

There is insufficient evidence to show that the claimant, while out on a medical leave of absence after breaking her leg, was capable of or available for suitable work. She is ineligible for benefits pursuant to G.L. c. 151A, §§ 29 and 1(r).

**Board of Review
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Issue ID: 0049 5772 04

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was on a leave of absence from her employer and filed a claim for unemployment benefits with the DUA, effective July 12, 2020, which was denied in a determination issued on September 23, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on December 19, 2020. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was capable of sedentary work, but none was available to her while on a medical leave of absence, and, thus, she was not disqualified under G.L. c. 151A, §§ 29 and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to obtain specific evidence about the claimant's medical capabilities and any availability restrictions during her leave of absence. Only the employer participated in the remand hearing. Thereafter, the review examiner issued her 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 original decision, which concluded that the claimant was eligible for benefits because, while on leave, she remained capable and available for sedentary 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 filed an initial claim for unemployment benefits effective July 12, 2020.

2. The claimant worked full time as a direct support professional for the employer, a human services agency that provides services to individuals with disabilities, beginning December 9, 2019.
3. Prior to filing her claim, the last day the claimant worked for the employer was June 14, 2020.
4. Sometime between June 14 and June 17, 2020, the claimant broke her leg outside of work.
5. The claimant requested a leave of absence from the employer.
6. The claimant was not eligible for FMLA leave because she did not meet the one year of service requirement.
7. The employer granted the claimant a medical leave through August 31, 2020. The medical leave was extended at the claimant's request.
8. The claimant underwent surgery on June 24, 2020. After surgery, the claimant's leg was in a cast. The claimant had to keep her foot elevated.
9. The claimant could not perform her regular job duties because it required her to walk and lift as she cared for disabled adults.
10. The claimant did not ask to perform other work for the employer.
11. When an employee is not capable of performing their assigned work, the employer will determine if it has other work to offer the employee. At the time of the claimant's leave, the employer did not have other work to offer the claimant.
12. The claimant was paid accrued paid time off for approximately two and a half weeks.
13. The claimant returned to work on September 28, 2020.
14. A few weeks after she returned to work, the claimant was promoted to an assistant residential manager. The claimant was capable of performing her new job duties after she had surgery.
15. On September 23, 2020, the Department of Unemployment Assistance issued the claimant a Notice of Disqualification under Sections 2(a) & 1(r) of the Law beginning June 14, 2020 and for an indefinite period of time thereafter.

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, based upon these consolidated findings, we reject the review examiner's legal conclusion that the claimant was eligible for benefits during her leave of absence.

In order to be eligible for benefits, the claimant must be in unemployment within the meaning of the unemployment statute. 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.

It is well settled that a claimant may be eligible for benefits when she takes a leave of absence because medical restrictions prevent her from performing her regular work duties, if she remains able and available for some type of suitable work. *See Dir. of Division of Employment Security v. Fitzgerald*, 382 Mass. 159 (1980) (welder who was medically unable to perform her welding duties because of pregnancy was nevertheless in unemployment and eligible for benefits while on maternity leave, because there were other light duty jobs that she was capable of performing and she actively sought work).

Here, the employer granted the claimant a leave of absence because she could not perform her usual job as a direct support professional, because she had broken her leg and could not walk and lift the disabled adults that she cared for. *See Consolidated Findings ## 4, and 7-9*. In her original decision, the review examiner granted the claimant benefits, because she determined that the claimant was able and available for sedentary work while recovering from her leg injury. However, the claimant's testimony underlying this conclusion was vague. We remanded for medical evidence to confirm the claimant's physical capabilities and availability for work during her leave of absence.

Because the claimant did not participate in the remand hearing, there is no further evidence. The consolidated findings now merely provide that, while on leave, the claimant could not perform her regular job duties and did not ask for any other work. Missing are any findings as to whether the claimant was, nonetheless, capable and available for any other type of suitable work. Absent such findings, we can only infer that the claimant had removed herself from the labor force while

recovering from her injury. Unlike the claimant in Fitzgerald, the claimant has not established that she was in unemployment, as that term is defined under G.L. c. 151A, §§ 29 and 1(r).

We, therefore, conclude as a matter of law that there is not substantial evidence to show that the claimant was eligible for benefits under G.L. c. 151A, §§ 29 and 1(r).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning July 12, 2020, through September 26, 2020.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 30, 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.

AB/rh