

The claimant has asthma and could not wear a mask for prolonged periods. She was therefore at increased risk of infection of COVID-19 from her work, and her physician instructed her to remain out of work until masks were no longer necessary. The work was not suitable under the DUA's COVID-19 Emergency Regulations and the more flexible policies in effect during the pandemic. The claimant is eligible for benefits.

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 filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 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 October 14, 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)(2), 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 a medical leave of absence from the instant employer, 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. On 02/19/20, the claimant began variable hours of work, from 25-40 hours per week at a rate of \$19.00 per hour, as a Children's Back-up Care Giver (Nanny) for this employer's childcare service company.

2. The claimant is 57 years of age and suffers with asthma.
3. When [COVID]-19 began, and the wearing of masks became required when visiting homes to provide childcare services, the claimant had difficulty wearing a mask because of her breathing issues.
4. The claimant did not want to separate from this employment and she instead requested a medical leave of absence for an indefinite period until masks were no longer needed to perform her job tasks. The employer granted the claimant's medical leave request.
5. The claimant is out on an employer approved medical leave for an indefinite period. The claimant was told by the employer that she can return to work when she feels ready to return to work. The claimant's job is not in jeopardy.
6. The claimant's last day on the job working was 07/13/20 and her approved unpaid medical leave, taken at the claimant's request, began 07/14/20.
7. On 07/22/20, the claimant filed a claim for unemployment benefits effective 07/12/20.
8. The claimant requested a hearing on the 08/10/20 Notice of Disqualification because the claimant is out on an employer approved leave taken at the claimant's request.

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 original 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 issue before the Board is whether the claimant is in unemployment under Massachusetts law. 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.* (Emphasis added.)

Ordinarily, under G.L. c. 151A, § 29, claimants are only considered to be in unemployment and thereby 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 statutorily mandated 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 July 5, 2020, the effective date of her claim, through the present, 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 asthma which prevents her from wearing a mask for long periods. Findings of Fact ## 2 and 3. As documented in the claimant’s FMLA paperwork, which was admitted into evidence as Exhibit 5, her physician determined it was reasonable for her to remain out of work given her inability to wear a mask and high risk of infection of COVID-19.⁷

Both the claimant and employer agreed that the claimant would return to work when employees were no longer required to wear masks. Findings of Fact ## 4 and 5. This evidence is sufficient to demonstrate that the claimant intended to return to work. Additionally, the claimant fulfilled the requirement to search for work, as the record indicates that she made reasonable efforts to maintain contact with the employer.⁸

During this time, the claimant also had to be available for all hours of suitable work offered by her employer. Because the employer could only offer the claimant work that required her to wear a mask for a minimum of four hours, it was not suitable.⁹ Therefore, in accordance with the DUA’s interpretation of its own regulations, we conclude that the claimant was on standby status pursuant to the DUA emergency regulations and while the emergency regulations were in effect, including from July 12, 2020, the effective date of her claim, through November 2, 2020.

We next consider the claimant’s eligibility for benefits following the expiration of the emergency regulations. DUA has determined, as a matter of policy, that it will continue to apply the expanded definition of suitable work to consider whether a claimant’s “health or safety would be compromised due to an underlying medical or other condition if the claimant accepted the employment. . . .” DUA UI Policy & Performance Memorandum 2020.14 (Nov. 25, 2020). Given the claimant’s asthma, inability to wear a mask for prolonged periods, and her physician’s instructions, the work offered by the employer remained unsuitable under DUA policy because it posed a substantial risk to her health. Therefore, the claimant may not be disqualified for declining such work.

DUA has also adopted a policy stating that “work search requirements may be waived for all claimants requesting benefits during the pandemic crisis, so long as such claimants remain ready

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”.

⁷ 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).

⁸ This is also part of the unchallenged evidence before the review examiner.

⁹ This is also part of the unchallenged evidence before the review examiner.

to return to work once the pandemic measures have been lifted.” DUA UI Policy & Performance Memorandum 2020.15 (Nov. 25, 2020). In deference to this temporary policy change, which is authorized by federal law and has been approved by the U.S. Department of Labor, we apply this standard to the present case. The findings show that the claimant intends to return to work as soon as the mask mandate has been lifted. *See* Findings of Fact # 4 and 5. In the absence of any evidence suggesting the claimant is not capable of and available for suitable work that she can perform given her health issues, she is eligible for benefits as of November 3, 2020.

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

The review examiner’s decision is reversed. The claimant is eligible for benefits from the week beginning July 12, 2020, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 16, 2020



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