

- DECISION -

Claimant:
KETRA A EVANS

Decision No.: 860-BR-13

Date: February 26, 2013

Appeal No.: 1230127

S.S. No.:

Employer:

L.O. No.: 63

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: March 28, 2013

REVIEW OF THE RECORD

After a review of the record, the Board adopts the first paragraph and the first sentence of the second paragraph of the hearing examiner's findings of fact. The Board makes the following additional findings of fact:

The claimant has been seeking work as a dental assistant and as a medical assistant. The claimant was restricted by her doctor from working May 4, 2012 through July 6, 2012.

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. *Plaugher 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 offers no specific contentions of error as to the findings of fact or the conclusions of law in the hearing examiner's decision. The claimant does not cite to the evidence of record and makes no other contentions of error. The claimant merely states: "Reason: File an appeal".

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board will not order the taking of additional evidence or a new hearing unless there has been clear error, a defect in the record, or a failure of due process. The record is complete. The claimant appeared and testified. With the exception of the hearing examiner's exceeding the scope of the Notice of Hearing, as discussed below, the necessary elements of due process were observed throughout the hearing. The Board finds no reason to

order a new hearing or take additional evidence in this matter.

In *Shaw v. Valdez*, 819 F.2d 965 (10th Cir. 1987), the U. S. Supreme Court held: “[i]t goes without saying that the requirements of a fair hearing include notice of the claims of the opposing party and an opportunity to meet them.” *FTC v. National Lead Co.*, 352 U.S. 419, 427, (1957); see also *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

The Court has additionally stated: “We think Shaw was entitled, as a matter of right, to know in advance all of the factual and legal issues that would be presented at the hearing.” The *Shaw* Court further held:

Lastly, we are not persuaded by the consideration that the volume of appeals in such cases required expeditious proceedings, without a more specific notice. The State could afford a fair hearing premised on fair notice by a brief statement of particular factual and legal points to be raised at the hearing... with a warning to the parties that there would be no "issue switching" at the hearing.

And we note further that while the burden on the administrative process of a particular procedural safeguard should be considered, *Mathews v. Eldridge*, 424 U.S. 319, 335, (1976) administrative "speed and efficiency" cannot justify a failure to observe basic fairness in procedure. See *Stanley v. Illinois*, 405 U.S. 645, 656, (1972).

In an unemployment insurance benefit hearing, both parties are entitled to notice of the factual and legal issues to be adjudicated at the hearing. This requires more than a broad unspecified statement or a statement that is so vague and potentially inclusive as to be meaningless. Additionally, the issue stated on the Notice of Hearing should be materially consistent with the issue shown on the benefit determination from which a party has appealed.

Whatever administrative burden is placed on the Agency to provide actual notice of both the legal and factual issues to be considered in a hearing is outweighed by the private interests of the party against whom this burden lies. It is patently unfair to require or expect a party to be prepared for any and all factual issues which may arise from a generalized legal issue stated in a Notice of Hearing. This is not to require the Agency to list each and every allegation contained within the various documents which precede an appeal hearing. But, the Agency is expected to provide a level of specificity such that a reasonable person has a fair opportunity to prepare to advance their cause or defend their position.

Here, the Notice of Hearing included aspects which were beyond the benefit determination. The claimant did not have actual notice of the factual issues which would be adjudicated. The claimant could not reasonably have been expected to present competent evidence on any factual issue beyond her ability to work. The Board limits the scope of this decision to that issue, based upon the evidence from the hearing.

The claimant was under a doctor's care for two months. She was restricted from working during this period. The claimant was not able to work from May 4, 2012 through July 6, 2012. She was not eligible for benefits during that time. The hearing examiner erred in initiating the claimant's ineligibility period on April 30, 2012. The claimant was able to work for the majority of that week. Her restriction began on

Friday, May 4, 2012; her ineligibility should have begun on Sunday, May 6, 2012. The restriction ended as of July 6, 2012, at which time the claimant returned to being able to work, and eligible for benefits. If the claimant has limitations on her availability or has not conducted an adequate work search, the Agency must adjudicate those factual issues and issue a benefit determination, or determinations, before any hearing may be held.

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 did not meet her burden of demonstrating that she was able, available, and actively seeking work, from the week beginning May 6, 2012 through the week ending July 7, 2012, 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 was not 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. The claimant is disqualified from receiving benefits from the week beginning May 6, 2012 and until week ending July 7, 2012.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

VD/mw

Copies mailed to:

KETRA A. EVANS

SUSAN BASS DLLR

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

KETRA A EVANS

SSN #

Claimant

vs.

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: 1230127

Appellant: Claimant

Local Office : 63 / CUMBERLAND

CLAIM CENTER

October 01, 2012

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, Ketra Evans, filed for unemployment insurance benefits establishing a benefit year effective July 31, 2011 with a weekly benefit amount of \$284.

Since opening her claim for benefits, the claimant has been seeking work as a dental and medical assistant, for which the customary hours of employment vary between day and evening shifts. With respect to whether the claimant has any restrictions on her availability to perform work, the claimant was under a doctor's care and restricted from working May 4, 2012 through July 6, 2012. Further, between August 6, 2012 and September 16, 2012, the claimant attended Fortis College Monday through Thursday from 6:00 p.m. through 11:00 p.m. The claimant started an externship for school on September 17, 2012 which is

Monday through Friday from 9:00 a.m. to 5:30 p.m. The claimant is looking for work that does not conflict with her school/externship schedule.

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 Hearing Examiner considered all of the testimony and evidence of record in reaching this decision. Where the evidence was in conflict, the Hearing Examiner decided the facts on the credible evidence as determined by the Hearing Examiner.

The claimant had the burden to show, by a preponderance of the evidence, that she is in compliance with Agency requirements. In the case at bar, that burden has been partially met. The claimant was under a doctor's care and restricted from working May 4, 2012 through July 6, 2012 and has only been looking for night time work since starting her externship on September 17, 2012. Accordingly, a disqualification is not warranted and benefits will be allowed for those weeks in which the claimant demonstrated no material restriction upon availability for work, as discussed above.

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 April 30, 2012 through the week ending July 7, 2012 and the week beginning September 16, 2012 and until the claimant is fully able, available and actively seeking work without material restriction.

IT IS FURTHER HELD THAT the claimant is able, available and actively seeking work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-903. Benefits are allowed from the week beginning July 8, 2012 through September 15, 2012, provided that the claimant meets the other eligibility requirements of the Maryland Unemployment Insurance 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.

D.W. Purdie

D W Purdie, 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 October 16, 2012. 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: September 22, 2012

DAH/Specialist ID: WCU3C

Seq No: 004

Copies mailed on October 01, 2012 to:

KETRA A. EVANS

LOCAL OFFICE #63

SUSAN BASS DLLR