

Review examiner erred in ignoring 430 CMR 4.45(3) and concluding that the claimant, whose availability for work was medically restricted to part-time employment due to a high-risk pregnancy, was ineligible for benefits under § 24(b). However, since the review examiner also found the claimant did not satisfy the work search requirements of § 24(b), the claimant was still ineligible for benefits, at least as of the date of the review examiner's decision.

**Board of Review
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**Issue ID: 0016 3525 25
Claimant ID:**

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Allison Williams, 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 began a medical leave of absence on or about June 1, 2015. She filed a claim for unemployment benefits with the DUA on June 2, 2015, which was denied in a determination issued on June 21, 2015. 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 August 6, 2015. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not available for full-time work and did not perform an adequate search for work and, thus, was ineligible for benefits pursuant to G.L. c. 151A, § 24(b). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's conclusion – that the claimant was ineligible for benefits because she was not available for full-time work and did not perform an adequate work search, as required by G.L. c. 151A, § 24(b) – is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant's appeal is from a determination which denied her benefits under Section 24(b) of the Law for the week-beginning 5/31/15 and indefinitely thereafter.
2. The claimant had worked full-time for her most recent employer since she began work on 10/27/14.
3. The claimant worked as a custodian, Thursday to Monday, 3:30 PM to 12:00 AM, earning \$20.50 an hour.
4. On 6/1/15, the claimant's doctor instructed her to only work part-time 24 hours because she had a high risk pregnancy.
5. The claimant filed a new claim for unemployment benefits on 6/2/15. She was unable to work full-time at that time.
6. Since filing for unemployment benefits, the claimant has sought part-time work only. She has looked for work one to three times a week. She has looked on the Internet and personally reached out to potential employers.
7. The claimant is looking for part time work cleaning.
8. The claimant is available to work only 24 hours a week per her doctor's instructions.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings of fact are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant did not meet the availability requirements of G.L. c. 151A, § 24(b).

The review examiner denied benefits on the basis of 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

Under this section of the law, the claimant bears the burden of proving that she is able, available for, and actively seeking employment. The review examiner concluded that because the claimant was restricting her availability to part-time employment, she did not meet the availability requirement of G.L. c. 151A, § 24(b).

The review examiner's analysis fails to consider pertinent regulations which provide further guidance as to whether a claimant may be eligible for benefits under G.L. c. 151A, § 24(b), when her availability is limited to part-time work. 430 CMR 4.45(3) provides, in pertinent part, as follows:

[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.

430 CMR 4.44 sets out 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 review examiner found that the claimant's physician instructed her to reduce her availability to work to 24 hours per week, due to a high-risk pregnancy. For the purposes of our analysis here, we consider the claimant's pregnancy to be a disability which limits her major life activity of working. We take administrative notice that the claimant provided her employer and DUA with documentation from her physician that she is able to work up to 24 hours per week, without additional restrictions.¹ We further note that the claimant's physician did not remove the claimant from the labor force, but only restricted her to working 24 hours per week while pregnant. Thus, we conclude, as a matter of law, that the claimant was available for employment within the parameters of G.L. c. 151A, § 24(b), and 430 CMR 4.45(3).

However, the review examiner also concluded that the claimant failed to conduct an adequate work search, because she did not look for work at least three times in each week. We agree. The claimant's work search log (Exhibit 13) fails to meet the DUA's requirement that claimant's make at least three contacts a week and keep a record showing specific dates on which the contacts occurred, the names, addresses or URL's, and phone numbers of the individuals contacted, and the results of each contact. *See* DUA Service Representatives Handbook § 1015(C) and Board of Review Decision 0010 9803 91 (July 24, 2014)(claimant who failed to produce a detailed work search log did not meet her burden to show that she had been actively seeking work under G.L. c. 151A, § 24(b).) During the week of June 14-20, for instance, the log

¹This case was heard by the same review examiner simultaneously with DUA Issue ID# 0016 3524 21, which the claimant appealed to the Board separately. In that case, Hearings Exhibit #11 was the note the claimant's physician provided limiting her to part-time work as of June 1, 2015.

identifies an address of one employer, then simply states, “on line job searching for the rest of the week!”² We, therefore conclude as a matter of law that the claimant did not meet the work search requirements of G.L. c. 151A, § 24(b), as of the date of the review examiner’s decision, August 6, 2015.

In view of our conclusion that the claimant met the availability requirements of G.L. c. 151A, § 24(b), she may seek a new determination on her eligibility for benefits after August 6, 2015, under the work search requirement of G.L. c. 151A, § 24(b).

The review examiner’s decision is affirmed in part and reversed in part. The review examiner’s conclusion that the claimant did not meet the availability requirements of G.L. c. 151A, § 24(b), is reversed. However, as the claimant did not meet the work search requirements of G.L. c. 151A, § 24(b), we affirm the claimant’s denial of benefits for the week ending June 6, 2015, and for subsequent weeks until such time as she fully meets the requirements of G.L. c. 151A, § 24(b). If there is a change in the claimant’s circumstances, particularly concerning her efforts to find work, she may request a new determination.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 8, 2016



Paul T. Fitzgerald, Esq.
Chairman



Judith M. Neumann, Esq.
Member

Member Stephen M. Linsky, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT* OR TO THE BOSTON MUNICIPAL 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.

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.

² We have supplemented the findings of fact 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).

JPC/jv

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