

Claimant's resignation from his truck driving job was due to urgent, compelling, and necessitous circumstances. He could not afford the physical examination fee to renew his DOT medical certificate before it expired. After it expired, he reasonably believed that multiple health problems, including blurred vision, diabetes, and a heart condition would make it unlikely that he would pass such an exam.

**Board of Review
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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by 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 resigned from his position with the employer on May 17, 2017. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on June 17, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on August 30, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without having good cause attributable to the employer or urgent, compelling, and necessitous reasons, and, thus, he was disqualified under G.L. c. 151A, § 25(e)(1). 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 obtain further evidence pertaining to the reasons the claimant did not return to work after his workers' compensation leave. 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 original conclusion that the claimant separated from the employer for disqualifying reasons under G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the record after remand shows that the claimant could not return to his truck driving job due to a combination of health and financial obstacles to renewing his Department of Transportation (DOT) medical clearance card.

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 full time truck driver for the employer from October 1, 2016 until the claimant quit on May 17, 2017.
2. About 10 days prior to March 12, 2017, the claimant, while driving for work, was pulled over by the police. At that time, the claimant was reminded that his DOT Medical Examiner Certificate would expire on March 12, 2017.
3. The claimant's DOT Medical Examiner Certificate expired on March 12, 2017.
4. There is a \$90.00 fee for the requisite physical exam to renew the DOT Medical Examiner Certificate.
5. The claimant did not have the funds to pay the fee for the physical exam to renew the DOT Medical Examiner Certificate.
6. The claimant continued to work until March 27, 2017 in spite of his expired DOT Medical Examiner Certificate because he believed he needed to work to pay his child support and make the necessary wages to pay for the requisite physical exam.
7. The claimant did not notify the employer that his DOT Medical Examiner Certificate expired.
8. The employer has a program through which they offer employees financial assistance to enable renewal of their DOT Medical Certificate.
9. The claimant was not aware of the employer's program offering financial assistance to renew the DOT Medical Certificate.
10. The claimant's last physical day at work was March 27, 2017.
11. On March 27, 2017, the claimant injured his back while working.
12. Prior to the claimant injuring his back, the employer did have work for the claimant that did not require him to drive a commercial vehicle.
13. The employer did not discuss with the claimant the possibility of suitable work for the claimant that did not require the claimant to drive a commercial vehicle.
14. After March 27, 2017, the claimant was receiving workers' compensation.

15. As of April 2017, the claimant was being treated by multiple doctors.
16. In April 2017, the claimant was diagnosed with Diabetes.
17. On April 12, 2017, one of the claimant's medical providers released the claimant to return to work without restrictions.
18. As of April 13, 2017, the claimant was released to return to work with a restriction to not lift more than 20 to 25 lbs.
19. As of May 2, 2017, another medical provider released the claimant to return to work with a restriction to not lift more than 20 lbs. As of May 16, 2017, that same medical provider released the claimant to return to work without restrictions.
20. As of May 15, 2017, another one of the claimant's medical providers released the claimant to return to work with restrictions. The claimant's restrictions included "no pulling, pushing or pulling over 25 pounds". There was no restriction on the claimant's driving ability.
21. As of May 18, 2017, the claimant was medically released to return to work but restricted to avoid jobs that required heavy lifting.
22. The employer notified the claimant that when he returned to work he would be assigned to drive and the employer would assign a helper to the claimant in order for the claimant to avoid strenuous activity.
23. On or about May 17, 2017, the claimant sent a text message to the employer indicating that he was not returning to work.
24. The claimant did not return to work because his DOT Medical Examiner Certificate expired.
25. The claimant did not notify the employer that he was not returning to work because his DOT Medical Examiner Certificate expired.
26. The claimant informed the employer that he was not returning to work because his back was still hurting.
27. The claimant did not attempt to renew the DOT Medical Examiner Certificate after it expired because he believed he would not pass the requisite physical exam.
28. The claimant believed he would not pass the exam because he was being treated for diabetes, chest pain and difficulty with his vision.

29. In August 2017, the claimant was diagnosed with 2 vessel in-stent restenosis. The claimant was referred for coronary artery bypass surgery.
30. The claimant did not submit to a physical exam nor did he make any attempts to renew his DOT Medical Examiner Certificate.
31. It is unknown whether the claimant's health problems would have prevented him from being able to renew his Medical Examiner Certificate.
32. On or about May 17, 2017, the claimant quit due to his DOT Medical Examiner Certificate being expired.

Credibility Assessment:

The claimant contends that he did notify the employer that he was not returning to work because he did not have his DOT Medical Examiner Certificate due to his medical condition. During the hearing, the claimant offered that he went for a physical exam but did not pass the test because of his health conditions. When questioned further, the claimant admitted that he did not submit to the physical exam but that he did not attempt to renew the DOT Medical Examiner Certificate after it expired because he believed he would not pass the requisite physical exam. In addition, the claimant also offered that his certificate would not be renewed because of his medical condition. However, the claimant admitted he did not make any attempt to renew his DOT Medical Examiner Certificate.

It is not disputed that when the claimant was released to work but restricted to jobs that did not require heavy lifting, the employer notified the claimant that when he returned to work he would be assigned to drive and the employer would assign a helper to the claimant in order for the claimant to avoid strenuous activity. The employer's witness denies that the claimant informed the employer that he was not returning to work because he could not drive due to his lack of a valid DOT Medical Examiner Certificate. The employer's witness offered that the claimant notified him that he was not able to return to work because his back was still hurting.

Given the claimant's conflicting testimony regarding whether he submitted to a physical exam, it is concluded that the claimant's testimony that he did notify the employer of why he was not returning to work is less credible than the employer's testimony.

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 original 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 accept the portion of Consolidated Finding #

30, which states that the claimant did not submit to a physical exam only insofar as it refers to a physical examination specifically to obtain a DOT medical certificate. The many medical notes presented into evidence indicate that at or near the time of his separation, the claimant had been subjected to physical examinations for several medical conditions by a number of medical providers.¹ In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we do not agree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

Because the claimant did not accept the employer's offer to return to work as a truck driver, we agree with the review examiner's assessment that he resigned from his employment. As such, his eligibility for unemployment benefits is properly decided under the following provisions of G.L. c. 151A, § 25(e):

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . . [or] if such individual established to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

Based upon the limited evidence before her at the original hearing in which the claimant did not participate, the review examiner disqualified the claimant because the record failed to explain why the claimant did not return to work after being cleared to do so by workers' compensation. After remand, the record now provides an explanation.

Implicit in the findings is that the claimant's commercial truck driving position with the employer required him to have current DOT medical clearance. His DOT medical certificate expired on March 12, 2017. Consolidated Finding # 3. Upon being released to return to work following his March 27, 2017, workers' compensation injury, the claimant turned down the employer's offer to return to driving its commercial truck, because he had not renewed his expired DOT medical certificate. Consolidated Finding # 24.

In order to determine whether the separation was for good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). Because the employer was not aware that the claimant's DOT certificate had expired, we find nothing about the employer's offer for the claimant to return to his truck driving job to be unreasonable. See Consolidated Finding # 7. Therefore, we conclude that he did not resign for good cause attributable to the employer.

We next consider whether the claimant separated due to urgent, compelling, and necessitous circumstances. Our standard for determining whether a claimant's reasons for leaving work are urgent, compelling, and necessitous has been set forth by the Supreme Judicial Court. We must examine the circumstances in each case, and evaluate "the strength and effect of the compulsive

¹ See Exhibits ## 5, 6, and Remand Exhibits ## 8 and 9.

pressure of external and objective forces” on the claimant to ascertain whether the claimant “acted reasonably, based on pressing circumstances, in leaving employment.” Reep v. Comm’r of Department of Employment and Training, 412 Mass. 845, 848, 851 (1992).

The consolidated findings show that the claimant did not renew that certificate for two reasons. At the time, the claimant did not have the \$90 necessary to pay for the DOT medical examination and he was not aware that the employer had a program that offered financial assistance for this purpose. Consolidated Findings ## 4, 5, 8, and 9. This explains why the claimant failed to take a DOT medical examination in the period between the certificate’s expiration on March 12, 2017, and the last day he physically worked before going out on a workers’ compensation leave due to the back injury, March 27, 2017. Although the claimant continued to work and get paid during this period, we accept the review examiner’s finding that he could not afford the test fee.

After March 27, 2017, he did not pursue a DOT medical examination to renew his certificate because he believed that he would not be able to pass the examination. *See* Consolidated Finding # 27. His back injury prompted referrals to different doctors for multiple health conditions, including continued therapy for his back, diabetes, difficulty with his vision, and a heart condition that required coronary bypass surgery. *See* Consolidated Findings ## 14–16, 28, and 29. In light of these multiple medical conditions and the employer’s description of the DOT physical, we cannot say that the claimant’s belief was unreasonable.²

In determining whether the claimant’s resignation was reasonable, we also consider whether, given his circumstances, he made reasonable efforts to stay employed or whether such efforts would have been futile. *See Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development*, 66 Mass. App. Ct. 759, 766 (2006) (a claimant must show reasonable efforts to preserve her employment — not that she had “no choice to do otherwise.”) (citation omitted). In response to the known lifting restrictions from the back injury, the employer offered the claimant his old DOT driving job back with a helper to do the lifting. *See* Consolidated Findings ## 21 and 22. The claimant did not accept this offer because he did not have the required DOT medical clearance. Although the claimant testified that he asked the employer for any other type of light duty work, the review examiner made no such finding. It may be that she rejected this testimony or simply overlooked it. It makes no difference to our analysis, however, because apparently, no such work was available.³ Thus, any such request would have been futile.

We, therefore, conclude as a matter of law that the claimant separated from employment involuntarily for urgent, compelling, and necessitous reasons within the meaning of G.L. c. 151A, § 25(e). Because we conclude that this was an involuntary resignation, benefits shall not

² One of the employer’s witnesses, also a truck driver, described that the DOT physical examination included checking for blood sugar levels, an eye exam, and a back exam. While not explicitly incorporated into the review examiner’s findings, his testimony is part of the unchallenged evidence introduced at the hearing and placed in the record, 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 Dir. of Department of Employment and Training*, 64 Mass. App. Ct. 370, 371 (2005).

³ During the remand hearing, the review examiner asked the employer’s witness whether the employer had work for the claimant that did not require him to drive a commercial vehicle. He responded that he did not think so. This testimony is also part of the uncontested record.

be charged to the employer's account, but shall be charged to the solvency account pursuant to G.L. c. 151A, § 14(d).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning April 23, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 20, 2018



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.

AB/rh