

The claimant was eligible for benefits during the first three weeks of her leave of absence. Her work had become unsuitable because her doctor advised her to quarantine due to COVID-19 during the 16 days before her surgery, and she was otherwise able and available for work. She was not in unemployment and, therefore, was ineligible for benefits during the remainder of her leave, as she was not capable of working while she recovered from her surgery.

**Board of Review
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Issue ID: 0049 7155 64

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 last worked on July 14, 2020, before taking a leave of absence from the employer. The claimant reopened a previously filed a claim for unemployment benefits, effective July 12, 2020. In a determination issued on August 27, 2020, the DUA denied benefits to the claimant because she was on an indefinite medical leave of absence. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner modified the agency's initial determination and denied benefits through September 27, 2020, when the claimant's leave ended. The review examiner rendered his decision on March 24, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment within the meaning of the law while on a leave of absence 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 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 eligible for benefits during the totality of her leave of absence, is supported by substantial and credible evidence and is free from error of law, where the first few weeks of the claimant's leave were for the purpose of quarantining prior to surgery due to the COVID-19 public health emergency.

Findings of Fact

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

1. The claimant worked for the employer as a full-time dental hygienist from 10/16/2016 until 7/14/2020, when she last physically worked.
2. The claimant was granted a leave of absence effective 7/15/2020.
3. The claimant requested a leave of absence due to the need to have hysterectomy surgery on 7/31/2020.
4. The claimant requested leave effective 7/15/2020 because her doctor wanted her to quarantine for two weeks prior to her surgery due to COVID-19.
5. The claimant's doctor informed her to remain out of work to recover from surgery until 9/28/2020.
6. The claimant informed the employer that she was expecting to return to work on 9/28/2020, if medically cleared.
7. The employer allowed the claimant to remain out of work on a non-FMLA leave of absence.
8. The employer had work available while the claimant remained out on a leave of absence.
9. The claimant was medically cleared to return to work for 9/28/2020.
10. The claimant was not available to return to work due to the need to assist her children ages 16 and 7 with remote schooling.
11. The claimant resigned her employment effective 9/28/2020, in order to assist her children with remote schooling due to COVID-19.

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 in unemployment while quarantining before her surgery due to the COVID-19 public health emergency.

To be eligible for unemployment benefits, the claimant must show that she is 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.

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. In this case, because the claimant seeks benefits as of July 12, 2020, the effective date of her reopened 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 adopted several policies, including a policy relaxing its definition of suitable work.³ Under this policy, employment is not suitable if it poses a substantial risk to the claimant’s health or safety, the claimant’s health or safety would be compromised due to an underlying medical or other condition if the claimant accepted the employment, or the claimant has a reasonable belief that one of the above factors applies. These policies are effective retroactively to March 8, 2020.⁴

In this case, the review examiner denied benefits to the claimant after concluding that she was not in unemployment. Specifically, the review examiner concluded that for the duration of her leave of absence, July 15, 2020, through September 27, 2020, the claimant was neither capable of working, nor available for work. We disagree with the review examiner’s conclusion that the claimant was not in unemployment during the weeks ending July 18, 2020, July 25, 2020, and August 1, 2020.

The review examiner found that the claimant’s doctor advised her to quarantine for two weeks prior to her surgery on July 31, 2020, to avoid exposure to COVID-19. Based on the doctor’s advice, we can reasonably infer that the claimant’s health or safety from surgery would have been compromised if she had contracted COVID-19. Accordingly, we conclude that, between the weeks ending July 18th and August 1st, the claimant’s work with the instant employer was unsuitable due to the claimant’s medical condition and potential exposure to COVID-19.

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 DUA UI Policy and Performance Memo (UIPP) 2020.14 (Nov. 25, 2020), p. 2-3.

⁴ DUA UI Policy and Performance Memo (UIPP) 2021.02 (Jan. 22, 2021), p. 2.

Furthermore, there is no indication in the record that during her quarantine period the claimant was not otherwise able and available for work that would not expose her to COVID-19. Thus, her inability to work for the instant employer during these weeks is not disqualifying.

We agree with the review examiner's conclusion that the claimant is not eligible for benefits between the weeks ending August 8, 2020, and September 26, 2020, as she was not capable of performing any work while she recovered from her surgery.

The review examiner's decision is affirmed in part and reversed in part. We affirm the part of the decision denying benefits to the claimant between the weeks ending August 8, 2020, and September 26, 2020. We reverse the part of the decision denying benefits to the claimant during the weeks ending July 18, 2020, July 25, 2020, and August 1, 2020. The claimant is eligible for benefits during these three weeks.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 25, 2021



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 apply at: <https://ui-cares-act.mass.gov/PUA/>. The claimant may also call customer assistance at 877-626-6800 (select the number for your preferred language, then press # 2 for PUA).

**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.

SVL/rh