COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW
Government Center
19 Staniford Street
Boston, MA 02114

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Office Hours:
8:45 a.m. to 5:00 p.m.

DECISION OF BOARD OF REVIEW

In the matter of:

Appeal number: BR-75955

EMPLOYEE APPELLANT:
[redacted]
Office #23

The Board of Review held a hearing in Boston, Massachusetts, on July 15, 1998, to take additional evidence in the above-cited case. The claimant was present and represented by counsel. The Board reviewed a transcript of the testimony presented at a hearing of the Deputy Director's representative held on March 5, 1998.

The Board allowed the claimant's application for review of the Deputy Director's decision in accordance with the provisions of Section 41 of Chapter 151A, of the General Laws, the Massachusetts Employment and Training Law.

The appeal of the claimant is from a decision of the Deputy Director which concluded that:

> The claimant failed to meet the requirements of Section 24(b) of the Law. The claimant, although she has good cause for restricting her availability to part-time work, has not had a history of part-time work. Therefore, under Division policy, she does not meet the requirements of the above-cited section of the Law and is subject to disqualification.
>
> The determination is affirmed.
>
> The claimant is ineligible for benefits for the week ending January 17, 1998, and for an indefinite number of weeks thereafter until she meets the requirements of the Law.

Section 24(b) of M.G.L. c., 151A of the General Laws is pertinent and provides, in part, as follows:

> Section 24. 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; . . .

430 CMR §§ 4.44 and 4.45 are also pertinent and provide, in part, as follows:

430 CMR 4.44:

Definitions

The following words and phrases shall have the following meanings unless otherwise clearly indicated by the context of 430 CMR 4.42 through 4.45.

. . .

Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individuals.

. . .

Major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

. . .

Part-Time Employment means employment at less than the full-time work schedule customary for the individual's occupation.

Prior Work History of Part-Time Employment means a period of time consisting of not less than 20 weeks of part-time employment during the most recent 26 weeks of employment.

Qualified individual with a disability means an individual with a disability who, with or without a reasonable accommodation, meets the essential eligibility requirements for the receipt of services or for the participation in programs or activities provided by the public entity.

430 CMR 4.45:

Conditions For Limiting Availability

(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;

(b) 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 existed during the prior work history of part-time employment; and

(c) 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.

(2) 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 sustaining 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.

(3) Any individual who meets the requirements of either 430 CMR 4.45(1) or (2) must be actively seeking and available for suitable work to be eligible for benefits. An offer of employment will not be considered an offer of suitable employment and the individual will not be disqualified for refusing such offer where such offer:

(a) in the case of an individual who meets the requirements of 430 CMR 4.45(1) requires greater hours than those used to establish the individual's prior work history of part-time employment; or

(b) in the case of an individual who meets the requirements of 430 CMR 4.45(2) requires greater hours than the individual is capable of working.

After reviewing the prior record of proceedings and after holding its own hearing, the Board makes the following findings of fact:

The claimant was employed by a temporary employment agency from April 1997 until January 9, 1998. She worked as a full-time data entry clerk until her assignment ended. On January 13, 1998, she reopened her claim for unemployment benefits for the week ending January 17, 1998.

For most of her life, the claimant has been treated by a medical doctor, an oncologist, for a thyroid condition. When she reopened her claim, the claimant was pregnant and due to deliver her baby in mid-March 1998. A nurse midwife, who is a member of the health team at the Codman Square Health Center in Dorchester, was treating and advising the claimant during her pregnancy.

On or about January 7, 1998, the nurse midwife gave the claimant a letter written on the stationary of the Codman Square Health Center which the claimant delivered to her employer. The letter provided in pertinent part as follows;

To Whom it May Concern:

[redacted] is pregnant. Her due date is March 8, 1998 [sic] she should stop work all together by February 4, 1998. Currently, if she is to work, she should have a reduced work load. She should avoid bending and lifting, prolonged standing or sitting. She should not go up and down stairs.

Thank you
/s/ [redacted]

The nurse midwife later advised the claimant that she should not work full-time due to her pregnancy, and her morbid obesity which was causing swelling in her extremities, backaches and severe fatigue. She also advised the claimant that because of the pregnancy, her thyroid condition was becoming worse and was contributing to her condition of nausea and fatigue.

Based on this advice, the claimant determined that she could only work a maximum of 20 hours each week until the end of February 1998, when she would stop working until after her child was born and her physical condition improved. For the weeks ending January 17, January 24, January 31, February 7, February 14, February 21, and February 28, 1998, the claimant sought part-time work for a maximum of 20 hours per week, by reading the help-wanted classified advertisements in the Boston Globe, the Boston Herald, and the Quincy Patriot Ledger, sending resumes to Tufts College, and the United Parcel Service, taking tests and interviewing with the United States Postal Service, going to job fairs, contacting several temporary employment agencies, and calling family and friends looking for job contacts.

A majority of the Board concludes as follows:

For the weeks ending January 17, 1998, through the week ending February 28, 1998, the claimant has met her burden of proving that she was a qualified individual with a disability, by providing documentation substantiating her inability to work full-time because of her thyroid condition and morbid obesity, which were complicated by the pregnancy, and by showing that her limitation did not effectively remove her from the labor force, in accordance with 430 CMR 4.45(2), cited above. She has also shown that she has engaged in a systematic and sustained search for work during those weeks and is capable of, available for, and actively seeking part-time work in her usual occupation, a data-entry clerk, or in any other occupation for which she is reasonably fitted, such as a clerical, or administrative worker. She meets the eligibility requirements of Section 24(b) of the Law, also cited above.

The majority of the Board notes that the claimant submitted two letters from the treating nurse-midwife as evidence substantiating her inability to work because of her disability. The nurse-midwife functioned as a member of a health-care team, including a licensed physician, and personally treated and advised the claimant. We have concluded that, although these letters were hearsay, they contain sufficient indicia of reliability and probative value so that we could rely on them in deciding that the claimant was a qualified individual with a disability, but only for the weeks we have indicated.

The decision of the Deputy Director is modified. The claimant is entitled to benefits for the weeks ending January 17, 1998, through February 28, 1998, if otherwise eligible.

Thomas E. Gorman
Member

Kevin P. Foley
Member

See Dissent, page 5.

DISSENT

This is a matter where the claimant alleges that she is a "qualified individual with a disability" under 430 CMR 4.44 such that she is exempt from seeking full-time work under 430 CMR 4.45(2). The claimant is a woman who worked full-time while she was pregnant, became separated from her position at the beginning of her third trimester of pregnancy, and sought to limit her hours of availability after her full-time job ended. She alleges pregnancy-related medical complications which rise to the level of a disability as the reason for limiting her availability. The regulations permitting a person from limiting her availability to look for work under the regulations should be reserved for those who are deserving of protected status. The claimant does not meet the criteria of a "'qualified individual" within the meaning of 430 CMR 4.43, et. seq., and the purpose of the regulations to protect a specific class of persons should not be diluted.

It is clear that the definition of "qualified individual with a disability" within 430 CMR 4.44 mirrors the definition under the American with Disabilities Act (ADA).[1] A person meets the criteria for protected status as a disabled person if a) she has a physical of mental impairment that substantially limits one or more major life activities such as walking, seeing, and hearing, for example, b) if she has a record of such impairment, or c) she is regarded as having such an impairment. 42 U.S. C. § 12102(2) (1995). Pregnancy, is specifically cited as an example of a condition not considered an impairment under the ADA. 29 C.F.R. § 1630.2(h), App. (1995). However, whether a claimant is "qualified" under another qualifying provision is determined by "...the effect of that impairment [which] may be disabling for particular individuals but not for others..." 29 C.F.R. § 1630.2(j). Most courts have held that pregnancy-related symptoms are not disabilities under the ADA. Darian v. Univ. of Mass. Boston, 98 F.Supp.at 85 (D.Mass. 1997). However, to determine whether or not an individual is otherwise qualified, courts consider whether the condition is a physical or mental impairment, whether that impairment affects a major life activity, and whether the major life activity is substantially limited by the impairment. Cerrato v. Durham, 941 F. Supp. 388 (S.D.N.Y. 1996). "Substantially limited" is defined as "significantly restricted as to the condition, manner or duration under which [she] can perform a particular major life function as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity. 29 CFR § 1630.2(j)(1)(ii). Thus, a comparative analysis is utilized.

To be considered a "qualified individual with a disability" under existing case law, Ms. [redacted] would have to show several factors that are determinative of the nature of the disability, regardless of its origin. See Darian v. Univ. of Mass. Boston, 980 F. Supp. at 86-87 (citing Tsesteranos v. Tech Prototype, Inc., 893 F.Supp. 109, 119 (D.N.H.1995)(wherein court relied on Equal Employment Opportunity Commission guidelines which excluded both pregnancy and temporary, non-chronic impairments of short duration); Villarreal v. J.W. Merit Constructors, Inc., 895 F.Supp.149, 152 (S.D.Tex.1995) (holding that "pregnancy and related medical conditions are not 'disabilities' as that term is defined in by the ADA"); Jessie v. Carter Health Care Center, Inc., 926 F.Supp. 613, 616 (E.D.Ky.1996)(finding that "no unusual circumstances exist" with respect to the pregnancy though the complications caused the employee to miss work); Gudenkauf v. Stauffer Communications, Inc., 922 F.Supp. 465, 473 (D.Kan.1996)(holding that morning sickness, stress, nausea, back pain, swelling and headaches were not disabilities under the ADA because "all of the physiological conditions and changes related to pregnancy...are not impairments unless they exceed the normal ranges or are attributable to some disorder); Richards v. City of Topeka, 934 F.Supp. 378 (D.Kan.1996)(finding that plaintiff made no allegations that her pregnancy was abnormal or unusual); and Johnson v. A.P. Products, Ltd., 934 F.Supp. 625 (S.D.N.Y.1996)(where warehouse clerk suffered pregnancy complications rendering her temporarily unable to work as warehouse clerk)).

Addressing the factors analyzed in Darian would lead to the answer of whether or not the claimant is a "qualified individual with a disability". The inquiry is outlined as: 1- Is the physiological disorder an abnormal functioning of the body or a tissue or organ?

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[1] See Footnote 3 of Claimant's Brief wherein she acknowledges that the basis of "qualified individual with a disability" is derived from 42 U.S.C. § 12102(2)(a)(definition of a "disability").

2-Are the conditions a function of a normal pregnancy, or a physiological disorder with disabling consequences? 3- Do the symptoms substantially interfere with her ability to work? 4- Are the symptoms minor or insignificant?, 5- Do the symptoms limit a major life activity, and/or 6- Is the condition a nonchronic impairment of limited duration? See Darian v. Univ. of Mass. Boston , 980 F. Supp. at 87 (D.Mass.1997) (citing Hernandez v. City of Hartford, 959 F.Supp. 125 (D.Conn.1997). In effect, Ms. [redacted] would have to offer medical evidence on whether or not her symptoms had a "profoundly disabling" consequence on her well being. Id. at 87. To do that, she would have to show that her any of her conditions were chronic or resulted in long-term, permanent impact. Locomparra v. Pergament Home Centers, Inc. 982 F. Supp. at 228 (S.D.N.Y.1997). The Board should adopt a combination analysis derived from Darian and Locomparra to provide a consistent framework in all disability-related matters.

Moreover, Ms. [redacted] would have to offer substantial evidence relating to her medical condition. I do not conclude that an non-authenticated, non-corroborated note on a health center letterhead nor a patient history card without qualification or reliable interpretation is sufficiently reliable to be given probative effect under G.L. c. 30A, § 11(2); and, therefore, they cannot constitute substantial evidence within the meaning under G.L. c. 30A, § 1(6). The answer from the analysis is that Ms. [redacted] is not a "qualified individual with a disability".

In these matters, the court relies on documentation from a physician licensed in the subject matter of the alleged medical condition. E.g. Darian v. Univ. of Mass. Boston, 980 F. Supp. at 79 (where plaintiff's pregnancy restrictions were ordered by her obstetrician and court found "*serious difficulties* with her pregnancy, ...*severe* pelvic bone pains, premature uterine contractions, irritation of the uterus, back pain, poly hydrominus, increased heart rate, edema, and large fetus." emphasis provided). A physician's letter containing sufficient information on the subject matter should be used in these medically-related matters to constitute substantial evidence. Cf. School Committee of Brockton v. Mass. Comm'n Against Discrimination, 423 Mass. 7, 12, 666 N.E.2d 468 (1996)(where physician's letters deemed indicia of reliability and probative value to constitute substantial evidence). It is clear that the physician's letter alone does not give it its value; it is also the information contained therein. In our own unemployment cases, the court has relied on physician's statements to determine reasons for separating from employment. Cf, Director of the Div. of Employment Sec. v. Fitzgerald, 382 Mass. 159, 160, 414 N.E. 2d 608 (1980)(where claimant presented letters from physicians regarding health reasons connected with her preganancy under §25(e)(1) claim); Fergione v. Director of Div. of Employment Sec., 396 Mass. 281, 285, 485 N.E. 2d, 949 (1985) (where statement from claimant's physician supported physical ailments under § 25(e)(1) claim). Unlike the plaintiff in Darian, there was no offer of evidence from a treating physician. And unlike the plaintiff in Darian, there was no offer that the claimant's symptoms "adversely affected" a major life function. . See Darian v. Univ. of Mass. Boston, 980 F. Supp. at 79. It certainly is not within this Board's authority or expertise to diagnose or infer a medical condition of such consequence in the absence of clear medical evidence from or corroborated by a licensed physician.

If the consequences of her pregnancy and related thyroid condition were serious and severe, would not the nurse mid-wife[2], as a member of a health team as the Board infers, be compelled to refer the claimant to a physician at the time the symptoms due to pregnancy and/or thyroid became acute? However, the claimant testified that she irregularly saw her physician. Further, she testified that that her symptoms dissipated after she delivered her child. Can these symptoms be deemed "resulting in long-term permanent impact" ? One of the nurse mid-wife's notes restricted her from such things as bending and lifting heavy objects. Does not this rather routine language lead more to a question of light duty, not a disability in this context? Even if the notes were authorized by a physician, only one of these restrictions related to her duties, thus suggesting inconclusive indicia of a physical condition. And the recommendation to stop work two weeks before delivery, in the absence of comparative information, would seem a standard recommendation in most normal pregnancies. In fact, Ms. [redacted] testified that she was willing to work until late February, one month before she was due.

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[2] The signature of Ms. [redacted] is not accompanied by any credentials. We can only assume that she is licensed under G.L. c. 112, c. 80C and the regulations promulgated thereunder.

In the present case, Ms. [redacted], though a compelling witness, has offered insufficient evidence that she was a "qualified individual" under 430 CMR 4.44, et. seq., which she states is the basis of her appeal. The record supports that she was pregnant and suffered from a pre-existing thryoid condition. There was not more to distinguish her situation from other similarly-situated pregnant women or similarly-incapacitated men with non-chronic, temporary ailments. Her evidence suggests, in the light most favorable to the claimant, that the existence and impact of the symptoms in her third trimester were temporary. To that extent, she should not be subject to the protection offered under the regulations.

Maria Marasco

BOSTON, MASSACHUSETTS
DATE OF MAILING - SEP 08 1998

Maria Marasco, Esq.
Chairman

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

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LAST DAY - OCT 08 1998