

Because the claimant did not show that she was capable of performing some kind of work after she had surgery and gave the employer a doctor's note stating that she needed to be out of work for two weeks due to the surgery, she was not in unemployment for the period of time addressed in the note.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member**

Issue ID: 0020 7883 37

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Jodi Ferullo, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits for the period from April 3, 2016 through April 23, 2016. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

After beginning a part-time job with the employer, the claimant filed a new unemployment claim on December 13, 2015, and the claim was determined to be effective December 13, 2015. On February 2, 2017, the DUA sent the claimant a Notice of Disqualification, informing her that she was not eligible to receive benefits for the period from January 31, 2016 through July 2, 2016. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner, in a decision issued on June 6, 2017, reversed the determination in large part; however, she concluded that the claimant was still subject to disqualification from April 3, 2016, through April 23, 2016.

Benefits were denied for those three weeks, because the review examiner determined that the claimant was not able to work during those weeks and, thus, was not in unemployment as defined under G.L. c. 151A, §§ 29 and 1. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accepted the claimant's application for review and remanded the case to the review examiner to take additional evidence regarding the claimant's ability to work and her work search efforts for the period of time that she could not perform her regular job duties with the employer. Both parties attended the remand hearing. Thereafter, the review examiner issued her 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 was not in unemployment, from April 3 through April 23, 2016, is supported by substantial and credible evidence and is free from error of law, where the claimant had surgery on her knee on March 24, 2016, she was having pain in that leg as a result of it, and her doctor wrote her a note on April 6, 2016, stating that the claimant would be "out of work for 2 weeks due to surgery."

Findings of Fact

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

1. The claimant worked as a part-time Cashier/Customer Service person for the employer, a grocery retail store, from December 5, 2015, until March 23, 2016.
2. The claimant was working approximately 15 to 25 hours per week for the employer. The claimant was paid \$12 per hour in her position.
3. In 2012, before being employed with the instant employer, the claimant had a fall. As a result of that fall, the claimant suffered an injury to both of her knees and one of her elbows. (The claimant has no cartilage in her knee and a tear in the cartilage of her knee cap and a tear in the tendon of her elbow.) The claimant had [ongoing] issues with that injury.
4. In or around 2013, the claimant had knee surgery. The claimant had the surgery on a Thursday and was able to return to work on Monday in a full-time capacity, which included walking and doing stairs, with limited bending and twisting. The claimant had a difficult time walking long distances after the surgery.
5. The claimant's normal career was in Fire Safety Sales, but she was having difficulty in locating a position in that field.
6. In the position of Fire Safety Sales, the claimant would go door-to-door, driving, making calls, setting up appointments, doing contracts for testing and inspecting fire alarms and extinguishers, viewing property, taking test reports and providing quotes for possible sales. The claimant covered the entire Massachusetts territory. (The position did not require a degree, just sales experience and knowledge of fire safety, sprinklers and fire alarms.)
7. The claimant separated from her regular employer on December 12, 2013.
8. The claimant continued to look for work in her regular occupation and related fields after her separation from work. Beginning at the time of her separation and continuing thereafter, the claimant was looking for full-time work in property management, fire safety sales, banking, or customer service. (The minimal salary the claimant would accept was \$45,000 annually.)
9. The claimant decided to work for the instant employer, while continuing to look for work in her regular occupation. The claimant believed that she could perform the position of Cashier and did not inform the employer of her medical condition when hired.

10. The claimant was still experiencing some pain in her elbow and some difficulty walking when she began work with the instant employer.
11. On November 25, 2015, at the employer orientation, the claimant received a written job description. The job description indicated in part that the Cashier would be standing for long periods of time and would need to gather the employer shopping carts.
12. After working for a few weeks, the claimant realized that standing on the concrete was bothering her knee, as the normal pain that she had prior to working for the employer increased.
13. The claimant also realized that the repetitive motion of performing the cashier functions was causing her elbow to swell and become painful. (At some point, the claimant informed the employer that in the future, she would need to undergo rotator cuff surgery due to issues with her elbow/shoulder.)
14. The claimant visited her doctor when her symptoms began to worsen. The claimant was provided with restriction from her doctor, indicating that she could perform no lifting, pulling or pushing of more than 5 pounds.
15. The claimant notified the employer that she felt she was unable to collect the carriages due to her medical condition and restrictions. The claimant was instructed to have her doctor fill out the medical form for an accommodation.
16. The claimant provided the employer with a medical note dated February 2, 2016 indicating that she had a restriction to her right "upper extremity – no lifting, pushing or pulling over 5 lbs. No pushing or pulling cars."
17. The claimant was placed on a Transitional Work Plan with the employer indicating that she would still be working in her position but "will not be pushing carriages at this time. She will only be able to lift up to 10 lbs. with her right arm. It is her responsibility to follow these restrictions. This is only temporary and will be reviewed on March 22nd after her follow-up appointment with the treating physician." The claimant signed the Transitional Work Plan with a date of February 19, 2016.
18. The claimant submitted that form and was given an accommodation of not having to collect and/or handle the carriages.
19. The claimant last worked for the instant employer on March 23, 2016.
20. On March 24, 2016, the claimant underwent surgery on her left knee to repair a tear. The surgery that the claimant had was the same surgery that she had in 2013.

21. After having surgery on March 24th, the claimant was provided with a doctor's note dated March 25th indicating that she had a restriction of "standing less than 2 hours." The claimant provided the employer with that doctor's note. The employer did not have a position meeting those restrictions at that time, but indicated that the employer would see what they could come up with.
22. The claimant was scheduled to work March 28th, March 29th and March 30th, 2016 with her next scheduled shift being April 8th, 2016.
23. On March 28, 2016, the claimant called out of work informing the employer that she was calling out sick because she was in too much pain to work. At that time, the claimant had a doctor's note with a restriction of "sit down work only. To be re-evaluated at 4/06/16 apt". That doctor's note was provided to the employer.
24. After the surgery, the claimant believed that she was able to work as a Cashier for the employer, along with working in her regular field, if she could sit down and ice her knee. (The claimant had a knee sleeve that she could insert an icepack into.)
25. The claimant asked the Manager of Customer Service about light duty work, whether she could sit as a Cashier. The claimant was told that she could not sit down as a Cashier as the employer perceived that it would be a liability. (The employer was concerned that she would strain her back if seated while performing the work.)
26. The claimant maintained contact with the employer to see if they had any position available that she could return to after her surgery, which would meet her restrictions of being able to be seated. The claimant spoke to the Manager of Customer Service many times about light duty and he indicated it was not available.
27. At no time did the employer notify the claimant that they had a position available which would meet her restriction.
28. After asking the claimant about her duties as a Cashier with the employer, the claimant's doctor informed the claimant that he did not want her bending, twisting or lifting which would put stress on her knee. The claimant's doctor then provided her with a note indicating that she would have to be out of work for two weeks.
29. The claimant provided the employer with the doctor's note dated April 6th, 2016 indicating that the claimant was to be "out of work for 2 weeks due to surgery". The employer accepted the note and back-dated the claimant's medical leave.

30. The claimant continued to conduct her job search activities after her knee surgery during the two-week period and thereafter.
31. While working for the instant employer, the claimant did not have a scheduled date to undergo the necessary shoulder surgery. At no time did the claimant turn down light duty work with the employer, because she was scheduled for shoulder surgery. (The claimant underwent shoulder surgery in late May 2016.)
32. The claimant began a new full-time position with a different employer on July 18, 2016.
33. The claimant filed her claim for unemployment benefits December 13, 2015. (Claim 2015-01). The effective date of the claim is December 13, 2015. (The claimant filed a new claim for unemployment benefits effective January 8, 2017.)
34. On February 2, 2017, a Notice of Disqualification was issued under Section 29(a) of the Law, indicating that “for a set period of time, you are on a medical leave of absence granted by our employer. Since work remains available to you, it is determined that you are not in unemployment and are subject to disqualification.” “Your medial leave was/is from 2/1/2016 to 6/28/2016.” The disqualification period indicated was the period beginning 1/31/2016 through 7/2/2016.”

CREDIBILITY ASSESSMENT:

Although the employer witness testified that they would have been able to provide the claimant with light duty work after her knee surgery, but did not do so because the claimant had informed the employer that she would be going out for shoulder surgery in a few weeks so there was no need for transitional work, such testimony was deemed not to be credible given the totality of the circumstances.

First, the employer witness testified that she had no direct knowledge of the claimant’s conversations with the Manager of Customer Service regarding light duty and/or transitional work. It was the claimant’s direct and consistent testimony that she had spoken to the Manager of Customer Service, more than once, about obtaining light duty work after having her knee surgery and was informed that it was unavailable.

Second, the claimant provided direct and consistent testimony that she had no knowledge of when her shoulder surgery would be scheduled at the time she returned from knee surgery in late March 2016/early April 2016, and as such did not instruct the employer not to provide her with transitional work due to that surgery. Further supporting the claimant’s testimony, it was unrefuted that the claimant did not actually undergo shoulder surgery until late May 2016, which

was clearly not within a few weeks of the claimant's return from her knee surgery.

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. As discussed more fully below, we agree with the review examiner and conclude that the claimant has not shown through substantial and credible evidence that she was in unemployment from April 3, 2016, through April 23, 2016.

During the period at issue, the claimant had an active unemployment claim, which was effective December 13, 2015. To be eligible for unemployment benefits in the weeks after she filed her claim, the claimant must show that she was in a state of unemployment, whether total or partial. G.L. c. 151A, § 29(a), authorizes benefits to be paid to those in total unemployment. Total unemployment is defined at G.L. c. 151A, § 1(r)(2), which provides, in relevant part, as follows:

"Total unemployment", an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable and available for work, he is unable to obtain any suitable work.

G.L. c. 151A, § 29(b), authorizes benefits to be paid to those in partial unemployment. Partial unemployment is defined at G.L. c. 151A, § 1(r)(1), which provides, in relevant part, as follows:

"Partial unemployment", an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week....

The review examiner found that the claimant last worked for the employer on March 23, 2016. Therefore, for the period of time in April, the claimant had no earnings from the employer and performed no services for it. Thus, the total unemployment provision is applicable to this matter.

The overarching question in this case is whether, regardless of the claimant's medical issues, she was still in unemployment after she filed her claim. Per the definition of total unemployment, to receive benefits, the claimant must show that she was "capable and available for work" but "unable to obtain any suitable work." Even if the claimant was unable to do her job duties as a cashier/customer service person as the employer wished her to do, if she could do some type of suitable work, she will be in unemployment. See Dir. of Division of Employment Security v. Fitzgerald, 382 Mass. 159, 163 (1980).

In this case, the DUA initially disqualified the claimant from January 31, 2016, through July 2, 2016. In her decision, the review examiner reduced the period of disqualification to April 3, 2016, through April 23, 2016. The review examiner's decision to limit the disqualification period is supported by the record and her findings of fact. After starting work with the employer in early December of 2015, the claimant found it difficult to perform all of the job functions of the cashier/customer service position. Standing for long periods caused pain in her knee, and the repetitive motion of the cashier job duties caused her elbow to swell. Consolidated Findings of Fact ##12 and 13. She was still able to work, however. Her doctor gave her reasonable restrictions, which included lifting and pushing/pulling requirements. Consolidated Findings of Fact ## 14–16. The employer also put the claimant on a Transitional Work Plan. Since the claimant was still capable of performing her work with some accommodation, she was able to work, in the sense of G.L. c. 151A, § 1(r)(2), since she began working for the employer. Moreover, she has been searching for work on a regular basis in her usual profession. *See* Consolidated Finding of Fact # 8. In light of these considerations, the claimant was able and available to work, at least as of January 31, 2016.¹ The review examiner was correct to conclude that she was in unemployment as of that time.

The claimant's ability to work, however, changed somewhat after she had surgery on March 24, 2016. After her surgery, she produced a doctor's note indicating that she could return to work with restrictions. Consolidated Finding of Fact # 21. However, on March 28, 2016, the claimant notified the employer that she was unable to work, because she was in too much pain. She was next evaluated for work by her doctor on April 6, 2016. In that note, the doctor crossed out the word "Return" and circled the word "Work." He then wrote: "out of work for 2 weeks due to surgery." Remand Exhibit # 6. The doctor provided no specifics as to any restrictions she was under, or whether the claimant was capable of working light duty. This note, read in relation to the March 24 surgery and the March 28 notification to the employer that she could not work due to her pain, is reasonably interpreted as indicating that the claimant was not to work for several weeks in any capacity.

The claimant strenuously argued that she was able to work light duty for the period addressed by the note and that she was searching for work. She has submitted work search records supporting her testimony about the work search. *See* Remand Exhibit # 9. The review examiner also found that the claimant "believed that she was able to work as a Cashier for the employer." Consolidated Finding of Fact # 24. However, this belief is directly contrary to the text of the note, dated April 6, 2016. The claimant supplied no other documentation relating directly to the April 3, 2016, through April 23, 2016 disqualification period at issue. The surgery, the pain in her knee, the note, and the proposed accommodations (sitting down and icing the knee constantly) do not suggest that the claimant was ready and able to work. They certainly do not indicate that the claimant could do her normal work in fire safety sales, which required door-to-door work, driving, and viewing property. Consolidated Finding of Fact # 6. They also do not indicate that the claimant was readily able to perform work as a cashier.

In short, given the state of the record, the claimant has failed to carry her burden to show that she was "able and available" to work for the majority of the weeks included in the April 3, 2016

¹ Similarly, the claimant was in unemployment for the period of time after the weeks addressed in the April 6, 2016, note. The key factor affecting the claimant's eligibility here is the April 6, 2016, note from the claimant's doctor indicating that she was to be out of work for several weeks. *See* Remand Exhibit # 6.

through April 23, 2016 period. Because she has not presented sufficient evidence to conclude this, she has not shown that she was in unemployment for that period of time.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits, pursuant to G.L. c. 151A, §§ 29 and 1, for the period from April 3, 2016, through April 23, 2016, is supported by substantial and credible evidence and free from error of law, because the claimant failed to show sufficient evidence that she could do some type of work during that period of time.

The review examiner's decision is affirmed. The claimant is denied benefits for the period beginning April 3, 2016, and ending April 23, 2016.



Paul T. Fitzgerald, Esq.

Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 9, 2018



Charlene A. Stawicki, Esq.

Member

**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/rh