

BR-124156

CLAIMANT APPELLANT:
Hearings Docket # 614771

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Wayne Robinson, 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 on May 9, 2012, which was denied in a determination issued on May 29, 2012. 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 1, 2012.

Benefits were denied after the review examiner determined that the claimant was not capable of, available for, and actively seeking 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 take additional testimony and evidence regarding the claimant's ability to work, availability for work, and work search. 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 on appeal is whether the claimant, who was placed under a weight-lifting restriction by her physician, was nonetheless capable of, available for, and actively seeking work in an occupation for which she is reasonably fitted beginning the week ending May 12, 2012.

Findings of Fact

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

1. The claimant filed an application for unemployment compensation benefits on May 9, 2012.
2. The claimant was on a medical leave from the employer when she filed the instant claim. The claimant's capability to work since filing her claim as noted in doctor's notes provided at the remand hearing, was as follows: anything not involving lifting over forty pounds, including clerical work, administrative work, teaching, and call center management.
3. The claimant was recovering from Golf Elbow when she filed her claim. At that time, she was advised by her doctor to refrain from lifting for an indefinite period of time. The claimant was cleared to return to work without restriction on June 4, 2012.
4. The claimant did not provide a DUA work search log at the original hearing, or at the remand hearing. At the remand hearing, the claimant testified to looking for the following work in each week since filing her claim: anything not involving lifting over forty pounds, including clerical work, administrative work, teaching, and call center management.
5. At the remand hearing, the claimant testified to making three employer contacts a week via in-person visits, telephone calls, via facsimile, and via e-mail.
6. At the remand hearing, the claimant testified to performing wage-earning services as a Comcast Center VIP Escort, part-time, 7 hours per week, beginning May 28, 2012 and ending September 9, 2012 at \$8.75 per hour.

Ruling of the Board

The Board adopts the 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.

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. . .

Under this section of the law, the claimant has the burden to show that he is entitled to benefits. *See Conley v. Dir. of Div. of Employment Sec.*, 340 Mass. 315, 320 (1960) (claimant has initial burden to establish that he is eligible for benefits).

The review examiner found that the claimant was on a medical leave of absence from her regular job when she filed her claim for unemployment benefits. At that time, the claimant could not do any work which required her to lift over forty pounds. However, the claimant could do many other types of work, including clerical work, administrative work, teaching, and call center jobs. Since the claimant was able to perform some type of suitable work at the time she filed her claim, she has carried her burden to show that she was capable of performing work for which she was reasonably fitted.

The review examiner's findings of fact do not indicate any restrictions to the claimant's availability for work.¹ However, the claimant clearly testified during the hearing that she was available for full-time work at the time she filed her claim, as illustrated by her attempt to at re-employment with her former employer.² Given the claimant's testimony, and also the fact that she apparently did work beginning in late May 2012, it does appear that the claimant was available for work at the time she filed her claim.

Finally, we must address whether the claimant actively looked for work. The review examiner noted that the claimant did not provide a DUA work search log. However, the claimant did provide her own list of jobs which she had researched and applied for. The review examiner noted in his findings that the claimant testified to searching for work through telephone calls, e-mail, and in person visits. Although the review examiner's findings specifically speak only to what the claimant "testified to," we interpret these findings as having been adopted by the review examiner as facts. Had the review examiner not believed the claimant's testimony, we are confident that he would not have reduced the testimony to findings of fact, and he would have indicated in a credibility assessment why he did not find the claimant to be credible. Based on the claimant's sustained search for work as indicated in her own work search log, as well as the several different ways in which she has tried to obtain work, we believe that the claimant has made a sustained effort to search for work for which she is reasonably fitted.

¹ We note that one of the questions in the Board's September 20, 2012 remand order was, "Is the claimant available for full-time work?" There is no direct answer to this question in the consolidated findings of fact.

² The claimant's availability for work, while not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing, 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 Director, DET*, 64 Mass. App. Ct. 370, 371 (2005).

We, therefore, conclude as a matter of law that the claimant was capable of, available for, and actively seeking work since she filed her claim for unemployment benefits.

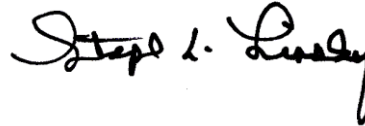
The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending May 12, 2012 and for subsequent weeks if otherwise eligible.

N.B. In the determination of benefits, the agency shall account for all earnings, including those referenced in Finding of Fact # 6.



John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING – March 19, 2013



Stephen M. Linsky, Esq.
Member

Member Sandor J. Zapolin did not participate in this decision.

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 – April 18, 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.