

The claimant was immune-compromised because of cancer treatment and was medically precluded from working until August 24, 2020 as a result of the COVID-19 pandemic. Because she informed the employer that she intended to return to work, she was on standby status and eligible for benefits. However, she was not eligible after that date, when she was medically cleared to return to work without restrictions, but declined suitable work.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

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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 we affirm in part and reverse in part.

The claimant filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 10, 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 January 7, 2021. 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. 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 total or partial unemployment, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The instant employer, a home health company, re-hired the claimant on 12/1/19. She is a home health aide.
2. The claimant worked approximately 18 to 30 hours per week before she requested a medical leave of absence, effective 3/16/20.

3. The employer granted the claimant's request for a leave of absence.
4. The claimant was diagnosed with breast cancer and received chemotherapy and radiation treatment. She also had surgery to remove a lymph node in her underarm.
5. On 8/10/20, the claimant provided the employer's Human Resources Department with a medical note stating that she was cleared to return to work effective 8/24/20. The note does not state whether the claimant is subject to work restrictions.
6. Effective 8/24/20, the employer started offering the claimant work similar to work she performed before the start of her leave of absence. This work continues to be available to the claimant.
7. The claimant has not accepted any work since before the start of her leave of absence.
8. The claimant told one of the employer's schedulers she would not accept assignments that require her to vacuum and/or lift clients, as her arms do not have full range of motion after the above lymph node removal surgery.
9. The claimant has not provided the employer with any other medical notes, detailing whether the claimant has any work restrictions.
10. The claimant has not separated from employment with the instant employer.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's 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 in total or partial unemployment within the meaning of the law during the entire period on appeal.

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, 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.⁴ Additionally, as a practical matter, DUA has adopted the following policy⁵:

[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 follows⁶:

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.

⁴ 430 CMR 22.03(1).

⁵ DUA UI Policy and Performance Memo (UIPP) 2020.13 (Nov. 2, 2020), p. 3.

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

purposes of this section, “condition” [means]⁷ 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.

In March 2020, the claimant requested a medical leave of absence from her employer following her diagnosis with breast cancer. *See Consolidated Findings ## 2–4*. She provided the employer with a note from her oncologist, admitted into evidence as Exhibit # 1, explaining that she was instructed not to work because she could be immunocompromised during treatment and therefore was at increased risk of exposure from COVID-19.⁸

While work may have been available to the claimant during the time she was on leave, we believe 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 increased possibility of exposure to COVID-19. *See Exhibit 1*. Because any work offered by the employer would not be considered suitable due to the COVID-19 pandemic, under the modified definition of that term articulated in 430 CMR 22.04, she was temporarily unemployed because of a lack of work.

As the claimant proactively informed her employer that she would soon be cleared to return to work, we believe she presented sufficient evidence to demonstrate that she intended to return to work for this employer. Finding of Fact # 5. Therefore, in accordance with the DUA’s emergency regulations, we conclude that the claimant was on standby status within the meaning of 430 CMR 22.03 beginning the week of March 16, 2020.

However, the claimant’s unemployment status changed when she was medically cleared to return to work on August 24, 2020. *See Finding of Fact # 5*. Because the claimant was no longer precluded from working due to the impact of the COVID-19 pandemic, we must consider whether she was in total unemployment within the meaning of G.L. c. 151A, §§ 29(a) and 1(r), as of August 24, 2020.

The claimant contended that the work offered to her beginning August 24, 2020, was not suitable work because she was medically unable to perform some of the required job duties. *See Finding of Fact # 8*. While the review examiner did not detail her credibility assessment, it is clear from the review examiner’s decision that she implicitly rejected the claimant’s testimony on the grounds that the claimant did not provide medical evidence of any limitations on her ability to work. Such assessments are within the scope of the fact finder’s role, and, unless they are unreasonable in

⁷ 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”.

⁸ 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).

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 see no reason to disturb the review examiners implicit credibility assessment.

As the work offered to the claimant was in the same or similar positions to the work she did prior to her leave of absence, we believe this work constituted suitable work within the meaning of the law. *See Findings of Fact ## 5 and 6.* Because the claimant declined suitable work, she cannot be in unemployment within the meaning of G.L. c. 151A, §§ 29(a) and 1(r), beginning August 24, 2020.

We, therefore, conclude as a matter of law that, from the week beginning March 15, 2020, through August 22, 2020, the claimant may not be disqualified under G.L. c. 151A, § 29, because, pursuant to temporary DUA policy and regulations, the claimant has met the eligibility requirements adopted in response to the COVID-19 pandemic. We further conclude that since the claimant was able and available to work since August 24, 2020, but declined suitable work since that date, she was not unemployment within the meaning of the law from the week beginning August 23, 2020.

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits from the week beginning March 15, 2020, through August 22, 2020. She is denied benefits for the week beginning August 23, 2020, and for subsequent weeks, until such time as she meets all the requirements of G.L. c. 151A, §§ 29(a), 29(b), and 1(r)(1) and (2).

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 15, 2021



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, 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