability to work sometime in January, 2023, she did not provide any documentation verifying these limitations until she provided the employer with a doctor's note dated June 6, 2023. Consolidated Findings ## 8, 9, and 27. This note, which was admitted into evidence as Remand Exhibit 3, speaks only prospectively about restricting the claimant's ability to work more than six hours a day.[1] Absent other documentary evidence indicating that the claimant was medically precluded from working more than six hours a day prior to June 6, 2023, the claimant has not presented substantial and credible evidence showing she met the requirements to limit her availability to part-time work under 430 CMR 4.45(3) between April 9, 2023, the effective date of her claim, and June 3, 2023.

While the claimant did present documentation substantiating her inability to work full-time beginning the week of June 4, 2023, the claimant conceded she had an additional limitation on her availability for work that precluded her from accepting certain work offered by the employer. Specifically, the claimant explained that she was unable to work afternoon shifts on weekdays because she needed to pick up her grandson from the bus stop after school. Consolidated Finding

[1] The full substance of Remand Exhibit 3, while not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing and placed in the record, 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).

14. The need to provide childcare may constitute good cause to restrict availability to certain hours of the day. *See* Board of Review Decision 0008 9771 96 (May 15, 2014), *citing* Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 22-24 (1980). However, this does not automatically permit the claimant to limit availability to part-time work. Pursuant to 430 CMR 4.45(1)(a), a claimant must also have a history of part-time work and must show that she is available for at least as many hours of work per week as her previous part-time work.

Since the claimant worked a part-time 24 hour a week schedule for the instant employer prior to filing her claim for benefits, she has a history of part-time work. Consolidated Findings ## 1 and 2. However, the claimant's paystubs from around the time she began certifying for benefits confirm that she regularly worked less than 24 hours a week after the employer agreed to reduce her Saturday schedule. Consolidated Findings ## 11 and 20. The claimant was already working six-hour shifts on Saturdays and Sundays, meaning that she was unable to work more hours either day. *See* Consolidated Findings ## 10 and 11. As the claimant was also unable to work on weekday afternoons, we can reasonably infer from her paystubs that the claimant's additional childcare responsibilities rendered her unable to continue working 24 hours a week for the instant employer. *See* Consolidated Findings ## 20, 21, 28, and 29. Therefore, the claimant has not shown that she met the criteria for limiting her availability to part-time work under 430 CMR 4.45(1)(a), beginning June 5, 2023.

Effective July 1, 2023, the claimant requested that she be transitioned to relief status for the instant employer. Consolidated Finding # 30. As a result of this change, the claimant was only accepting *up to* 18 hours of work a week beginning the week of July 2, 2023. Consolidated Finding # 32. The claimant requested to be reduced to relief status because she felt that the program director was prioritizing the employer's staffing ratios over the claimant's health and disliked the program director's requests that she provide doctors notes explaining her absences. Consolidated Findings ## 30–31. The claimant's disagreement with the program director's requests did not constitute good cause for declining suitable work. Therefore, the claimant was not in unemployment within the meaning of G.L. c. 151A, §§ 29(a) and 1(r), beginning the week of July 2, 2023.

We, therefore, conclude as a matter of law that the claimant has not met her burden to show that she was in partial unemployment under G.L. c. 151A, §§ 29 and 1(r).

The review examiner's decision is affirmed. The claimant is denied benefits for the week of April 9, 2023, and for subsequent weeks until she meets the requirements of G.L c. 151A.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 26, 2024

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

LSW/rh