

Claimant was not in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), while on leave of absence during her high risk-pregnancy, as her doctor instructed her not to work. After giving birth, she was also not in unemployment, because she chose not to work in order to spend time with her baby.

**Board of Review
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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Eric Sullivan, a review examiner of the Department of Unemployment Assistance (DUA), to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant took a leave of absence from her position with the employer on June 13, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 22, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on September 13, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was available for other suitable work while on a leave of absence from the employer and, thus, she was not disqualified under G.L. c. 151A, §§ 29 and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to obtain further evidence about the claimant's availability to perform work while on maternity leave. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), during her maternity leave of absence is supported by substantial and credible evidence and is free from error of law.

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 as a part-time direct staff employee from April 2017 until 6/12/2017, when she last performed work.
2. On 6/11/2017, the claimant was having pregnancy complications and went to the emergency room, where the doctor told her not to work nights and to see her own doctor the next day.
3. The claimant was approximately 5 months pregnant.
4. On 6/12/2017, the claimant went to her own doctor who instructed her to refrain from performing any work due to being at a high risk for pregnancy issues. The claimant's personal doctor informed her to remain [sic] of work until after giving birth.
5. The claimant [sic] contacted her supervisor on 6/13/2017 indicating that her doctor stated that she needed to take early leave because of a high risk pregnancy.
6. The employer placed the claimant on an unpaid leave of absence informing her to return to work when ready.
7. While on the leave of absence, the claimant still searched for work that involved sitting and felt able to work a job sitting.
8. The claimant gave birth on 9/3/2017 and is still remaining out of work on a leave of absence.
9. The claimant is continuing to remain out of work because she is a first time mother who wants to spend time with her baby.
10. The employer still has overnight work available for the claimant, however the claimant has not contacted the employer to return to work.
11. The employer has kept the claimant's part-time position open for when she returns to work.
12. The claimant has not permanently separated from the employer.
13. During the base period of her unemployment claim, the claimant worked for one employer performing warehouse work on her feet for 8–10 hours a day.

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

except as follows. In light of Consolidated Finding #5, we believe the omitted word in Consolidated Finding # 4 was meant to be “out” so as to state that the claimant’s personal doctor informed her to remain out of work. *See also* Remand Exhibit # 5. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, the consolidated findings no longer support the review examiner’s legal conclusion that the claimant was in total unemployment and eligible for benefits during her leave of absence.

To be eligible for unemployment benefits, the claimant must show that she was in a state of unemployment, whether total or partial. Since the claimant has not performed any work during her maternity leave, we must determine whether the claimant was in total unemployment. 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.

It was undisputed that, just prior to her separation from the employer on June 13, 2017, the claimant had been working the night shift. *See* Consolidated Finding # 2. In his original decision, the review examiner relied upon findings that the claimant had been instructed by her doctor to work only day shifts due to pregnancy complications and that the employer could not give her day-shift work.¹ Such findings properly led to his legal conclusion that the claimant was in unemployment and eligible for benefits, relying upon the Supreme Judicial Court’s decision in Dir. of Division of Employment Security v. Fitzgerald, 382 Mass. 159 (1980) (welder who was medically unable to perform her welding duties because of pregnancy was nevertheless in unemployment and eligible for benefits while on maternity leave, because there were other light duty jobs that she was capable of performing and she actively sought work).

With the addition of further evidence at the remand hearing, the consolidated findings now clarify that the instruction to seek day-shift work came from an emergency room physician and that the claimant did not make this request to the employer. *See* Consolidated Findings ## 2 and 5. Apparently, the day after visiting the emergency room, the claimant saw her regular physician, who told her to stop working until after giving birth. Consolidated Finding # 4. This is what the claimant conveyed to the employer on June 13, 2017. Consolidated Finding # 5. Her regular physician’s instruction to stop working also appears in Remand Exhibit # 5, a Health Care Provider’s Statement of Capability provided to the DUA and signed by the physician on June 21, 2017.²

¹ The original hearing decision is now in the record as Remand Exhibit # 1.

² Although Remand Exhibit # 5, the Health Care Provider’s Statement of Capability, is not explicitly incorporated into the review examiner’s findings, it 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).

Because the claimant's doctor instructed her not to perform *any* work, her circumstances are not the same as the welder in Fitzgerald, who had continued to seek light duty work during her pregnancy. A fundamental requirement for qualifying for unemployment benefits is that the person who is not working must be capable and available for suitable work. This requirement appears in the definition of total unemployment under G.L. c. 151A, § 1(r)(2), above, as well as in the general availability provision, G.L. c. 151A, § 24(b). Here, the record shows that, upon beginning her leave of absence and through the duration of her high-risk pregnancy, the claimant was incapable of working. It further shows that after she gave birth on September 3, 2017, the claimant chose to remain out of work so that she could spend time with her baby. *See* Consolidated Finding # 9. This may have been the correct personal choice for the claimant and her family. However, the Legislature has not authorized the payment of unemployment benefits under these circumstances. *See Cusack v. Dir. of Division of Employment Security*, 376 Mass. 96, 98 (1978) (the purpose of the unemployment statute is to provide temporary relief to "persons who are out of work and unable to secure work through no fault of their own.") (citations omitted).

The employer still had the claimant's old night-shift job available for her. Consolidated Finding # 10. Even if her old night-shift job was no longer feasible after having her child, to be eligible for benefits, the claimant must still seek other work and demonstrate that her job search criteria were not so narrow as to effectively remove herself from the labor force.³ *See* 430 CMR 4.45(1)(b). She has not done so.

We, therefore, conclude as a matter of law that the claimant has not been in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), during her leave of absence.

³ We decline to attribute any weight to Consolidated Finding # 7, which refers to the claimant searching for jobs that involve sitting, as there is no evidence indicating when she made this effort, what jobs she searched for, or how actively she looked.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning June 12, 2017, and for subsequent weeks, until such time as she has met the requirements of G.L. c. 151A, §§ 29 and 1.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 25, 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