

- DECISION -

Claimant:

ROBERTA L GEORGE

Decision No.: 1368-BR-12

Date: April 18, 2012

Appeal No.: 1134064

S.S. No.:

Employer:

WHOLE FOODS MARKET
GROUP INC

L.O. No.: 64

Appellant: Claimant

Issue: Whether the claimant was able, available and actively seeking work within the meaning of the Maryland Code, Labor and Employment Article, Title 8 Section 903.

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the Maryland Rules of Procedure, Title 7, Chapter 200.

The period for filing an appeal expires: May 17, 2012

REVIEW OF THE RECORD

After a review of the record, the Board adopts the hearing examiner's findings of fact. However, the Board concludes that these facts warrant different conclusions of law and a reversal of the hearing examiner's decision.

The General Assembly declared that, in its considered judgment, the public good and the general welfare of the citizens of the State required the enactment of the Unemployment Insurance Law, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of individuals unemployed through no fault of their own. *Md. Code Ann., Lab. & Empl. Art., § 8-102(c)*. Unemployment compensation laws are to be read liberally in favor of eligibility, and disqualification

provisions are to be strictly construed. *Sinai Hosp. of Baltimore v. Dept. of Empl. & Training*, 309 Md. 28 (1987).

The Board reviews the record *de novo* and may affirm, modify, or reverse the findings of fact or conclusions of law of the hearing examiner on the basis of evidence submitted to the hearing examiner or evidence that the Board may direct to be taken. *Md. Code Ann., Lab. & Empl. Art., § 8-510(d)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*.

The claimant has the burden of demonstrating by a preponderance of the evidence that he is able, available and actively seeking work. *Md. Code Ann., Lab. & Empl. Art., § 8-903*. A claimant may not impose conditions and limitations on his willingness to work and still be available as the statute requires. *Robinson v. Md. Empl. Sec. Bd*, 202 Md. 515, 519 (1953). A denial of unemployment insurance benefits is warranted if the evidence supports a finding that the claimant was unavailable for work. *Md. Empl. Sec. Bd. v. Poorbaugh*, 195 Md. 197, 198 (1950); compare *Laurel Racing Ass'n Ltd. P'shp v. Babendreier*, 146 Md. App. 1, 21 (2002).

A claimant should actively seek work in those fields in which he is most likely to obtain employment. *Goldman v. Allen's Auto Supply*, 1123-BR-82; also see and compare *Laurel Racing Ass'n Ltd. P'shp v. Babendreier*, 146 Md. App. 1 (2002).

The term "available for work" as used in § 8-903 means, among other things, a general willingness to work demonstrated by an active and reasonable search to obtain work. *Plaughter v. Preston Trucking*, 279-BH-84. A claimant need not make herself available to a specific employer, particularly when the employer cannot guarantee her work, in order to be available as the statute requires. *Laurel Racing Ass'n Ltd. P'shp v. Babendreier*, 146 Md. App. 1, 22 (2002).

Section 8-903 provides that a claimant must be able to work, available to work, and actively seeking work in each week for which benefits are claimed.

In her appeal, the claimant essentially reiterates her testimony from the hearing. She explains the problems she encountered in obtaining a specific date upon which her doctor would release her to return to work and contends she was seeking work in August and September of 2011 while she was off work. On appeal, the Board reviews the evidence of record from the Lower Appeal hearing. The Board finds, upon completion of its review, that the hearing examiner's decision should be reversed.

The specific issue here was whether the claimant was able to work. The hearing examiner inappropriately considered only the narrower question of whether the claimant was able to perform the regular duties of her existing job.

The proper criteria for this issue involve consideration as to whether a claimant is able to perform the duties of a job which is within the claimant's training, education and experience. The fact that the claimant may have been unable to perform certain duties within one job does not make her unable to work under the meaning of §8-903.

The evidence established that, because of her pregnancy, the claimant was not able to perform the heavy lifting required of her current position with this employer. The employer placed her on a medical leave pending further information from the claimant's doctor. The claimant remained able to perform a variety of other functions throughout this period. She simply could not lift heavy items as was needed. The claimant was unable to perform some duties of her job; the claimant was not unable to work. Therefore, the claimant is not ineligible for the receipt of benefits under §8-903.

If the claimant is qualified and otherwise eligible for benefits, she is entitled to benefits for the weeks claimed.

The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

The Board finds based upon a preponderance of the credible evidence that the claimant has met her burden of demonstrating that she was able, available, and actively seeking work within the meaning of *Robinson v. Md. Empl. Sec. Bd.*, 202 Md. 515 (1953) and §8-903. The decision shall be reversed for the reasons stated herein.

DECISION

The claimant is able to work, available for work and actively seeking work within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 903. Benefits are allowed from the week beginning August 28, 2011.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

VD

Copies mailed to:

ROBERTA L. GEORGE
WHOLE FOODS MARKET
SUSAN BASS DLLR
WHOLE FOODS MARKET
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

ROBERTA L GEORGE

SSN #

Claimant

vs.

WHOLE FOODS MARKET
GROUP INC

Employer/Agency

Before the:
**Maryland Department of Labor,
Licensing and Regulation
Division of Appeals**
1100 North Eutaw Street
Room 511
Baltimore, MD 21201
(410) 767-2421

Appeal Number: 1134064
Appellant: Claimant
Local Office : 64 / BALTOMETRO
CALL CENTER

October 19, 2011

For the Claimant: PRESENT

For the Employer:

For the Agency:

ISSUE(S)

Whether the claimant is able, available for work and actively seeking work within the meaning of the MD Code Annotated, Labor and Employment Article, Title 8 Sections 903 and 904; and/or whether the claimant is entitled to sick claim benefits within the meaning of Section 8-907.

FINDINGS OF FACT

The claimant, Roberta L George, filed a claim for unemployment insurance benefits, establishing a benefit year effective August 28, 2011, and a weekly benefit amount of \$340.00. The Claim Specialist denied benefits the week beginning August 28, 2011, and until meeting the requirements of the law, because the claimant was not able and available for work due to a pre-claim status, medical condition/illness, contrary to the requirements in Maryland Code, Labor & Employment Article, Title 8, Section 903.

The claimant is pregnant and due to deliver her baby January 26, 2012. The claimant worked for the employer, Whole Foods Market Group Inc, as a bulk buyer. The claimant was restricted by her doctor from lifting more than 30 lbs. The claimant's position as bulk buyer required her to do heavy physical labor, including breaking down pallets, using a handjack and lifting over 50 lbs.

The claimant could no longer perform the duties of this position due to her medical condition. The employer therefore placed the claimant on medical leave on August 9, 2011. However, as of September 26, 2011, the claimant's restrictions were lifted by her doctor and she returned to work with the employer on October 4, 2011, as a team member, which does not involve heavy lifting.

CONCLUSIONS OF LAW

Md. Code Ann., Labor of Emp. Article, Section 8-903 provides that a claimant for unemployment insurance benefits shall be (1) able to work (2) available for work; and (3) actively seeking work. In Robinson v. Maryland Employment Sec. Bd., 202 Md. 515 97 A.2d 300 (1953), the Court of Appeals held that a claimant may not impose restrictions upon his or her willingness to work and still be available as the statute requires.

EVALUATION OF EVIDENCE

The claimant had the burden to show, by a preponderance of the credible evidence that he was able to work, available for work and actively seeking work, during the period in question, as defined by Maryland Unemployment Insurance Law. In the case at bar, the claimant did not initially meet this burden, but did so for the period after March 6, 2011.

In Brooks, 12-BR-85, the Board of Appeals held "A claimant who has been released to return to full-time work, without restrictions, is able to work within the meaning of Section 8-903 from the date of the release."

Similarly, in the case at bar, the claimant's treating physician released her to return to full time work, without restrictions, effective September 26, 2011. Prior to that date, the claimant was not fully able to perform her duties as bulk buyer with the employer. Therefore, from the time the claimant filed her claim during the week of August 28, 2011, and until the week ending September 24, 2011, the claimant was unable to work and not meeting the requirements of Section 8-903 of the law. However, as of the week beginning September 25, 2011, the claimant was meeting the requirements of the law and benefits are allowed as of that date, provided the claimant meets all other eligibility requirements of the law.

DECISION

IT IS HELD THAT the claimant is not fully able, available and actively seeking work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-903. Benefits are denied from the week beginning August 28, 2011, and through the week ending September 24, 2011. However, benefits are allowed as of September 24, 2011, provided the claimant meets the other eligibility requirements of the law. The claimant may contact Claimant Information Service concerning the other eligibility requirements of the law at ui@dllr.state.md.us or call 410-949-0022 from the Baltimore region, or 1-800-827-4839 from outside the Baltimore area. Deaf claimants with TTY may contact Client Information Service at (410) 767-2727, or outside the Baltimore area at 1-800-827-4400.

The determination of the Claims Specialist is modified.



C A Applefeld, Esq.
Hearing Examiner

Notice of Right to Request Waiver of Overpayment

The Department of Labor, Licensing and Regulation may seek recovery of any overpayment received by the Claimant. Pursuant to Section 8-809 of the Labor and Employment Article of the Annotated Code of Maryland, and Code of Maryland Regulations 09.32.07.01 through 09.32.07.09, the Claimant has a right to request a waiver of recovery of this overpayment. This request may be made by contacting Overpayment Recoveries Unit at 410-767-2404. If this request is made, the Claimant is entitled to a hearing on this issue.

A request for waiver of recovery of overpayment does not act as an appeal of this decision.

Esto es un documento legal importante que decide si usted recibirá los beneficios del seguro del desempleo. Si usted disiente de lo que fue decidido, usted tiene un tiempo limitado a apelar esta decisión. Si usted no entiende cómo apelar, usted puede contactar (301) 313-8000 para una explicación.

Notice of Right of Further Appeal

Any party may request a further appeal either in person, by facsimile or by mail with the Board of Appeals. Under COMAR 09.32.06.01A(1) appeals may not be filed by e-mail. Your appeal must be filed by November 03, 2011. You may file your request for further appeal in person at or by mail to the following address:

Board of Appeals
1100 North Eutaw Street
Room 515
Baltimore, Maryland 21201
Fax 410-767-2787
Phone 410-767-2781

NOTE: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing : October 14,2011

TH/Specialist ID: RBA8U

Seq No: 002

Copies mailed on October 19, 2011 to:

ROBERTA L. GEORGE

WHOLE FOODS MARKET

LOCAL OFFICE #64

SUSAN BASS DLLR

WHOLE FOODS MARKET