

Claimant whose medical provider testified that his diagnoses of severe asthma and allergies placed him at heightened risk of exposure to COVID-19 nevertheless remained capable of and available for suitable full-time employment working remotely from home. Held he was in total unemployment under G.L. c. 151A, § 29 and 1(r).

**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 last performed services for this employer on April 27, 2020. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 29, 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 29, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was on an indefinite leave of absence due to a medical condition, and was neither capable of nor available for work that the employer had available for him and, thus, was disqualified under G.L. c. 151A, §§ 29(a), 29(b), 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 take additional evidence regarding the claimant's medical issues and communications between the parties regarding the claimant's capability and availability for work. Only the claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. 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 entitled to benefits because he was on an indefinite medical leave of absence and was not capable of or available for work that the employer had available for him, 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 and credibility assessment are set forth below in their entirety:

1. The claimant worked full-time for the employer, a temporary staffing company, from 08/12/19 until 04/27/20. He worked one assignment as an Accounts Receivable Specialist and earned \$17.00 an hour.
2. The claimant has a long history of suffering from severe asthma and allergies. His medical conditions cause him to suffer greatly when he gets a common cold because it makes it difficult for him to breathe.
3. On 02/26/20, the claimant left work early because he experienced shortness of breath, coughing, and weakness. He was treated at an urgent care facility and was diagnosed with an exacerbation of his asthma. The claimant was prescribed a steroid, Prednisone.
4. On 02/27/20, the claimant called out sick and was treated by a Nurse Practitioner (N.P.) at his primary care office. The N.P. diagnosed him with persistent asthma. She performed a nebulizer treatment and prescribed an Albuterol inhaler.
5. On or about 04/12/20, the claimant learned that his supervisor had been diagnosed with COVID-19.
6. On 04/13/20, the claimant spoke with the N.P. over the telephone because he was experiencing shortness of breath and coughing. She diagnosed the claimant with an exacerbation of asthma and increased his steroid dose.
7. The N.P. provided him with a note indicating that he should remain out of work until 04/28/20 to reduce his exposure to the COVID-19 virus as his supervisor had just tested positive.
8. The claimant provided the note to his employer and stayed home.
9. On 04/20/20, the N.P. called the claimant to check on him. They discussed the fact that his allergies were causing his asthma to flare and that he should continue to use his inhaler. The N.P. prescribed allergy medication as well.
10. According to DUA records, the claimant filed a claim for benefits on 04/21/20.
11. On 04/27/20, a coworker needed his assistance in the office. The claimant felt a little better so he returned to the workplace even though his doctor had recommended he not return until the following day.
12. That morning, the claimant advised his supervisor of his health concerns. The claimant believed that the work environment and his coworkers would expose him to COVID-19 virus and he was very fearful for his safety considering his pre-existing medical conditions. The claimant asked what he could do, but his supervisor did not have an answer.

13. The claimant asked if he could work from home but his supervisor indicated he could not.
14. The claimant also asked if he could come to the office only a few days per week to reduce his exposure to the virus, but the employer did not agree to his request.
15. The claimant asked if he could collect unemployment benefits; the supervisor did not respond.
16. The claimant left around noon and never returned to the workplace.
17. On 05/22/20, the N.P. wrote a note indicating that the claimant must stay out of work until further notice due to his severe asthma for his health and safety during the COVID-19 pandemic.
18. The claimant did not give his employer the 05/22/20 doctor note until about 06/18/20.
19. On 06/02/20, the claimant followed up with the N.P. and reported that he felt a little better but that he was experiencing financial issues because he was unemployed.
20. The claimant spoke with the employer after he sent them his note on 06/18/20. He explained that he could only work from home due to his medical condition.
21. The employer indicated they did not have a position for him that he could perform at home.
22. On 08/04/20, the claimant spoke with his N.P. again and was diagnosed with an exacerbation of his asthma condition. The N.P. prescribed more steroids.
23. On 08/26/20, the claimant called his employer again and asked if they had any work that he could perform at home. The employer indicated they did not.
24. On 09/29/20, the N.P. wrote another note for the claimant. The note stated in part: "The patient has a history of asthma which is often persistent placing him at risk for COVID-19 complications. The patient is not able to work during this time due to increased risk. He is currently looking for remote work which is safer for him with his condition. Please allow him unemployment while he is looking for remote work..."
25. Since 04/12/20, the claimant has been capable of working full-time, remotely from his home.
26. The claimant has been looking for work in the customer service and/or data entry fields, which can typically be completed remotely.

27. The claimant is not capable of working outside of his home during the COVID-19 pandemic because his medical conditions place him at high risk for severe complications from the virus.
28. On 06/19/20, the employer completed a DUA Questionnaire indicating the claimant was on a leave of absence.
29. On 06/22/20, the claimant completed a DUA Questionnaire indicating that he was on a leave of absence.
30. On 06/29/20, the DUA sent the claimant a Notice of Disqualification indicating that he is on an indefinite medical leave of absence granted by his employer. Since work remains available to him, it is determined that s/he is not in unemployment and is subject to disqualification and is not entitled to receive benefits beginning 4/12/2020 and indefinitely thereafter until he meets the requirements of the Law.

Credibility Assessment:

The claimant's testimony surrounding his medical condition and the events that occurred around the time he left employment is considered credible because it was supported by the Nurse Practitioner's testimony. Although the claimant did not submit additional medical evidence as requested, the N.P. read into the record the different work notes she provided to him. The claimant established he suffered from severe asthma and allergies which has prevented him from working outside of his home during the COVID-19 pandemic. The claimant further established that he is available for full-time work as long as he can work from home and that he has been searching for work that he can do remotely since he filed his claim.

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 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we believe that the review examiner's consolidated findings of fact support the conclusion that the claimant, who remains capable of and available for full-time work (with accommodations for his serious medical conditions), is eligible for benefits.

To be eligible for unemployment benefits, the claimant must show that he was in a state of unemployment within the meaning of the statute. G.L. c. 151A, § 29, authorizes benefits to be paid to those in total or partial unemployment. Those terms are 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.

Where the review examiner found that the employer had full-time work available and that the claimant failed to work, the review examiner disqualified him from benefits indefinitely because he was not in total or partial unemployment.

The review examiner’s initial conclusion, however, failed to acknowledge that the claimant was out of work because he has medical conditions that would have put his health at substantial risk from COVID-19.

To alleviate hardships caused by COVID-19, the DUA has promulgated emergency regulations setting forth circumstances where claimants may be eligible for unemployment benefits, even where employers have work available. Pursuant to 430 CMR 23.05¹:

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 the purposes of this section, “condition” includes, but is not limited to, an underlying medical or other condition that puts the claimant at increased risk for severe illness from COVID-19, a request to a claimant from an employer, a medical professional, a local health official, or any civil authority that the claimant . . . be isolated or quarantined as a consequence of COVID-19, even if the claimant . . . has not actually been diagnosed with COVID-19.

Here, the review examiner found that the claimant has a long history of suffering from severe asthma and allergies. *See* Consolidated Finding # 2. At various times during 2020, he sought treatment from his medical providers and was diagnosed with exacerbations of his asthma, for which he was prescribed various medications and steroid treatments. *See* Consolidated Findings ## 3–4, 6, 9, 22, and 24.

The claimant’s medical provider provided him with documentation removing him from the employer’s workplace because his medical history placed him at heightened risk for exposure to

¹ 430 CMR 23.05 became effective on August 4, 2020. It replaced 430 CMR 22.04, adding “an underlying medical or other condition that puts the claimant at increased risk for severe illness from COVID-19” to the definition of “condition” from the otherwise identical emergency regulation that had been implemented on March 16, 2020.

and infection from COVID-19. *See* Consolidated Findings ## 7, 17, and 24. *See also* Hearings Exhibit 8.²

Despite having medical conditions that preclude him from working at his most recent job with this employer, the claimant has not been completely removed from the workforce. The review examiner found that the claimant's medical provider has determined he is capable of full-time work, so long as he works remotely from home. He sought this type of work from the employer, but the employer rejected the claimant's repeated requests to be permitted to work from home. *See* Consolidated Findings ## 13, 14, 20–21, and 23–27.

Noting that the claimant's testimony was corroborated by sworn testimony from the nurse practitioner who has been providing medical treatment to him throughout 2020, the review examiner provided a detailed credibility assessment acknowledging that the claimant's severe asthma and allergies prevent him from working outside of his home during the COVID-19 pandemic, and that he remains available for full-time work remotely from home. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). We believe that the assessment is reasonable in relation to the evidence presented.

Although the claimant has not been able to return to the employer's workplace, he remains capable of and available for suitable full-time work. We, therefore, conclude as a matter of law that the claimant is in total unemployment, pursuant to G.L. c. 151A, §§ 29(a), 29(b), and 1(r), as well as 430 CMR 23.05.

² The claimant also submitted a medical note from his provider, summarized in part in Consolidated Finding # 24, dated September 29, 2020. Both the provider and the claimant read this note into the record during the remand hearing, and although the review examiner did not formally enter it into evidence, the document was uploaded into UI Online on October 8, 2020. *See* Appeal Case Folder, E1 Other, "Claimant uploaded document." We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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 ending April 18, 2020, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS

DATE OF DECISION - November 4, 2020

Paul T. Fitzgerald, Esq.
Chairman



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.

JPCA/rh

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