

The claimant has multiple medical conditions and was therefore at increased risk of complications from COVID-19. Her physician instructed her to remain out of work due to the increased risk of exposure. Work offered by the employer was not suitable under the DUA's COVID-19 Emergency Regulations and its more flexible temporary policies. As the claimant intended to return to work, she is eligible for benefits while on her leave of absence.

**Board of Review
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Issue ID: 0042 3167 41

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 July 21, 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 September 25, 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), 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 on the claimant's medical restrictions and availability for work. Only the claimant 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 because she declined available work, 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 for the employer as a part-time cashier from August 2016 until 4/9/2020 when she last performed work before opening her claim for unemployment benefits.

2. Due to her fear of contracting COVID due to working with the public, the claimant asked the employer to remain out of work to which the employer agreed.
3. The claimant requested a leave because she was afraid of the increased risk of exposure to COVID-19 at her work due to [sic] high number of COVID cases in the [City A] where she lived and worked. In addition, the claimant has diagnosed medical conditions such as hypertension, diabetes, depression, anxiety, panic attacks and other medical conditions.
4. The claimant obtained the employer's Request for Family or Medical Leave which her doctor completed on 4/27/2020.
5. The claimant's doctor put in writing that the claimant needed to cease working because of her increased risk of exposure to COVID and due to her anxiety and panic attacks related to her concern with COVID.
6. The claimant's diagnosed medical conditions prevented her from performing her job duties with the doctor stating full incapacity from 5/3/2020 until 6/1/2020.
7. At the time of requesting the leave of absence, the employer had provided masks to employees and set up a plexiglass barrier; however customers were still less than 6 feet away as the claimant still needed to interact with customers face to face at the service desk where there was no plexiglass.
8. The claimant was anxious and did not feel safe working in such environment.
9. The claimant and the employer had agreed upon a return to work date of 6/2/2020, however the claimant asked to verbally extend the leave until 7/1/2020 because COVID numbers in [City A] were still very high around 6/2/2020.
10. The claimant spoke with the employer bi-weekly during the next month and discussing [sic] if the claimant planned on returning to work.
11. They discussed that the employer wanted her to return to work on 7/1/2020, however the claimant told the employer she did not feel comfortable returning due to high COVID numbers.
12. The claimant did not return to work on 7/1/2020 and spoke with the employer stating that she hoped to return to work in the future, however she did not have a specific date.
13. While remaining out of work, the claimant was told on 8/26/2020 that she would need vision surgery on 11/1/2020. The claimant had vision issues with reading screens at work.

14. After being informed of the eye surgery, the claimant decided to resign her employment due to her various medical issues and her fear of contracting COVID through work.
15. The claimant notified the employer on 8/31/2020 that she was resigning her employment.
16. In the past, the claimant had only worked for the employer at their service desk and the claimant had not performed any other duties for the employer.
17. The claimant holds a Bachelor of Science Degree in Elementary Education.
18. The claimant has always and only performed work that involved regular contact with members of the public.
19. During the period between April 9, 2020 and August 31, 2020, the claimant did not look for work.
20. The claimant hopes to return to work for the employer again in the future once a vaccine is released for COVID.
21. The claimant was not offered work by any other employers while remaining out of work with her employer.
22. The claimant's employer had work available while the claimant remained out of work.

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 claimant was not eligible for benefits because she declined suitable work during the time she was on a leave of absence.

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.

Ordinarily, under federal and Massachusetts law, claimants are only eligible for benefits if they are physically capable of, available for, and actively seeking full-time work, and they may not turn down suitable work. They may meet these requirements, even though they are on a leave of absence from their regular employer. *See, e.g., Dir. of Division of Employment Security v. Fitzgerald*, 382 Mass. 159, 163–164 (1980). In this case, because the claimant seeks benefits from May 17, 2020, the effective date of her claim, through the week beginning August 23, 2020, we must also consider temporary modifications to the unemployment law brought about by the COVID-19 pandemic.

In March, 2020, Congress enacted the Emergency Unemployment Insurance Stabilization and Access Act (EUISAA) which, among other things, permitted states to modify their unemployment compensation law and policies with respect to work search and good cause on an emergency temporary basis as needed to respond to the spread of the COVID-19 pandemic.¹ The U.S. Department of Labor has also advised states that they have significant flexibility in implementing the able, available, and work search requirements, as well as flexibility in determining the type of work that is suitable given an individual’s circumstances.² In response, the DUA promulgated COVID-19 Emergency Regulations relaxing its definition of suitable work and the standards for work search for individuals in certain circumstances.³

Under the emergency regulations, claimants who were temporarily unemployed from their employer because of lack of work due to COVID-19 and who had an expected return-to-work date, were deemed to be on stand-by status. While on standby status, they satisfied the work search requirement if they maintained contact with their employer and were available for all hours of suitable work. Additionally, as a practical matter, DUA has adopted the following policy⁴:

[C]laimants 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. A claimant could remain on standby potentially for the entire period from March 16, 2020-November 4, 2020, so long as the claimant fulfils the requirements.

The emergency regulations defined suitable work, in relevant part, as follows⁵:

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. For

¹ *See* EUISAA, Pub. Law 116-127 (Mar. 18, 2020), § 4102(b).

² *See* U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 10-20 (Mar. 12, 2020), 4(b).

³ *See* 430 CMR 22.00, effective Mar. 16 – Jun. 14, 2020, and 430 CMR 22.00, effective Aug. 4 – Nov. 2, 2020.

⁴ DUA UI Policy and Performance Memo (UIPP) 2020.13 (Nov. 2, 2020), p. 3.

⁵ 430 CMR 22.04 (effective Mar. 16, 2020).

purposes of this section, “condition” [means]⁶ a request to a claimant from an employer, a medical professional, a local health official, or any civil authority that a claimant or a member of the claimant’s immediate family or household member be isolated or quarantined as a consequence of COVID-19, even if the claimant or the claimant’s immediate family or household member has not actually been diagnosed with COVID-19.

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 certain medical conditions which increase her risk of health complications from COVID-19. *See Consolidated Finding # 3.* Further, as documented in the claimant’s FMLA paperwork, her doctor instructed her to cease working because of her increased risk from exposure to COVID-19 as well as her anxiety and panic attacks associated with her concerns about exposure. *Consolidated Findings ## 5 and 6.*

While work was available during the time the claimant was on leave, we believe that she presented sufficient evidence to show that her medical conditions prevented her from performing her duties without a substantial risk to her health due to the possibility of exposure to COVID-19. *See Consolidated Findings 3, 5–7, 9, and 11.* As such, we conclude that any work offered by the employer would not be considered suitable work under the modified definition of that term articulated in 430 CMR 22.04. Because no suitable work was available to the claimant, the record demonstrates that she was temporarily unemployed because of a lack of work due to the COVID-19 pandemic.

During the time the claimant was on leave, she remained in contact with the employer and confirmed tentative return to work dates, contingent upon the status of the pandemic and her medical restrictions. *See Consolidated Findings ## 9–12.* This evidence is sufficient to demonstrate that the claimant intended to return to work. Therefore, in accordance with the DUA’s interpretation of its own regulations, we conclude that the claimant was on standby status within the meaning of 430 CMR 22.03 beginning the week of May 17, 2020.

The claimant’s employment status changed following her resignation on August 31, 2020. *See Consolidated Finding # 15.* Accordingly, the DUA has issued a separate determination pertaining to the claimant’s eligibility for benefits from the week beginning August 30, 2020. That determination is not before the Board at this time.

We, therefore, conclude, as a matter of law, that the claimant may not be disqualified under G.L. c. 151A, §§ 29 and 1(r), for the period between the week beginning May 17, 2020, through the week beginning August 23, 2020, because, pursuant to temporary DUA policy and regulations, the claimant has met the eligibility requirements adopted in response to the COVID-19 pandemic.

⁶ The word “means” is used in 430 CMR 22.04 (effective Mar. 16, 2020). The later regulations substituted “includes” and further provided: “but is not limited to, an underlying medical or other condition that puts the claimant at increased risk for severe illness from COVID-19”.

The review examiner's decision is reversed. The claimant entitled to receive benefits for the week beginning May 17, 2020, through the week beginning August 23, 2020, if otherwise eligible.



Charlene A. Stawicki, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 29, 2021



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. 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