

Following eye surgery on May 11, 2023, a week before his layoff, the claimant was physically unable to work at all until his doctor cleared him to work part-time as of June 17th and full-time as of July 1st. Because he had not been available for work since his separation from employment, he was not eligible for illness week benefits under G.L. c. 151A, § 24(c). However, once able to work part-time, he met the part-time availability requirements under 430 CMR 4.45(3), and he became eligible for benefits pursuant to G.L. c. 151A, § 24(b).

**Board of Review
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Issue ID: 0080 3802 54

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 was laid off from his prior employment on May 18, 2023. He filed a claim for unemployment benefits with the DUA, effective May 14, 2023, which was denied beginning May 21, 2023, in a determination issued on June 2, 2023. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by the claimant, the review examiner modified the agency's initial determination, awarding benefits from May 21 to June 10, 2023, and denying benefits thereafter, in a decision rendered on July 1, 2023. We accepted the claimant's application for review.

Three weeks of benefits were awarded between May 21 to June 10, 2023, because the review examiner determined that the claimant was eligible pursuant to G.L. c. 151A, § 24(c). He denied benefits beginning June 11, 2023, as he determined that the claimant was not medically capable of working, and, thus, he 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 for additional evidence pertaining to the claimant's ability to work full- or part-time. The claimant attended the remand hearing with counsel. 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 eligible for three so-called "illness weeks" and then disqualified, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings after remand show that the claimant had been medically unable to work since his layoff until cleared for part-time and then full-time work by his eye doctor.

Findings of Fact

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

1. The claimant filed a claim for unemployment insurance benefits effective May 14, 2023, with a benefit year end of May 11, 2024. The Department of Unemployment Assistance (DUA) calculated the claimant's weekly benefit amount as \$670.00, with an earnings disregard of \$223.33.
2. The claimant served a waiting week for the week ending May 27, 2023 [sic].
3. Prior to filing the unemployment claim, the claimant was employed as a full-time customer success representative for the employer, a biomedical company from November 2021, through May 18, 2023, when he was laid off from his employment.
4. The claimant had emergency eye surgery on May 11, 2023, due to an eye infection.
5. On August 7, 2023, the [claimant's medical provider] issued a letter. The claimant was able to resume work part time since June 17, 2023, and full-time since July 1, 2023." [sic]
6. Between the claimant's layoff on May 18, 2023, and June 16, 2023, the claimant was not physically capable of performing full-time or part-time work due to his lack of vision from his May 11, 2023, eye surgery.
7. Between the claimant's layoff on May 18, 2023, and June 16, 2023, other than not being able to physically work due to his medical issues, the claimant placed no limitations on his availability to work.
8. The claimant did not search for employment from the week beginning May 16, 2023, through the week ending June 3, 2023.
9. From the week beginning June 4, 2023, through June 30, 2023, the claimant was searching for full-time employment within the customer service/support and computer networking fields, while completing a minimum of five (5) or six (6) work searches per week using various methods such as editing his resume, reviewing online job websites such as ZipRecruiter, Indeed, and LinkedIn, networking, and communicating with recruiters.
10. From June 17, 2023, through June 30, 2023, the claimant was capable of working part-time, approximately twenty (20) hours per week, within the customer service/support and computer networking fields due to his May 11, 2023, eye surgery.
11. From June 17, 2023, through June 30, 2023, other than only being able to work in a part-time capacity due to his May 11, 2023, eye surgery, the claimant placed

no limitations on his availability to work and was available to work any days or hours during the week.

12. Beginning July 1, 2023, the claimant had no physical or medical issues that restricted his ability to work.
13. Beginning July 1, 2023, the claimant placed no limitations on his availability to work.
14. From the week beginning July 1, 2023, the claimant was searching for full-time employment within the customer service/support and computer networking fields, while completing a minimum of five (5) or six (6) work searches per week using various methods such as editing his resume, reviewing online job websites such as ZipRecruiter, Indeed, and LinkedIn, networking, and communicating with recruiters.
15. On June 2, 2023, the DUA sent the claimant a Notice of Disqualification stating he was disqualified from receiving unemployment benefits beginning May 21, 2023, as he did not meet the capability requirements of Section 24(b) of the Law.

Credibility Assessment:

The claimant provided credible and consistent testimony that following his May 11, 2023, eye surgery, he was not medically capable of working in any capacity until his medical provider cleared him to return to work in a part-time capacity on June 17, 2023, and full-time employment on July 1, 2023. The claimant's testimony is supported by an August 7, 2023, letter from his medical provider. The claimant was also specific and detailed about his work search methods and efforts.

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. Consolidated Finding # 2 states that the wait week is the week ending May 27, 2023. This is incorrect, inasmuch as the wait week is the first week of the benefit year, which, here, is the week beginning May 14, 2023. In adopting the remaining findings, we deem 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. However, in light of the consolidated findings after remand, we disagree with the review examiner's original legal conclusions about the claimant's eligibility for benefits.

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. . . .

For benefit eligibility during the period May 21 – June 10, 2023, the review examiner also considered G.L. c. 151A, § 24(c), which states, in relevant 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.

Because of eye surgery on May 11, 2023, the claimant was physically unable to work at all from the effective date of his claim, May 14, 2023, through June 16, 2023. *See Consolidated Findings ## 1 and 6.* Although not in the findings, the claimant testified that he had not received any offers of work as of the date of the remand hearing on September 8, 2023.¹ Presumably, because he could not work due to his eye condition and had not turned down suitable work, the review examiner awarded three illness weeks for the period from May 21 to June 10, 2023. This was a legal error.

The U.S. Department of Labor has promulgated a regulation, which limits a state agency's ability to award illness weeks. Specifically, 20 CFR § 604.4(b) states:

If an individual has previously demonstrated his or her ability to work and availability for work following the most recent separation from employment, the State may consider the individual able to work during the week of unemployment claimed despite the individual's illness or injury, unless the individual has refused an offer of suitable work due to such illness or injury.

(Emphasis added.)

In this case, the claimant's most recent separation from employment occurred on May 18, 2023, when he was laid off. *See Consolidated Finding # 3.* He had not been physically capable of work since the week before when he had eye surgery, and this physical inability to work continued through June 16, 2023. *See Consolidated Findings ## 3–7.* This means that he did not demonstrate an ability to work at any time following his separation through the weeks from May 21 to June 10, 2023, when the review examiner awarded the illness weeks. Pursuant to this federal regulation, the review examiner had no authority to do so.²

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).

² Given the findings that the claimant had become capable of, and available for, work as of June 17, 2023, he may become eligible for illness weeks later in his claim, should the need arise.

Because the claimant remained incapable of working at all during the week beginning June 11, 2023, we agree that he was not eligible for benefits during that week pursuant to G.L. c. 151A, § 24(b). *See* Consolidated Finding # 6.

As of the week beginning June 18, 2023, however, the claimant became eligible for benefits. As a general rule, an individual seeking unemployment benefits must be available for full-time work.³ However, DUA regulations allow an individual to limit his availability to part-time work under certain circumstances. Specifically, 430 CMR 4.45 provides, in pertinent part, as follows:

(3) Notwithstanding the provisions of 430 CMR 4.45(1), an otherwise eligible individual who does not meet the requirements of 430 CMR 4.45(1) 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.

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*.

(Emphasis added.)

The record shows that, because of an eye condition requiring surgery, the claimant became temporarily disabled and unable to work. *See* Consolidated Findings ## 4–6 and Exhibit 8.⁴ Between June 17 and June 30, 2023, this temporary disability rendered him able to work only on a part-time basis, approximately 20 hours per week. *See* Consolidated Findings ## 5 and 10. During this same period, the review examiner found that the claimant had been available for, and actively seeking work. *See* Consolidated Findings ## 9 and 11. Thus, the claimant has shown that

³ *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.

⁴ Exhibit 8, a Health Care Provider's Statement of Capability signed by the claimant's physician on May 31, 2023, is also part of the unchallenged evidence in the record.

he was a qualified individual with a disability, he documented that he was unable to work because of that disability, and he established that he did not remove himself from the labor force.

Finally, the consolidated findings show that the claimant continued to be eligible for benefits once he became capable of working full-time, as of July 1, 2023. *See Consolidated Finding # 5.* This is because the claimant remained available for, and continued to actively seek, full-time work. *See Consolidated Findings ## 12–14.*

We, therefore, conclude as a matter of law that, because the claimant could not work and did not meet the capability requirement under 20 CFR § 604.4(b), he was not eligible for illness week benefits pursuant to G.L. c. 151A, §§ 24(b) and (c), during the initial weeks of his claim. We further conclude that, as of the week beginning June 18, 2023, he met the DUA's requirements to be able, available, and actively seeking work pursuant to G.L. c. 151A, § 24(b), and 430 CMR 4.45(3).

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the period from May 14 to June 17, 2023. The claimant is entitled to receive benefits as of the week beginning June 18, 2023, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 16, 2024



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.

AB/rh