

Although medically restricted to part-time work following a brain injury, the claimant's medical condition did not remove her from the labor force and she was actively searching for work. She met the conditions for limiting her availability under 430 CMR 4.45(3) and was therefore eligible for benefits under G.L. c. 151A, § 24(b), for all but the week that her symptoms precluded her from working in any capacity.

**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: 0080 4489 01

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 May 21, 2023, which was denied beginning May 28, 2023, in a determination issued on June 17, 2023. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on July 25, 2023. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not capable of 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 obtain additional evidence about the claimant's capability and availability for work. 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 entitled to benefits because she was not capable of performing any work due to an ongoing medical issue, 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. The claimant filed a new claim for unemployment benefits effective 5/21/2023.

2. Prior to separating from employment, the claimant worked part-time for a coffee shop for approximately eight years.
3. The claimant suffered from a brain aneurysm in 2014 and the claimant was paralyzed following the surgery. [The] claimant had 7 more surgeries following the first one and has a shunt in her brain. The claimant must undergo a yearly MRI and CT scan. The claimant also suffers from ongoing pains in her head due to the shunt in her brain and numbness in her legs.
4. The claimant's physician initially advised the claimant to apply for disability [sic] as he did not want her to return to work; however, the claimant begged him to allow her to work on a part-time basis and he agreed that she could do so as long her body tolerated it.
5. The claimant's physician completed a Health Care Provider's Statement of Capability on 6/16/2023 which indicated that the claimant was suffering from a brain injury due to a brain aneurysm in January of 2014 and was only able to work part time hours.
6. In a letter dated 6/16/2023, the claimant's physician indicated that the claimant was capable of working between 26 and 30 hours per week as tolerated.
7. On the weekly certification for the week ending 6/3/2023, the claimant indicated that she was not available for or capable of work during that week. The claimant was suffering from numbness in her legs and tingling in her foot.
8. The claimant's leg numbness went away quickly during the week ending 6/3/2023; however, the claimant suffers from tingling in her foot from time to time when driving. The claimant had a previously scheduled appointment with her physician on 8/4/2023 and she planned to address the foot tingling issue then.
9. The claimant's appointment with her physician on 8/4/2023 was a routine checkup appointment that the claimant attends yearly for evaluation of the shunt in her brain. The claimant was going to address the leg numbness and foot tingling at that appointment; however, it was canceled due to a schedule conflict that her physician had.
10. When the claimant initially began experiencing the leg numbness and foot tingling, the claimant's physician explained to her that because she has a shunt in her brain, the numbness in her legs and tingling in her foot were likely caused by stress and lack of sleep. The tingling the claimant experiences in her foot is similar to when a person's foot falls asleep, and it goes away quickly.
11. The numbness in her legs and tingling in her foot have not prevented the claimant from working since the week ending 6/3/2023.

12. The claimant has been capable of walking, driving, and working since the week beginning 6/4/2023.
13. During the period beginning 5/28/2023 and for the weeks thereafter, the claimant was available to work between 26 and 30 hours.
14. During the week beginning 5/28/2023 and for the weeks thereafter, the claimant searched for cashier positions at several retail establishments as well as counter help at a coffee shop. The claimant search [sic] for work at least three times each week and kept a detailed work search log.
15. On 6/17/2023, the DUA issued a Notice of Disqualification under Section 24(b) of the Law finding that the claimant had not met the capability requirements under the Law.

Credibility Assessment:

During the remand hearing, the claimant provided forthcoming testimony that the leg numbness and tingling in her foot had resolved during the week ending 6/3/2023 and that she does experience tingling in her foot from time to time, but it does not prevent her from working. The tingling she experiences in her foot is similar to when a person's foot falls asleep, and it goes away quickly. The claimant further testified that her appointment with her physician on 8/4/2023, was not scheduled to evaluate the leg numbness and tingling [sic] in her foot, but it had been scheduled as an annual checkup for the shunt in her brain. The claimant attends yearly checkups to evaluate the shunt which include MRIs scans of her brain. The claimant testified that the appointment was cancelled due to a scheduling conflict her physician had and that her physician indicated that the leg numbness and foot tingling most likely occurred because of stress and lack of sleep. As the claimant's testimony regarding these matters was forthcoming and reasonable, it is accepted as credible, and findings of fact were made accordingly.

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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was not entitled to benefits beginning May 28, 2023.

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. . . .

As a general rule, an individual seeking unemployment benefits must be available for full-time work.¹ However, there are certain limited exceptions to this requirement. In this case, the review examiner concluded that the claimant was still eligible to receive benefits even though she was limiting her availability to part-time hours because she met the requirements of 430 CMR 4.45(3), which provides, in relevant 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 claimant was paralyzed after suffering a brain aneurism in 2014. She regained functioning after undergoing several surgeries, including having a shunt placed in her brain, but continued to experience ongoing pain and numbness in her legs. Consolidated Finding # 3. While the claimant's doctor initially advised her against returning to work because of the limitations associated with her brain injury and shunt, her doctor eventually cleared her to return to work only in a part-time capacity. Consolidated Finding # 4. Upon review of the claimant's testimony and documentation from the claimant's physician, it is evident that the claimant's brain injury and shunt caused a disability which limits her major life activity of working. See Consolidated Findings ## 3–5. Further, as the claimant worked part-time at a coffee shop for eight years prior to filing her claim, we believe that the limitations resulting from the claimant's brain injury do not

¹ 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.

effectively remove her from the labor force. Thus, we agree with the review examiner's conclusion that the claimant met the conditions for limiting her availability under 430 CMR 4.45(3).

Despite this, the review examiner ultimately concluded that the claimant was not entitled to benefits, because she found that the claimant began experiencing severe leg numbness and tingling in her foot that prevented her from working during the week of May 28, 2023, and had ongoing issues with a tingling sensation in her foot that continued to impact her ability to work. Such findings were a mischaracterization of the claimant's testimony.

At both hearings, the claimant confirmed that she was unable to work during the week of May 28, 2023, because she experienced debilitating leg numbness and tingling in her foot that limited her ability to walk, drive, and stand. Consolidated Findings ## 7 and 8. However, she twice explained that the numbness she was experiencing subsided within a week, and, during that same period, the sporadic tingling sensation had also abated to the point that it no longer limited her ability to work. Consolidated Findings ## 8 and 11. Therefore, contrary to the review examiner's initial findings of fact, the uncontested evidence indicates the claimant was no longer unable to work as of the week beginning June 4, 2023.

As the claimant conceded that she was not capable of any work during the week of May 28, 2023, we agree that she did not meet the eligibility criteria under G.L. c. 151A, § 24(b), during that week. *See Consolidated Finding # 7.* However, the claimant no longer had the same restriction on her ability to work beginning the week of June 4, 2023. Consolidated Finding # 11. Inasmuch as the claimant met the conditions for limiting her availability under 430 CMR 4.45(3), and as she has been actively searching for work, the review examiner erred in disqualifying the claimant under G.L. c. 151A, § 24(b), beginning the week of June 4, 2023. *See Consolidated Findings ## 3-5, and 14.*

We, therefore, conclude as a matter of law that the claimant was capable of and available for employment, within the parameters of G.L. c. 151A, § 24(b), and 430 CMR 4.45(3), beginning June 4, 2023.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the week of May 28, 2023. The claimant is entitled to receive benefits for the week of June 4, 2023, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 29, 2023



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.

LSW/rh