

The claimant has two medical conditions that increase her risk of infection from COVID-19. As such, her work as a housekeeper is not suitable work under the emergency regulations. Because the claimant was medically precluded from working due to COVID-19 and intended to return to work, she was on standby status, and therefore eligible for benefits, within the meanings of the COVID-19 emergency regulations.

**Board of Review
19 Staniford St.
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**

Issue ID: 0048 8294 15

****CORRECTED****

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 August 4, 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 September 29, 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. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

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 she was on an approved FMLA leave, 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 claimant worked full-time for the instant employer, a college, as a housekeeper, beginning September 2013.

2. On March 18, 2020, the instant employer furloughed employees due to COVID-19.
3. Employees were scheduled to return to work on June 23, 2020.
4. The claimant suffers from high blood pressure and immunosuppressed lungs.
5. The claimant's primary physician instructed the claimant to remain out of work for 3 months due to an increased risk of infection due to COVID-19.
6. A tentative return to work date, contingent on the status of COVID-19, was set at October 23, 2020.
7. The claimant informed the instant employer she was unable to return to work on June 23, 2020.
8. The claimant did not return to work on June 23, 2020.
9. The claimant was granted Family Medical Leave Act (FMLA) leave effective July 5, 2020.
10. The claimant was paid through July 4, 2020 due to a government grant received by the instant employer.
11. On August 4, 2020, the Department of Unemployment Assistance issued a Notice of Disqualification to the claimant determining that the claimant was on a personal leave of absence granted by her employer and therefore she was not in unemployment and subject to disqualification beginning July 5, 2020 through January 1, 2021.

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 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 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. All of these actions have impacted the applicability of G.L. c. 151A, § 29, to the matter before us.

The DUA’s emergency regulations promulgated 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 & Performance Memorandum 2020.13 (November 2, 2020). Additionally, as a matter of policy, DUA has 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 during the same period. *See id.*

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).

⁴ 430 CMR 22.04 and 430 CMR 23.05.

⁵ *See* 430 CMR 22.03(2).

This Board has long recognized the DUA's experience and technical competence in promulgating its policies and regulations. Consequently, we have generally deferred to the agency in interpreting and enforcing said regulations and policies. *See, e.g.*, Board of Review Decision 0010 9803 91 (July 24, 2014) and Board of Review 0013 7881 86 (April 23, 2015). We again give such deference to the DUA's interpretation and enforcement of its own COVID-19 emergency regulations as they relate to the instant matter.

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 high blood pressure and immunosuppressed lungs. Finding of Fact # 4. Her primary care physician determined that it was reasonable for her to remain out of work given her high risk of infection of COVID-19. Finding of Fact # 5.

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* Findings of Fact ## 6–9. 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 during the period that the DUA emergency regulations were in effect, from the effective date of her claim, July 5, 2020 through November 2, 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* Findings of Fact ## 6–9. During this time, the claimant also had to be available for all hours of suitable work offered by her employer. Given the claimant's high blood pressure and immunosuppressed lungs, her physician's medical notes indicate that her current work 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. Further, nothing in the record suggests the claimant would not be available to perform suitable work if such work was available. As such, we see no reason to disqualify the claimant on the grounds that she was not available for work.

We, therefore, conclude, as a matter of law, that the claimant may not be disqualified under G.L. c. 151A, §§ 29 and 1(r), from July 5 through November 2, 2020, because, pursuant to the DUA's emergency regulations, the claimant was on standby status.

Because the Emergency Regulations have now expired, the claimant continues to meet the requirement of G.L. c. 151A, §§ 29(a) and 1(r), provided she searches for suitable work, which she can perform under her current medical constraints, such as work from home.

The review examiner's decision is reversed. The claimant is eligible for benefits from the week beginning July 5, 2020, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS

****DATE OF DECISION - November 19, 2020**

Charlene A. Stawicki, Esq.
Member



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