

Claimant was on a medical leave of absence with no English skills, work experience as a machine operator and cleaner, and who admittedly “couldn’t do much from home” was effectively removed from the labor force and ineligible for benefits under G.L. c. 151A, §§ 29 and 1(r).

**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 we affirm the denial of benefits through December 5, 2020. We also ask that the DUA open and investigate a new issue regarding the claimant’s separation from employment as of December 6, 2020.

The claimant began a leave of absence from her employer on August 22, 2020. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 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 affirmed the agency’s initial determination and denied benefits in a decision rendered on November 24, 2020. 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, 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 obtain additional testimony and evidence regarding the claimant’s capability of and availability for work. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. 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 is not eligible for benefits while on a leave of absence is supported by substantial and credible evidence and is free from error of law, where she cannot work for the employer because she does not have child-care due to the COVID-19 pandemic.

Findings of Fact

The review examiner’s consolidated findings of fact and credibility assessment are set forth below in their entirety:

1. The claimant began working for the employer, a manufacturer, as a full time machine operator on 09/24/2018.
2. The claimant's last day worked was 08/19/2020. The claimant filed an unemployment claim effective 08/16/2020.
3. The employer granted the claimant a leave of absence pursuant to the Family Medical Leave Act ("FMLA") for her own medical condition.
4. The FMLA leave of absence began on 08/22/2020 and expired on 11/07/2020.
5. On 09/04/2020, the human resources generalist received a fax from the claimant's doctor with completed forms for FMLA and short term disability.
6. The claimant's short term disability claim was denied in a letter dated 10/15/2020.
7. The employer was willing to consider additional time off as a reasonable accommodation of disability in the form of a personal leave of absence.
8. The claimant had an appointment scheduled with her specialist at 4:00 p.m. on 11/20/2020.
9. The claimant expects that after this appointment, he will send paperwork to the claimant's primary care doctor "to see what is going to happen." As of 11/20/2020 (the original hearing date), the claimant did not have an appointment scheduled with her primary care doctor.
10. As of 02/03/2021 (the remand hearing date), the claimant was not still employed by the employer. The claimant became separated from employment on 12/05/2020 and the claimant's separation was initiated by the employer.
11. The claimant was medically capable of performing full time work without restrictions as of 12/07/2020.
12. Given the claimant's medical condition, she was capable of performing some other type of work from home prior to 12/07/2020. Because of the claimant's inability to speak English and her work experience as a machine operator and cleaner, the claimant "couldn't do much from home" prior to 12/07/2020.
13. The claimant has one (1) child at home who is six (6) years old ("the child").
14. The child was doing remote learning due to COVID-19.

15. The claimant needed to care for the child at home while the child attended school remotely. The claimant did not have alternative childcare for the child for daytime or overnight hours.
16. Different school districts began remote learning at different times. The child began remote learning for the 2020-2021 school year in approximately late August or early September 2020. As of 02/03/2021 (the date of the remand hearing), the child was still remote learning.

Credibility Assessment:

During the hearing, the claimant alleged that she could have worked from home prior to 12/07/2020 and that she could perform some types of work. However, the claimant could not specify the type of work that she could perform from home. Given the claimant's testimony about her inability to speak English and her work experience as a machine operator and cleaner, the examiner credits the claimant's testimony that she "couldn't do much from home" prior to 12/07/2020.

During the remand hearing, the claimant alleged that she separated from employment on 08/19/2020. Given the documentation in the record regarding the claimant's completed forms for FMLA and short term disability faxed on 09/04/2020, and the communication from the employer regarding the claimant's short term disability denial on 10/15/2020, the human resources generalist's testimony that the claimant's employment ended on 12/05/2020 is more credible than the claimant's assertion that it ended on 08/19/2020.

During the hearing, the claimant's testimony was lacking and vague regarding the dates of the child's remote schooling. Therefore, the examiner credits the human resources generalist's approximations as more credible and reliable than the claimant's lack of knowledge regarding when the child began remote learning for the 2020-2021 school year.

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 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented.

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. They may meet these requirements, even if 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 as of August 16, 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.

The review examiner initially concluded that the claimant was not medically capable of working and had not been cleared to return to work by her doctor, so she was neither in total nor partial unemployment. We remanded the case for additional evidence because the review examiner’s initial inquiry did not adequately explore whether the claimant was capable of performing any work at all, or whether childcare obligations interfered with her availability to work.

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, as well as flexibility in determining the type of work that is suitable given an individual’s circumstances.²

The DOL has stated that individuals may be considered available for work if they are available for any work for all or a portion of the week claimed, provided any limitation upon their availability does not constitute a withdrawal from the labor market.³ In response, the DUA announced that if an individual is in total unemployment while on any type of unpaid leave of absence, the claimant is not subject to disqualification under G.L. c. 151A, §§ 29, 1(r), or 24(b), as long as the reason for the claimant’s inability to work is related to COVID-19 and the claimant remains available for some type of suitable work. This includes lack of child-care due to COVID-19. *See DUA UI Policy and Performance Memo (UIPP) 2020.14* (Nov. 24, 2020), pp. 3 and 4.

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* UIPL 10-20, 4(b).

In this case, the claimant did not have work from the employer because she did not have child-care to watch her 6-year-old child. Specifically, her child's school has been offered only on a virtual basis due to COVID-19, which meant that her child has had to stay home during the claimant's normal work hours. *See Consolidated Findings ## 13–15.* Because the claimant has not been able to find other child-care arrangements, she cannot perform her regular job, and she has been unavailable for this work as a consequence of COVID-19 while on her leave of absence.

However, the review examiner's consolidated findings also compel us to conclude that the claimant was not capable of performing any suitable work, until she was medically cleared to work by her medical providers as of December 7, 2020. *See Consolidated Finding # 11.*

Specifically, the review examiner found that the claimant has work experience as a machine operator and cleaner, she has an "inability to speak English," and she admitted she "couldn't do much from home" before she was medically cleared to work on December 7, 2020. *See Consolidated Finding # 12.* On the record before us, we conclude from these findings that the claimant was effectively removed from the labor force while she was recovering from her medical condition.

The review examiner's consolidated findings are premised on her credibility assessment which reflects the review examiner's efforts to explore the types of work the claimant might be able to perform from home. In rendering her credibility assessment, the review examiner accepted the claimant's admission that she "couldn't do much [work] from home." 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).* We believe the assessment is reasonable in relation to the evidence presented.

We, therefore, conclude as a matter of law, that the claimant did not meet the availability requirements of G.L. c. 151A, §§ 29(a) and 1(r), from August 16, 2020, through December 5, 2020, because she had effectively removed herself from the workforce during this period.

We also note that the review examiner found that the claimant became separated from the employer on December 5, 2020. *See Consolidated Finding # 10.*⁴ Where the claimant became separated on December 5, 2020, and became medically capable of working as of December 7, 2020, we will ask the DUA to investigate the claimant's eligibility for benefits under G.L. c. 151A, §§ 25(e)(1) and 25(e)(2), as of December 6, 2020.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the weeks ending August 22, 2020, through the week ending December 5, 2020. An end date of December 5, 2020, will be put on this issue, and the DUA will investigate the claimant's eligibility for benefits as of December 6, 2020, separately.



⁴ While the review examiner found the employer initiated the separation, the employer characterized the separation as "job abandonment." The nature of the separation will be adjudicated separately, so we need not address it here.

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.

JPC/rh