

Claimant nurse was on an extended medical leave of absence due to injuring her back and could no longer perform the same job that she'd been doing for the employer. Although capable of working full-time with physical restrictions, the claimant preferred to work only part-time. Because this does not fall within one of the exceptions for limiting availability to part-time work under 430 CMR 4.45, the claimant is ineligible for benefits.

**Board of Review
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Issue ID: 0031 9280 78

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 affirm.

The claimant began a leave of absence from her position with the employer on May 13, 2019. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on September 12, 2019. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on October 26, 2019. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was neither in total nor partial unemployment and, thus, was 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 claimant's appeal, we remanded the case to the review examiner to obtain further evidence about the claimant's capability to work and her work search efforts. 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 decision, which concluded that the claimant was not in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), while on her medical 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 are set forth below in their entirety:

1. As a teenager, the claimant worked as a receptionist in an attorney's office.
2. At the time of the remand hearing, the claimant was 71 years old.
3. The claimant had worked as a registered nurse for approximately 40 years.
4. On December 8, 2017, the claimant began working as a registered nurse case manager for the employer, a home care agency.
5. The claimant's immediate supervisor was the Director.
6. The claimant's job duties included going to patients' homes, nursing homes, group homes, assisted living facilities, performing physical assessments of patients. It required moderate to heavy physical effort, walking, standing, lifting up to 35 pounds, pushing, pulling and transferring up to 200 pounds, waking, stooping, bending, kneeling, squatting, climbing stairs, and travel.
7. On an unknown date [sic] 2018, the claimant reduced her schedule from full-time to part-time, thirty-two (32) hours a week, because she no longer wanted to work full-time.
8. On May 10, 2019, the claimant worked her last physical day of work.
9. The claimant did not perform any work for the employer after May 10, 2019.
10. On May 13, 2019, the claimant requested and was approved for a twelve (12) week Family Medical Leave Act (FMLA) leave of absence after she suffered a fall, in which she fractured her T12 vertebrae, requiring surgery, physical therapy and acupuncture.
11. The FMLA leave was scheduled to expire on July 23, 2019.
12. On July 12, 2019, the claimant spoke with the employer's human resources employee benefits representative (the HR EB Rep). During the phone call, the claimant was informed the employer could offer her a Supplemental Medical Leave of Absence for nine (9) additional months.
13. On July 15, 2019, the HR EB Rep mailed the claimant an application for a Supplemental Medical Leave of Absence. In the letter that accompanied the application, the HR EB Rep stated, "Prior to your planned return to work, you must contact Employee Health at 508.973.7798 and provide them with a letter from your physician clearing you to return to work."
14. On July 16, 2019, the claimant spoke with the Director and asked if there was any office work available at that time. The Director told the claimant there were not office positions available at that time.

15. On July 16, 2019, the claimant met with her physician. During the appointment, the claimant was not released to return to work with or without restrictions.
16. On July 17, 2019, the claimant applied for the Supplement Medical Leave of Absence, with an expiration of May 11, 2020.
17. The employer approved the claimant's request for the Supplement Medical Leave of Absence.
18. The Supplement Medical Leave of Absence was unpaid.
19. The claimant was considered an employee while on the Supplement Medical Leave of Absence.
20. The claimant's same position was not being held open for her while she was on the Supplement Medical Leave of Absence.
21. The claimant was able to apply for positions within the employer's group of facilities as an internal candidate, giving her preferential treatment over outside candidates.
22. The employer maintained multiple registered nurse positions and case manager positions.
23. The claimant did not contact the employer's Employee Health after she was able to return to work because she looked on the employer's website for available positions.
24. The claimant believed she would find employment with the employer through its online portal and that she would be able to speak with Employee Health at that time and provide the employer with a doctor's note allowing her to return to work during the interview process.
25. The claimant opened a new claim for unemployment benefits, with an effective date of August 18, 2019.
26. The claimant has been able to work since August 18, 2019.
27. At the time the claimant opened her claim for unemployment insurance benefits, she indicated to the Department of Unemployment Assistance (the DUA) that she was on a leave of absence from her position with the employer.
28. On September 16, 2019, the claimant's doctor completed a "Health Care Provider's Statement of Capability" (the Form) for the DUA indicating the claimant had been able to work full time since August 18, 2019. The doctor stated the claimant was "working part-time prior to accident and prefers to

remain in this capacity”. The doctor indicated the claimant could work with restrictions, which were “cannot do heavy lifting, pushing, pulling due to spinal injury at risk for injury”.

29. As of the remand hearing date, the claimant remained on a Supplemental Medical Leave of Absence.
30. The claimant did not find what she felt was suitable employment on the employer’s online portal. The claimant looked for part-time work in a clinic, out-patient facility, with family practitioners and primary care providers.
31. The claimant looked for work with other hospital groups. She applied for positions through their websites and by attending job fairs.
32. The claimant does not expect to ever be physically capable of returning to the work she previously performed, as a registered nurse case manager.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. 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 legal conclusion that the claimant is ineligible for benefits, but for reasons that were not apparent from the review examiner’s original decision.

G.L. c. 151A, § 29 authorizes benefits to be paid only to those in “total unemployment” or “partial unemployment.” These terms are, in turn, defined by G.L. c. 151A, § 1(r), which provides, in relevant part, as follows:

- (1) “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
- (2) “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.

Read together, these statutory provisions reflect the Legislature’s expectation that an unemployed worker will only be eligible for benefits if she is unable to obtain full-time work. In the present case, the claimant seeks only part-time work. *See* Consolidated Findings ## 28 and 30. DUA’s regulations allow for the payment of benefits to individuals who limit their

availability to part-time employment under certain circumstances. Specifically, 430 CMR 4.45 provides, in relevant part, as follows:

(1) An individual otherwise eligible for benefits may limit his/her availability for work during the benefit year to part-time employment provided, that the individual:

(a) has a prior work history of part-time employment; establishes to the satisfaction of the commissioner good cause for restricting availability during the benefit year to part-time employment and that such good cause reason is the same as, or is related to that which existed during the prior work history of part-time employment; and is available during the benefit year for at least as many hours of work per week as used to establish the prior work history of part-time employment; or

(b) establishes to the satisfaction of the commissioner that the reasons for leaving his or her employment were for such an urgent, compelling, and necessitous nature as to make his or her separation involuntary; and establishes to the satisfaction of the commissioner that the same or related urgent, compelling, and necessitous reasons require the individual to limit availability for work during the benefit year to part-time employment; and such limitation does not effectively remove the individual from the labor force, . . .

(3) Notwithstanding the provisions of 430 CMR 4.45(1), an otherwise eligible individual who does not meet the requirements of 430 CMR 4.45(1) may limit his/her availability for work during the benefit year to part-time employment provided, that the individual is:

(a) a qualified individual with a disability;

(b) provides documentation to the satisfaction of the commissioner substantiating an inability to work full-time because of such disability; and

(c) establishes to the satisfaction of the commissioner that such limitation does not effectively remove himself/herself from the labor force.

The claimant does not meet any of these exceptions. In 2018, she had reduced her hours with the employer to part-time, 32 hours per week, because she no longer wanted to work full-time. Consolidated Finding # 7. That may have been an appropriate choice for the claimant at this point in her life, but the desire to work fewer hours by itself does not constitute good cause within the meaning of 430 CMR 4.45(1)(a).

Nor is there any medical evidence to suggest that the claimant's surgery has rendered her a qualified individual with a disability within the meaning of 430 CMR 4.45(3). In fact, the one piece of medical evidence in the record, her physician's September 16, 2019, Health Care

Provider's Statement of Capability, provides that the claimant is capable of full-time work, though with certain physical limitations. *See* Consolidated Finding # 28 and Exhibit 11.

Because the claimant stopped working due to an injury, we have also considered whether she falls within the urgent, compelling, and necessitous exception under 430 CMR 4.45(1)(b). A medical condition may constitute an urgent, compelling, and necessitous reason to limit one's availability to part-time work. Again, in this case, the claimant is medically able to work full-time, but *prefers* to work part-time. *See* Consolidated Finding # 28 and Exhibit 11. Thus, her medical condition does not necessitate part-time employment.

We, therefore, conclude as a matter of law that because the claimant is not available for or actively seeking full-time work while on her leave of absence, she is not in total unemployment within the meaning of G.L. c. 151A, § 29 and 1(r)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the period beginning August 18, 2019, and for subsequent weeks, until she meets the requirement to be available for and actively seeking full-time employment.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 25, 2020



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

**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