

As a caregiver of a child with a disability, the claimant is entitled to restrict his availability to part-time work, pursuant to 430 CMR 4.45(3). He has established that his work search does not effectively remove him from the workforce, and he has presented sufficient documentary evidence substantiating that his son is a qualified individual with a disability and that the claimant needs to be home to care for his son when not in school.

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Issue ID: 0016 7212 27

Claimant ID:

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Richard Conway, 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 reverse.

The claimant filed a claim for unemployment benefits with the DUA, which was determined to be effective May 24, 2015. On August 8, 2015, the DUA sent the claimant a Notice of Disqualification, informing him that he was not entitled to unemployment benefits and that he had been overpaid \$875.00. 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 October 14, 2015. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was restricting his availability and work search to part-time work for personal reasons 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 take additional evidence about the reasons that the claimant was restricting his availability for work. The claimant attended the remand hearing. 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 conclusion that the claimant is ineligible for unemployment benefits, pursuant to the provisions of G.L. c. 151A, § 24(b), is supported by substantial and credible evidence and is free from error of law, where the claimant must restrict his availability primarily to care for and be available for his son, who has autism.

Findings of Fact

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

1. Over the last ten years the claimant's job history is as a stay-at home father caring for his son who has learning disabilities and also to be available to assist with care of his stepdaughter (who has mental health issues and lives with the claimant's elderly in-laws) while his wife was working full-time hours.
2. The claimant's step daughter is 18 years old and she is being treated for depression, personality disorder and for anti-social behavior.
3. As of May 2015 the claimant needed to restrict his hours to meet his [son's] needs and he also had to be available if help was unexpectedly needed to care for his step daughter. The claimant needs to be available if his son needs him or if his in-laws need him because of issues with his step-daughter. The claimant's father in law was recently diagnosed with Alzheimer's so his mother in law may require more help from the claimant. There are no other relatives available to assist in caregiving.
4. The claimant has personally been diagnosed with PTSD, OCD and Depression. None of these ailments have been determined to be a disability for the claimant and none have impacted the claimant's ability to work full-time hours.
5. The claimant wanted to be at home with his son when the son returned from school and to be available if either his son or his step daughter needed him because of the children's disabilities and because his wife is able to bring in a larger salary for the family if she works while the claimant remains home.
6. The claimant's 10 year old son attends a standard public school but he is diagnosed with a type of Autism (Asperger Syndrome) that requires special accommodations while at school.
7. In 2014 the claimant's wife was furloughed from her job for a time and the claimant obtained part-time seasonal employment to assist the family while his wife was seeking new full-time employment.
8. The claimant worked 20-30 hours per week as a Retail Sales Assistant as holiday help from 12/01/14 until he was separated due to a lack of work at the end of the season on 12/26/14.
9. The claimant filed a claim for unemployment benefits effective 05/24/15 and began receiving benefits.
10. On 08/08/15 the claimant was mailed a Notice of Disqualification because he was restricting himself to part-time work.

11. The claimant requested a hearing on the disqualification noting that he is restricting himself to part-time employment because of the needs of his disabled son and his disabled step daughter.
12. An elderly relative of the claimant who helped watch the claimant's children when they arrived home from school recently became too ill to help anymore. The claimant is investigating other possible childcare options for after school so that both the claimant and his wife can be working with the wife working full-time and the claimant part-time hours.
13. In September 2015 the claimant's wife returned to full-time employment.
14. The claimant interviewed to work part-time 15-20 hours per week as a \$10.00 per hour Van Driver and he was given a start date of 09/29/15 for this part-time job. The claimant hopes this job can become full-time and allow the flexibility necessary to meet his caregiving responsibilities.
15. The claimant would be willing to work full-time hours if the job allowed him to be home when his son is not in school as it is dangerous for his son to be home alone and if the job were flexible to allow the claimant to leave on short notice if his son or his step daughter needed his assistance. The claimant also must be home when his son's school bus arrives at the home because the driver can not release the son from the bus if no one is there to meet the son at the bus stop.
16. In May of 2015 the claimant was seeking full or part-time work because his wife was unemployed at that time and she was available to cover the caregiving duties while the claimant was working. If the claimant's wife is working the claimant will probably need to limit his work to part time because of his caregiving responsibilities. The claimant is the primary caregiver for his son and must be available if problems arise in the care of his step daughter.
17. The claimant was given an opportunity to submit additional medical records into the remand hearing record but the claimant did not wish to submit any additional medical records. The claimant believes sufficient medical documentation is already a part of the record.
18. The claimant's son cannot be home alone because of his mental health issues and his young age as this would be dangerous. The claimant tailors his job search to meet his caregiving responsibilities.
19. As of May, 2015, the claimant was available to work from 10:00 AM to 2:00 PM "Mothers hours" (allowing for travel time) as he needed to be home weekdays when his son's school bus arrived. The claimant could also work weekends when his wife would be available to watch over their son.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant should be subject to disqualification due to the restrictions on his availability for work. Since the claimant's restrictions are tied to his need to care for a child with a disability, and those restrictions do not remove him from the labor market, we conclude that he meets the availability requirements of G.L. c. 151A, § 24(b).

In its August 8, 2015 determination, the DUA disqualified the claimant, because he was restricting himself to part-time work. G.L. c. 151A, § 24(b), 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 . . .

Pursuant to this statute, the claimant's availability for work is a fundamental prerequisite to receiving unemployment benefits. The only issue noted in the Notice of Disqualification was the claimant's availability for work, and so our decision focuses on that issue.

The general rule under G.L. c. 151A is that an individual seeking unemployment benefits must available for full-time work. However, in certain circumstances, an individual can restrict himself to particular hours of work. This includes 430 CMR 4.45, 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.

We have previously held that pursuant to regulations promulgated under the Americans with Disability Act¹, this provision must extend to a claimant, who is a caregiver of a family member with a disability. Board of Review Decision BR-108922 (April 30, 2009) (mother of a child with neurologically mediated learning disorder and comorbid ADHD could limit her job search to

¹ 42 U.S.C. § 12101, *et seq.* See 28 C.F.R. § 35.130(a) and (g).

part-time work, because child had substantial functional limitations in at least one major life activity).

In the present case, the review examiner found that the claimant needed to care for his son, who has learning disabilities associated with his Autism diagnosis and who requires accommodations while at school. *See* Findings of Fact ## 1 and 6. These findings are supported by Exhibit # 9, the son's public school special education plan. Exhibit # 9 constitutes substantial documentary evidence that the son is a qualified person with a disability, inasmuch as his disability substantially limits a major life activity, (*i.e.*, learning,) and is a person who meets the essential eligibility requirements for the receipt of services provided by a public entity.² *See* the definitions of "disability," "major life activities," and "qualified individual with a disability" under 430 CMR 4.44. Thus, the claimant has established that he is a caregiver of a family member with a disability and meets the initial prong (a) under 430 CMR 4.45(3).

He has also established that he is unable to work full-time due to the need to be home for his son, when he is dropped off from school. Finding of Fact # 15 explains that the claimant must be at home, because the school bus driver is not permitted to release the son from the bus if there is no one there to meet him. As required under 430 CMR 4.45(3)(b), the claimant has provided documentation, which shows that his son receives special door-to-door transportation from the school system due to his disability.³

Finally, the claimant's work history shows that he has not restricted himself to such an extent that he has removed himself from the labor force. He has experience as a retail salesperson, and this is a type of work that is shift-based and flexible. *See* Finding of Fact # 8. The same can also be said of his van driver position. *See* Finding of Fact # 14. Thus, a steady amount of work was available for him even with his restrictions. We note also that, even though he could work "mother's hours" during the week, which amounted to about four hours per day, he also could work more hours on the weekends, when his wife was available to care for their son. This weekend work could take the claimant very close to or meet a full-time work week.

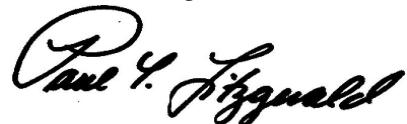
We, therefore, conclude as a matter of law that under the facts presented here, the claimant has satisfied the requirements of 430 CMR 4.45(3), which allows him to limit his availability to part-time employment for purposes of G.L. c. 151A, § 24(b).

² Exhibit # 9, the son's Individualized Education Program, while not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

³ *See* Exhibit # 9, p 9. *Id.*

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the period beginning May 24, 2015, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 8, 2016



Paul T. Fitzgerald, Esq.
Chairman



Judith M. Neumann, Esq.
Member

Member Charlene A. Stawicki, 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.

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.

SF/AB/rh