

During a medical leave of absence, the claimant could not work for his employer as a police officer, but he still could do other suitable work and tried to obtain it, so he meets the definition of total unemployment provided in G.L. c. 151A, § 1(r)(2).

**Board of Review
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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Meghan Orio-Dunne, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits for the period from October 30, 2016 through March 18, 2017. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part the review examiner's decision.

The claimant stopped performing services for the employer on September 15, 2016. He then re-opened an unemployment claim, which was initially effective April 3, 2016. On March 17, 2017, the DUA issued a Notice of Disqualification, informing the claimant that he was not eligible to receive benefits beginning September 11, 2016. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner modified the initial determination. She concluded that the claimant was not eligible to receive benefits from October 30, 2016 through March 18, 2017, but that he was eligible to receive benefits beginning March 19, 2017.

Benefits were denied after the review examiner determined that the claimant was on a medical leave of absence while work remained available to him and, thus, was not in unemployment and disqualified under G.L. c. 151A, §§ 29(a) and 1(r)(2). 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 as to whether the claimant was capable of doing any work other than as a police officer and whether the claimant was available for work while he was on his medical leave of absence. 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 is not eligible to receive benefits, pursuant to G.L. c. 151A, §§ 29 and 1, for the period from October 30, 2016 through March 18, 2017, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings of fact indicate that during the time the

claimant was on his leave of absence he was searching for work, able to work, and available for suitable work.

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 for the employer, a municipality, as a full time police officer beginning in April 1994. He last physically worked on September 15, 2016.
2. The claimant was placed on paid administrative leave beginning September 16, 2016 pending an investigation regarding his ability to perform his duties. The investigatory leave was initiated when the claimant reported becoming very angry while helping an African-American man cross the street.
3. The claimant was referred to the department's stress officer, who then recommended that he be evaluated by the city's consulting psychologist. On October 21, 2016, the consulting psychologist concluded that the claimant was psychologically unfit for duty as a police officer.
4. On October 28, 2016, the city's physician reviewed the psychologist's report and agreed that the claimant was unable to safely perform the essential functions of a police officer.
5. Effective October 28, 2016, the claimant was placed on a medical leave of absence by the employer pending the resolution of his psychological condition and receipt of a release to return to work.
6. During his medical leave, the claimant was capable of performing other work, including towing and landscaping.
7. During his medical leave, there were no circumstances limiting the claimant's availability for full time work.
8. The claimant sought employment as a tow truck driver, cook, or landscaper a minimum of 3 days per week from September 2016 through December 2016, when he was approved for Section 30 benefits and granted a waiver of his work search requirements.
9. To prevent conflicts of interest, the employer requires employees to obtain approval of the Chief of Police prior to accepting an offer of outside employment.
10. In October 2016, the claimant received an offer of employment as a driver for a local towing business. He submitted a Request for Permission to Engage in Outside Employment on October 17, 2016, and his request was denied.

11. The claimant began a full time CDL training program at New England Tractor Trailer School on October 31, 2016. On December 22, 2016, he was found eligible for Section 30 benefits for the period of October 31, 2016 through March 31, 2017. From October 31, 2016 through March 31, 2017, he attended training from Monday through Friday for 5 hours per day. (Exhibits 7-9)
12. In November 2016, the claimant received an offer of employment as a driver for a second local towing business. He submitted a Request for Permission to Engage in Outside Employment on November 16, 2016. His request was approved on an unspecified date, however the company had withdrawn their offer prior to the claimant's receipt of the employer's response.
13. The claimant was engaged in bi-weekly treatment with a psychiatrist for several years prior to the start of his medical leave. While on leave, he continued treatment with his physician.
14. On an unknown date, the claimant's psychiatrist informed him that he was able to return to work.
15. On February 7, 2017, the claimant underwent a Neurological and Psychological Fitness for Duty Evaluation by a clinical neuropsychologist. The clinician concluded that the claimant was fit for duty and was not demonstrating any cognitive, neuropsychological, or psychological difficulties that would prevent him from fully performing his duties as a police officer. The claimant provided the Fitness for Duty Evaluation to the employer on March 17, 2017.
16. The employer required the claimant to obtain medical clearance from the city's physicians prior to allowing him to return to work.
17. On April 7, 2017 and April 11, 2017, the claimant was seen by the city's consulting psychologist. The psychologist instructed the claimant to obtain his records from the Department of Veterans Affairs and informed him that a psychological profile would be completed sometime after May 9, 2017, when the clinician returned from vacation.
18. On April 22, 2017, the claimant was paid retroactively to March 17, 2017, the date he provided the employer a completed Fitness for Duty Evaluation.
19. As of the date of the continued hearing (October 4, 2017), the claimant remained in an "administrative leave with pay" status because the employer's physical had not yet provided clearance for the claimant to return to his prior position.

NOTE: The parties did not dispute the facts in this case. The claimant's Section 30 application, Notice of Approval, and Redetermined Notice of Disqualification have been entered as Remand Exhibits 7-9 per the Board's request.

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. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. We reject Consolidated Finding of Fact #7, as it conflicts with portions of Consolidated Finding of Fact #11. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we conclude that the claimant was in unemployment and eligible for benefits for the period of time that he could not do his job as a police officer. However, since he began to receive his regular pay again in March of 2017, he is disqualified from receiving unemployment benefits from that time forward.

To be eligible for unemployment benefits, the claimant must show that he 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....

In this case, the review examiner found that the claimant last performed services for the employer on September 15, 2016. He was then put on a paid administrative leave, effective September 16, 2016. The paid leave ended on October 28, 2016, when the employer placed him on an unpaid medical leave of absence. Since he was being paid his regular salary from September 16 through October 27, 2016, he was not in any state of unemployment during that time. However, beginning October 28, 2016, when he was put on an unpaid leave, he performed no work for the employer and received no pay. Therefore, the applicable provisions of law to be addressed here are G.L. c. 151A, §§ 29(a) and 1(r)(2).

The claimant was on the unpaid medical leave of absence, because he had reported to the employer that he became very angry while helping an African-American man cross a street. When he reported this, he was referred to the employer's medical professionals, who determined that the claimant was not capable of performing his duties as a police officer. The review examiner denied benefits, according to Part III of her decision, because work remained available

to the claimant, even though he was unable to do it. However, the fact that the claimant could not do his job, due to a medical reason, does not necessarily mean that he cannot receive benefits. As the Board has noted many times, it is well-established that “an employee is not shorn of unemployment benefits while out of work and seeking a suitable job, although . . . he has a good or even a perfect prospect of returning to his regular job when conditions change and there is work to do.” Dir. of Division of Employment Security v. Fitzgerald, 382 Mass. 159, 163 (1980). In Fitzgerald, a pregnant welder stopped working due to concerns that the welding work could negatively affect her pregnancy. She planned to return to work after the child was born. Since she was temporarily out of work for a reason beyond her control, she could have done more suitable work, and she was looking for such work, she was determined to be in unemployment even though she was on what could be considered to have been a leave of absence from her welding work.

The Fitzgerald case stands for the general proposition that a person who temporarily cannot do his work due to a circumstance beyond his control may still be eligible for unemployment benefits. In this case, we conclude that the claimant was in unemployment as of October 30, 2016. The employer told the claimant he could not work his job as a police officer. But, this did not mean that he could not do any work at all. During his imposed medical leave, he was able and available to do towing, landscaping, and cooking types of employment. *See Consolidated Findings of Fact ##6 and 8.* By his own admission during the remand hearing, the claimant is not trained in many types of work, as he has been a police officer for over two decades. However, the type of work he was seeking could have been suitable for him, as it is straightforward and not particularly specialized. He was searching for such work, and received some job offers, which ultimately did not pan out. *See Consolidated Findings of Fact ##10 and 12.*¹

As noted above, we have rejected Consolidated Finding of Fact #7, because the review examiner’s supported findings of fact indicate that there was at least one circumstance which affected the claimant’s availability for work. He was actively attending a CDL training program from October 31, 2017 through March 31, 2017. He attended the course five days per week, for five hours each day. We assume that he would not have been available to work during the hours he was physically in and attending the CDL course. However, the type of work the claimant was searching for, such as towing, is generally available throughout the day and night. The claimant also testified that he was willing to accept the offers of work which were given to him, if the employer had timely approved his requests to work outside of the city.² Thus, there is substantial and credible evidence to conclude that the claimant was available for full-time work while he was on his medical leave and even though he was attending the CDL course.

Based on this discussion, the claimant has met the definition of total unemployment laid out in G.L. c. 151A, § 1(r)(2), regardless of whether the claimant may have been on a “leave of

¹ There was an extra barrier to the claimant’s efforts to seek other work. His work outside of the city had to be approved by the Chief of Police. *See Consolidated Finding of Fact #9.* This procedure appears to have resulted in some delay and difficulty in the claimant being able to expeditiously obtain new work.

² We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

absence” from the instant employer.³ However, as of March 17, 2017, the claimant was put into a “paid” status. *See* Consolidated Findings of Fact ##18 and 19. Therefore, just like the paid administrative leave period from September 16, 2016 through October 27, 2016, the claimant was not in unemployment in March of 2017, when he was paid his regular salary again.

We, therefore, conclude as a matter of law that the review examiner’s decision to deny benefits from October 30, 2016 through March 18, 2017, is not supported by substantial and credible evidence or free from error of law, because the claimant has carried his burden to show that, even though he could not work for this employer as a police officer, he could do other, more suitable work, and searched for it while he was on an employer-imposed medical leave of absence.

The review examiner’s decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits for the period from October 30, 2016 through March 18, 2017. The claimant is disqualified from receiving benefits beginning March 19, 2017, because he was on paid administrative leave at that time.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 31, 2017



Paul T. Fitzgerald, Esq.
Chairman



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.

³ We note that the legal question is not whether the claimant was on a “leave of absence.” This term is not defined in Chapter 151A, and nowhere in the statute does it say that a person on a leave of absence from their job cannot receive unemployment benefits. Rather than ask whether the claimant was on a leave of absence, a better way to approach these types of cases is simply to inquire whether a person actually meets the literal definition of “total unemployment” as provided by G.L. c. 151A, § 1(r)(2). If they do, then the person will be in unemployment.

SRF/jv