

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Stephen M. Linsky, Esq.
Member
Judith M. Neumann, Esq.
Member**

Issue ID: 0002 1880 65

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Kathleen Della Penna, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits. Benefits were denied on the ground that the claimant did not establish that he was medically able to work, pursuant to G.L. c. 151A, § 24(b).

The claimant had filed a claim for unemployment benefits, which was denied in a determination issued by the agency on April 12, 2012. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on August 21, 2012. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On February 14, 2013, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence concerning the claimant's ability to work. The claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact.

After reviewing the entire record, including the testimony and evidence from the initial and remand hearings, the District Court's Order, and the consolidated findings of fact, we reverse the review examiner's decision.

The issue on appeal is whether the claimant has provided substantial and credible evidence that he was able, available for, and actively seeking work at the time he opened his claim, pursuant to G.L. c. 151A, § 24(b).

Findings of Fact

The review examiner's consolidated findings of fact, which were issued following the District Court remand, are set forth below in their entirety:

1. On 3/1/12 the claimant filed a sequence 008 claim for unemployment benefits.
2. On the sequence 008 claim the claimant signed for unemployment benefits for the week ending 3/3/12 through the week ending 7/7/12.

3. Because the claimant became separated from his last employer for medical reasons the claimant was issued a Health Care Provider's Statement of Capability (Form 268).
4. On 4/9/12 the claimant's doctor submitted a completed Form 268 which states in part:

Have you treated the above name individual since 1/31/12? *Yes*

What was the nature of the illness at that time? *Pain due arthritic, hammertoes, plantar wart.*

Approximate period of treatments: *from 11-30-11 to 6/4/11 [sic]*

In your opinion, did the above-named individual's illness require suspension from work? [(On this question the word *suspension* was crossed out and the word *disability* was put in its place)] *Yes*

What was the above-named individual able to do some type of full-time work on 2/26/2012? *No* [(the answer yes was originally checked and then crossed out and changed to no)]

Do you consider the above-named individual now able to work in his/her regular occupation? *No* [(the answer yes was originally checked and then crossed out and changed to no)]

If not, is the above-named individual now able to do some type of full-time work? *No*

If not able to perform full-time work, is the claimant capable of performing part-time work? *No*

On what date was the claimant first able to accept full-time work of some nature? *Unknown*

5. On 1/30/[13] the claimant's doctor provided an affidavit signed under the pains and penalties of perjury indicating that he treated the claimant from 11/30/11 through 4/18/12 for a condition of hammer toe which was aggravated by heavy duty work; the claimant was fully capable of performing some manner of full-time work, including light duty work and sedentary work; [and] that any contradicting statements were due to a misunderstanding around the questions on the Form 268. [See Court Remand Exhibit #7.]
6. The claimant previously worked as a trash pick-up driver and his responsibilities required him to work in a residential area where he had to get in and out of the truck routinely and he was on his feet 45 minutes of every hour. In addition the claimant had to do heavy lifting and this all impacted his feet.
7. The claimant's employment history over a 27 year period was as a truck driver. The claimant is still able to drive. The problem arises around spending long periods of time on his feet.

8. The claimant is continuing to look for work as a driver. The claimant looks for work in the newspaper and on the computer and over the past couple of weeks he has looked for work with the following:

Perkins Paper – Springfield, MA
AC Motors – West Springfield, MA
Gazette – Northampton, MA
Chuck Signs – Chicopee, MA
Chucks Towing – Chicopee, MA
Waste Management – Chicopee, MA

Ruling of the Board

The Board adopts the DUA review examiner's consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

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

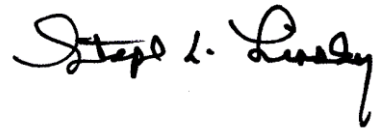
Under G.L. c. 151A, § 24(b), the claimant bears the burden of proving that he is able, available for, and actively seeking work. The review examiner initially concluded the claimant did not credibly establish that he was medically able and available for full-time work, noting the document submitted by the claimant's physician prior to the hearing had information crossed out; and the document provided by a medical professional for the continued hearing concerned a different physical problem and did not credibly address the health condition initially raised by the claimant and his first physician. The District Court remanded the case to take additional evidence regarding the claimant's medical condition. After remand, we conclude the claimant has met his burden.

After remand, the review examiner accepted into evidence an affidavit from the physician who had initially treated the medical condition that prompted the claimant's separation from work. *See* Court Remand Exhibit #7. This affidavit cured the deficiencies in the Health Care Provider's Statement of Capability which had previously been completed and submitted to DUA by the same physician. *Compare* Hearings Exhibit #6.

Consequently, the review examiner found that the claimant's last job prior to opening this claim for benefits was as a trash pick-up driver, which required substantial amounts of time performing heavy lifting on his feet throughout his work day. The claimant received treatment for hammer toes, a condition which his physician indicated was aggravated by the heavy work on his feet for his then-employer. The claimant has 27 years of experience as a truck driver, which does not require substantial time on his feet. At the time the claimant opened this claim for unemployment benefits, his physician credibly indicated he was capable of performing full-time

work, despite being unable to continue in his capacity as a trash pick-up driver. The claimant fulfilled his obligation to look for work, and had, in fact, become employed as of the date of the remand hearing. We, therefore, conclude as a matter of law that the claimant was able, available, and actively seeking work, pursuant to G.L. c. 151A, § 24(b).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending March 3, 2012, and for subsequent weeks if otherwise eligible.



Stephen M. Linsky, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF MAILING – August 29, 2013



Judith M. Neumann, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT – September 30, 2013

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.

JPC/rh