

Nurse had to take a leave of absence from her job on the COVID-19 unit, because it caused her anxiety, depression, and lack of sleep. On remand, she explained that she needed to step away from all COVID-19 work. Because she remained available for other types of work that did not involve COVID-19, she was eligible for benefits.

**Board of Review
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Issue ID: 0050 1499 69

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 took a leave of absence from her position with the employer and filed a claim for unemployment benefits with the DUA, effective July 26, 2020, which was denied in a determination issued on August 18, 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 December 18, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not available for work and, thus, she was 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 claimant's appeal, we remanded the case to the review examiner to clarify whether the claimant was available for any work while on leave. Both parties attended 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 decision, which concluded that the claimant was ineligible for benefits on the ground that she was not available for any type of work while on a leave of absence from her job in a COVID-19 hospital unit, 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 and credibility assessment are set forth below in their entirety:

1. The claimant worked as a Nurse for the employer, a hospital, from 10/28/09 through 7/2/20, when she last performed work before filing a new claim for unemployment benefits on 7/27/20.

2. The claimant was hired to work full time, 40 hours a week, earning \$32.64 an hour.
3. The claimant requested and was approved for a medical leave of absence from 7/6/20 through 8/10/20. She was expected to return to work on 8/11/20. The claimant had been working on a COVID Unit and started to have anxiety, depression, lack of sleep and panic attacks.
4. The claimant requested the leave of absence because she needed to step away from everything. The employer would have had continuing work available to the claimant had the claimant not requested the leave.
5. The claimant was not capable of performing any work. If the employer had remote or other suitable work the claimant would not have been capable of working, she needed the time off.
6. During her first week of her leave the claimant used a week's vacation. She received pay in the gross amount of \$1,329.69 for the week ending 7/11/20.
7. The claimant took advantage of the employee assistant program and began seeing a psychiatrist during her leave.
8. The claimant returned to work on 8/11/20.

Credibility Assessment:

The claimant's testimony at the remand hearing is not deemed credible. At the initial hearing when asked if she was capable of performing "remote or another type of work" during her leave the claimant testified that she probably could not, as she needed to step away from "everything". During the remand hearing the claimant testified that she was available for and capable of performing work outside of the medical field while she was out on leave either on a full time or part time basis. There was no indication in the initial question that remote or another type of work meant that the work would be in the medical field, to the contrary on its face it suggests otherwise. Such inconsistent testimony from the claimant suggests a conclusion that she was not able and available to perform any work.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject Consolidate Finding # 5. As discussed below, it is not reasonable in relation to the evidence presented. In adopting the remaining findings, we deem them to be

supported by substantial and credible evidence. After remand, we also disagree with the review examiner's legal conclusion that the claimant was ineligible for 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.

The claimant seeks benefits for the two weeks from July 26 through August 8, 2020. For this time period, 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 (DOL) has also advised states that they have significant flexibility in implementing the able, available, and work search requirements.²

Pursuant to the temporary flexibilities authorized by the federal government during the pandemic, the DUA has adopted the following policy. Employment is deemed to be not suitable if it poses a substantial risk to the claimant's health or safety, the individual's health or safety would be compromised if the claimant accepted the employment, or the claimant has a reasonable belief that one of these factors applies.³ It is important to note that the requirement to be able and available for suitable work is not waived completely. The federal government has stated that an individual's availability for work may not be so limited as to constitute a withdrawal from the labor market.⁴

In the present case, there was no dispute that the claimant was approved for a leave of absence from her job, because her work as a nurse on a unit with COVID-19 patients caused her anxiety, depression, lack of sleep and panic attacks. *See* Consolidated Finding # 3. The question on appeal is whether, during that leave of absence, the claimant was available for other suitable work or had completely withdrawn from the labor market.

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 Unemployment Insurance Policy & Performance Memorandum (UIPP) 2020.14 (Nov. 25, 2020), p. 2.

⁴ *See* UIPL 10-20, 4(b), p. 3.

Consolidated Finding # 5 states that the claimant was not capable of performing any work, including remote or other suitable work. The basis for this finding is explained in the credibility assessment, which declines to accept certain claimant testimony offered at the remand hearing. Such assessments are within the scope of the fact finder's role and unless they are unreasonable in 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). "The test is whether the finding is supported by "substantial evidence." *Lycurgus v. Dir. of Division of Employment Security*, 391 Mass. 623, 627 (1984) (citations omitted). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" *Id.* at 627–628, quoting *New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 466 (1981) (further citations omitted). Based upon the record before us, we do not believe the credibility assessment or Consolidated Finding # 5 is reasonable in relation to the evidence presented.

In her credibility assessment, the review examiner reverts to the original hearing testimony to explain how she arrived at Consolidated Finding # 5. During the initial hearing, the claimant was asked if she was capable of performing "remote or another type of work," and she responded that she "probably could not, as she needed to step away from everything." The credibility assessment explains that there was nothing in the original question to indicate that remote or another type of work meant that it was limited to the medical field. In effect, the review examiner is stating that, on its face, the original question was unambiguous. If we thought so, we would not have ordered the case remanded to explore how the claimant understood the question. The remand question explicitly asked the claimant to clarify her original testimony — whether she was referring stepping away from all types of work in the medical field or whether she meant to step away from any and all work, including outside the medical field. *See* Remand Exhibit 3.

At the remand hearing, the claimant testified that "stepping away from everything" meant to step away from all COVID-19 work, and that when she took the leave of absence, her employer did not offer her any work other than that which involved COVID-19. She further testified that, while on leave, she began to explore jobs elsewhere and if she had found another job, such as an administrative position that did not involve COVID-19, she would have taken it.⁵ There is nothing about this explanation that is inconsistent with the claimant's initial testimony. It clarifies that, when she testified about stepping away from "everything," she meant everything-COVID.

With this clarification, there is no basis to conclude that, while on her leave of absence, the claimant was incapable of, or unavailable for, suitable non-COVID-19 related work.

We, therefore, conclude as a matter of law that, pursuant to the temporary flexible policies adopted in response to the COVID-19 pandemic, the claimant satisfied the eligibility requirements under G.L. c. 151A, §§ 29 and 1(r), to be able and available for suitable work.

⁵ While not explicitly incorporated into the review examiner's findings, this part of the claimant's testimony is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the two weeks from July 26 through August 8, 2020, if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 21, 2021



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 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.

AB/rh