

The claimant was capable of working during her leave of absence, but the employer could not accommodate her weight lifting restriction. However, she received remuneration from the employer in the form of short-term disability benefits in an amount that exceeded her weekly benefit amount plus earnings disregard for several weeks after she opened her unemployment claim. In those weeks, the claimant was ineligible for benefits under G.L. c. 151A, § 29 and 1(r).

**Board of Review
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Issue ID: 0034 4641 70

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 we affirm in part and reverse in part.

The claimant was on a leave of absence from the employer beginning on November 27, 2019. She subsequently filed a claim for unemployment benefits with the DUA, effective March 15, 2020, which was denied in a determination issued on April 27, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on June 9, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was unable to work while on her leave of absence, and, thus, she is disqualified under G.L. c. 151A, §§ 29 and 1(r), beginning November 27, 2019, and indefinitely thereafter. 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 ability to work and the nature of payments that she received from the employer while on her leave. Only the claimant 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 incapable of working and, therefore, disqualified from receiving any unemployment benefits while on her medical leave of absence and thereafter, 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. The claimant opened an existing claim with an effective date of March 15, 2020.
2. The claimant worked part time for the employer from July 27, 2019.
3. The claimant requested a medical leave from the employer from November 27, 2019.
4. The employer approved the claimant's request for a medical leave of absence.
5. On November 25, 2019, the claimant's doctor cleared her to work with a 20 lbs. restriction. The employer replied that they could not accommodate her to return to work with the restriction.
6. On an unknown date in November 2019, the claimant received one check from workers' compensation. The payments from workers' compensation stopped because the claimant was deemed ineligible for such payments.
7. On January 10, 2020, the claimant began receiving short term disability payments from the employer because the employer could not accommodate the claimant's weight limit restriction. The payments were retroactive from November 27, 2020.
8. The claimant received weekly payments of \$720 in gross benefits from the employer's short-term disability office until May 20, 2020. The payments stopped on May 20, 2020 because the claimant reached the 26 weeks limit for such payments.
9. On May 15, 2020, the employer notified the claimant that she may apply for long term disability.
10. The claimant did not apply for long term disability because her doctor did not feel that was necessary because the claimant was able to return to work with a weight restriction.
11. The claimant's medical limitations from November 25, 2019 were substantially the same as the 20-pound lifting restriction imposed by the claimant's doctor on June 10, 2020.
12. The claimant has been capable of performing some work since she separated from the employer.
13. On June 10, 2020, the claimant was medically released to return to work with a 20 lbs. restriction.
14. From February 13, 2020 through May 21, 2020, the claimant worked about 40 hours per week for another employer until she was separated due to COVID-19.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Inasmuch as Consolidated Finding # 13 suggests that June 10, 2020 was the date that the claimant was released to work with a 20 lb. lifting restriction, it is misleading and in conflict with Consolidated Findings ## 5 and 11, which provide that the claimant had been released to work with the same restriction as of November 25, 2019. We also reject that portion of Consolidated Finding # 14, which indicates that the claimant worked about 40 hours per week during the entire period from February 13 through May 21, 2020, as it is unsupported by the record. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is indefinitely ineligible for benefits.

In order to be eligible for benefits, the claimant must be in unemployment within the meaning of the unemployment statute. G.L. c. 151A, § 29 authorizes benefits 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.

"Remuneration" is defined at G.L. c. 151A, § 1(r)(3), which states as follows:

For the purpose of this subsection, "Remuneration", any consideration, whether paid directly or indirectly, including salaries, commissions and bonuses, and reasonable cash value of board, rent, housing, lodging, payment in kind and all payments in any medium other than cash, received by an individual (1) from his employing unit for services rendered to such employing unit, (2) as net earnings from self-employment, and (3) as termination, severance or dismissal pay, or as payment in lieu of dismissal notice, whether or not notice is required, or as payment for vacation allowance during a period of regular employment; provided, however, that for the purposes of this chapter, "remuneration" shall not include any payments made pursuant to subsections (b) and (c) of section one hundred and eighty-three, and subsection (b) of section one hundred and eighty-four of chapter one hundred and forty-nine, nor shall it include payment for unused vacation or sick leave, or

the payment of such termination, severance or dismissal pay, or payment in lieu of dismissal notice, made to the employee in a lump sum in connection with a plant closing, nor shall this clause affect the application of subsection (d) of section twenty-nine. . . .

The review examiner disqualified the claimant beginning November 27, 2019. However, the only relevant period before us the period for which the claimant seeks unemployment benefits. Since the effective date of her unemployment claim is March 15, 2020, we consider only whether the claimant is eligible for benefits after that date.

The record indicates that the claimant sustained a head injury at work in November, 2019.¹ As a result of this injury, her physician imposed a 20 lb. weight-lifting restriction upon her ability to work. Because the employer could not accommodate the 20 lb. weight-lifting restriction, the claimant took a medical leave of absence from the employer. *See Consolidated Findings ## 3–5.*

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). Here, the claimant was willing and able to perform work that did not require lifting 20 pounds. And, in fact, while on leave of absence, she obtained work with another employer for a period of time.²

Since the record shows that the claimant has been capable of working since the effective date of her claim, March 15, 2020, we reject the review examiner's conclusion that she was disqualified under G.L. c. 151A, §§ 29 and 1(r) on this basis.

However, an additional requirement for being in total unemployment is that the claimant not receive any remuneration. G.L. c. 151A, §§ 29(a) and 1(r)(2). From the beginning of her unemployment claim on March 15, 2020, through the week ending May 23, 2020, the employer paid the claimant \$720 per week. *See Consolidated Finding # 8.* We view these short-term disability payments to the claimant from the employer during her leave of absence to be a form of sick pay during a period of regular employment. As such, they constitute remuneration under G.L. c. 151A, § 1(r)(3), and from March 15 through May 23, 2020, the claimant was not in total unemployment.

Pursuant to G.L. c. 151A, §§ 29(b) and 1(r)(1), the claimant could be eligible for partial unemployment benefits during any week in which she did not work full-time hours, was not refusing any hours, and earned less than her weekly benefit rate plus earnings disregard. Based upon the claimant's full-time, base period earnings, DUA's UI Online system shows that the

¹ This is based upon the claimant's testimony, a claimant email, and notes from her physician, Remand Exhibit 6. While not explicitly incorporated into the review examiner's findings, this evidence 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).

² The claimant testified that she was hired to work for the [Employer A] until this work stopped due to COVID-19. This testimony is also part of the unchallenged evidence in the record.

claimant's weekly benefit rate was \$188.00, with an earnings disregard of \$62.67. Thus, the claimant could be eligible for partial unemployment benefits during any week in which she was unable to obtain full-time hours and earned less than \$250.67. If the claimant earned \$250.67 or more, she would not be in partial unemployment and she would not be eligible for any benefits. Since the employer's weekly short-term disability payments exceeded \$250.67, the claimant was also not in partial unemployment from the beginning of her claim through May 23, 2020.

The record indicates that the claimant's work for the [Employer A] was not always full-time and that it ended on May 21, 2020. *See* Consolidated Finding # 14. However, the claimant has reported to DUA that she did work some part-time hours for the [Employer A] after this date.³ If she meets all other requirements of G.L. c. 151A, § 29(b) and 1(r), she may qualify for total unemployment benefits in any week that she does not perform any work, and partial unemployment benefits in weeks that she performed part-time work and earned less than \$250.67.

We, therefore, conclude as a matter of law that the review examiner's decision to disqualify the claimant indefinitely under G.L. c. 151A, §§ 29 and 1(r), on the ground that she was incapable of working during her leave of absence is not supported by substantial evidence. We further conclude that, because the claimant received remuneration that exceeded her weekly benefit rate plus earnings disregard during the weeks ending March 15 through May 23, 2020, she was neither in total nor partial unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r) during this period.

³ We note that the DUA's UI Online record-keeping system also includes continued claims summaries, which the claimant filed with the DUA each week since March 15, 2020. These summaries report only part-time hours during her claim.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the weeks ending March 15 through May 23, 2020. The claimant is entitled to receive benefits for the weeks beginning May 24, 2020, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS

Paul T. Fitzgerald, Esq.
Chairman

DATE OF DECISION - August 28, 2020



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
(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