

Though the claimant remained unable to return to her waitressing duties because of a shoulder injury, the claimant has established that she remained capable of performing light duty work. Because she has been available for, and actively sought, light duty positions with other employers while on a medical leave of absence from the employer, she is in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r).

**Board of Review
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Issue ID: 0033 1692 54

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 took a medical leave of absence from her position with the employer on December 9, 2019. She filed a claim for unemployment benefits with the DUA, effective December 22, 2019, which was denied in a determination issued on January 16, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on March 26, 2020. 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 pertaining to the claimant's ability to perform light duty work and efforts to find such work while on her 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 decision, which concluded that the claimant was unable to work during her leave of absence, is supported by substantial and credible evidence and is free from error of law, where the record after remand establishes that she has been able to perform and has been actively seeking light duty employment.

Findings of Fact

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

1. The claimant opened an existing claim with an effective date of December 22, 2019.
2. The claimant worked as a waitress/host for the employer from November 3, 2018.
3. The claimant is still employed by the employer.
4. The claimant injured her shoulder.
5. The claimant is on an approved medical leave from the employer from December 9, 2019, indefinitely. The claimant's work with the employer requires the full use of the claimant's both arms and shoulders.
6. As of at least December 19, 2019, the claimant was medically released to return to work with light duty as the claimant did not have full use of her left arm and shoulder.
7. The employer did not have work for the claimant that would comply with the claimant's medical restriction.
8. As of December 18, 2019, the claimant has searched for work as a receptionist and cashier.
9. The claimant is physically capable of performing work as a receptionist and cashier.
10. The claimant has past work experience as a cashier. The claimant is able and capable of answering a phone as a receptionist.
11. The claimant had a medical appointment in March 2020 that was cancelled due to COVID-19 limitations on medical appointments. The claimant believed, at that appointment, she would have been released to work without restriction.
12. As of the date of the remand hearing, due to COVID-19 related restrictions on medical appointments, the claimant has not been able to visit her doctor to obtain a release to return to work without restrictions.

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. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

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. . . .

In her original decision, the review examiner concluded that the claimant was not in total or partial unemployment because, due to her shoulder injury, she was not physically capable of returning to work to perform her waitressing job with the employer. After remand, the record now shows that, although the claimant is unable to perform her prior job, she can perform light duty work that does not require lifting. *See Consolidated Finding # 6.*

The claimant’s circumstances are similar to those 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). The claimant has work experience as a cashier, and she has been actively seeking employment as a cashier or a receptionist. *See Consolidated Findings ## 8–10.*¹ Thus, even though the claimant is unable to perform her prior job, she has been capable of, available for, and actively seeking other suitable work while on her medical leave of absence.

Therefore, we conclude as a matter of law that she has been in unemployment within the meaning of G.L. c. 151A, § 29 and 1(r).

¹ Although the consolidated findings do not provide detail about the claimant’s work search efforts, the claimant provided undisputed testimony that she has kept a work search log since December 18, 2019, and has actively sought work as a cashier or receptionist at a jewelers, CVS stores, Dunkin Donuts, The Paper Store, and hardware stores. This testimony about her work search efforts, while not explicitly incorporated into the review examiner’s findings, 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).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning December 22, 2019, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS

Stawicki, Esq.

DATE OF DECISION - June 25, 2020

Charlene A.

Member



Michael J. Albano

Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS
STATE DISTRICT COURT**

(See Section 42, Chapter 151A, General Laws Enclosed)

The last day to appeal this decision to a Massachusetts District Court is ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until July 1, 2020². If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day 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

² See Supreme Judicial Court's Second Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 5-26-20.