

The claimant, 65-years-old CNA with a heart condition, was on standby status under the DUA's Emergency Regulations while she remained out of work and on a leave of absence from her employer.

**Board of Review
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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 filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 20, 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 August 1, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment, as defined in G.L. c. 151A, §§ 29(a) and 1(r)(2), and, thus, was ineligible for benefits. 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 additional information about the claimant's medical restrictions and availability for work. 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 decision, which concluded that the claimant was not in unemployment under G.L. c. 151A, §§ 29 and 1(r), because work was offered to her while she was on an extended medical leave of absence from the instant employer, 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 worked 26 hours per week for the employer, a home health care provider, as a home health aide/certified nurses 'assistant (CNA), beginning July 13, 2015. The claimant is paid \$14.24 per hour.

2. The claimant provided services to three clients.
3. On April 7, 2020, one of the claimant's clients passed.
4. The claimant was emotionally and physically exhausted due to the client's passing.
5. The claimant went on vacation the period of April 12, through April 22, 2020.
6. The claimant requested a general leave of absence beginning April 23, 2020 through May 25, 2020, with a May 26, 2020 return to work date.
7. The employer granted the claimant's request for a general leave through May 25, 2020.
8. The claimant is over 65 years of age and has a heart condition, Ventricular Septal Defect.
9. Due to COVID-19, the claimant's cardiologist provided the claimant with a note dated May 4, 2020, stating it was reasonable for the claimant to remain out of work due to the high risk of infection for individuals over the age of 65.
10. The claimant provided the note to the employer.
11. On May 20, 2020, the employer offered the claimant work, including a single client assignment totaling 26 hours a week, which would have reduced her exposure to clients beginning after the expiration of her leave.
12. The employer told the claimant she would be provided with sanitizer, masks, gloves, gowns, and face shields.
13. The claimant declined the offer due to the increased risk of contracting COVID-19 based upon her age and cardiac condition.
14. The claimant did not return to work on May 25, 2020.
15. The claimant's cardiologist provided the claimant with a note dated July 17, 2020, stating it was reasonable for the claimant to remain out of work due to the high risk of infection for individuals over the age of 65. A tentative return to work date of August 31, 2020, was set which depended upon the status of the COVID-19 pandemic in the Commonwealth of Massachusetts.
16. On September 2, 2020, the claimant was released to work by her primary physician with the recommendation she work 8 to 10 hours per week with one client or work with 2 clients provided the clients were scheduled on different days.

17. On September 8, 2020, the claimant's cardiologist released the claimant to work.
18. On September 9, 2020, the claimant notified the employer she was available to work.
19. The employer told the claimant she will be contacted when they have clients who meet her primary physician's recommendations.
20. The claimant completed 11th grade and attended 12 [sic] grade through the month of March.
21. The claimant has performed no other work other than as a CNA.
22. The claimant had worked at a hospital as a CNA for 26 years.
23. The claimant was not able to perform any type of work until her September 8, 2020, release to work date due to the increased risk of contracting COVID-19 based upon her age and cardiac condition.
24. The claimant did not search for work beginning April 23, 2020, through May 25, 2020, because she was on a leave of absence.
25. The claimant did not search for work with other employers after May 25, 2020, due to COVID-19, and responded "other" and "constant contact with employer" when claiming benefits.
26. The claimant did not search for work with other employers because she intended to return to work for the instant employer.

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 reject the review examiner's legal conclusion that the claimant was not entitled to benefits.

The review examiner denied the claimant benefits under G.L. c. 151A, § 29, which 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.

However, since March, 2020, the Governor has declared a State of Emergency in Massachusetts, Congress has enacted new legislation, the U.S. Department of Labor (DOL) has issued new guidance, and the DUA has promulgated new emergency regulations and policy changes which temporarily modify aspects of unemployment law in response to the COVID-19 pandemic. All of these actions have impacted the applicability of G.L. c. 151A, § 29, to the matter before us.

The DUA’s emergency regulations articulate conditions under which a claimant impacted by the COVID-19 pandemic may be eligible for benefits even if they would not otherwise be eligible under G.L. c. 151A, § 29. The relevant portions of these regulations are under 430 CMR 22.03(1)¹, and 23.03(1)² which provide, in pertinent part, as follows:

- (a) “Standby” refers to a claimant who is temporarily unemployed because of a lack of work due to COVID 19, with an expected return-to-work date.
- (b) The requirement to search for work is fulfilled so long as the claimant is on standby³ and takes reasonable measures to maintain contact with the employer.
- (c) The claimant must be available for all hours of suitable work offered by the claimant’s employer.

The emergency regulations also temporarily modified the definition of suitable work⁴:

In determining whether work is suitable the department will consider whether a claimant has a condition that prevents the claimant from performing the essential functions of the job without a substantial risk to the claimant’s health or safety. . . .

Standby status was initially limited to four weeks automatically and eight weeks at the employer’s request.⁵ However, the DUA has waived the standby period, and has determined, as a matter of policy, that a claimant could potentially remain on standby status for the entire period from March 16, 2020, through November 2, 2020. *See* DUA UI Policy and Performance Memorandum

¹COVID-19 Emergency Regulations (Mar. 16 – June 14, 2020).

² COVID-19 Emergency Regulations (Aug. 4 – Nov. 2, 2020)

³ The emergency regulations enacted on August 4, 2020 under 430 CMR 23.03(1) included the words “standby status” instead of “standby” in subsection (1)(b) but are otherwise identical to the emergency regulations enacted on March 16, 2020 under 430 CMR 22.03(1).

⁴ COVID-19 Emergency Regulations (Mar. 16 – June 14, 2020), 430 CMR 22.04 and COVID-19 Emergency Regulations (Aug. 4 – Nov. 2, 2020), 430 CMR 23.05.

⁵ *See* 430 CMR 22.03(2) (Mar. 16 – June 14, 2020).

2020.13 (November 2, 2020). Additionally, the DUA has, as a matter of policy, clarified that claimants who attest that they are unemployed due to having been impacted by COVID-19 and intend to return to their former employer are automatically considered to be on standby status. *See id.*

In the present case, the record shows that the claimant was precluded from working due to the impact of the COVID-19 pandemic. The claimant has a cardiac condition and is 65 years old. Consolidated Finding # 8. Her cardiologist determined that it was reasonable for her to remain out of work given her age and high risk of infection of COVID-19. *See Consolidated Findings ## 9 and 15.*

During the time she was on leave, the claimant remained in contact with the employer in order to set tentative return to work dates, contingent upon the status of the pandemic and her medical restrictions. *See Consolidated Findings ## 6, 7, 15, 16, and 18.* This evidence is sufficient to demonstrate that the claimant intended to return to work. Her cardiologist did not release her to return to work until September 8, 2020. Therefore, in accordance with the DUA's interpretation of its own regulations, we conclude that the claimant was on standby status pursuant to the DUA emergency regulations, since the effective date of her claim, May 3, 2020, through the week ending September 5, 2020.

While on standby status, the claimant fulfilled the requirement to search for work, as the record indicates that she maintained contact with the employer. *See Consolidated Findings ## 10 – 13, 15.* During this time, the claimant also had to be available for all hours of suitable work offered by her employer. During the period May 3 through September 5, 2020, the employer offered the claimant only CNA work. *See Consolidated Finding # 11.* Given the claimant's age and heart condition, the cardiologist's medical notes indicate that this was not suitable work because the possible exposure to COVID-19 posed a substantial risk to her health. *See 430 CMR 22.04 and 430 CMR 23.05.* Therefore, she may not be disqualified for declining this work.

As of the week beginning September 6, 2020, the claimant has been medically released to work eight to 10 hours per week. *See Consolidated Findings ## 16 and 17.* Under the DUA emergency regulations, this constitutes suitable work for the claimant given her age and medical condition. Since she has remained in contact with the employer, has been available for suitable work, has been temporarily unemployed because of lack of such work, and expects to return to work for the employer as soon as it is available, she has continued to be on standby status while these emergency regulations have been in effect, through November 2, 2020.

The record shows that the claimant has worked as a CNA for twenty-six years and does not have work experience in any other field. Consolidated Findings ## 21 and 22. Given the claimant's training and experience, the record suggests that the only suitable work available to the claimant would be work as a CNA. Because beginning November 3, 2020, the claimant will no longer be in standby status, she must expand her work search for suitable CNA work beyond the employer in order to remain eligible for unemployment benefits.

We, therefore, conclude, as a matter of law, that the claimant may not be disqualified under G.L. c. 151A, §§ 29 and 1(r), because, pursuant to the DUA's emergency regulations, the claimant was on standby status.

The review examiner's decision is reversed. The claimant is eligible for benefits from the week beginning May 3, 2020, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS

Paul T. Fitzgerald, Esq.
Chairman

DATE OF DECISION - November 16, 2020



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may contact the PUA call center at (877) 626-6800 and ask to speak to a Tier 2 PUA Supervisor.

**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.

LSW/rh