

The claimant took a leave of absence when the employer could not accommodate her driving restriction, which had resulted from a foot injury that required surgery. During her leave, the claimant was able and available for other work that did not involve driving. Therefore, the claimant was in unemployment and eligible for benefits under G.L. c. 151A, §§ 29 and 1(r).

**Board of Review
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Issue ID: 0053 8252 25

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 was on a leave of absence from the employer beginning on September 13, 2020. She subsequently filed a claim for unemployment benefits with the DUA, which was denied from September 13, 2020, to January 2, 2021, in a determination issued on December 15, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency's initial determination in part, and overturned it in part, denying benefits for the period beginning September 13, 2020, through December 5, 2020, in a decision rendered on January 13, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was unable to work while on her medical leave of absence, and, thus, 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 afford the parties an opportunity to provide additional evidence about the claimant's ability to work while on her leave of absence. Both parties attended the remand hearing, which took place over three sessions. Thereafter, the review examiner issued his 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 disqualified from receiving benefits while on her medical leave of absence because she was incapable of performing her delivery driver position, is supported by substantial and credible evidence and is free from error of law, where the claimant demonstrated that, while on leave, she was capable of performing any other work except driving.

Findings of Fact

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

1. The claimant worked for the employer as a full-time delivery driver from July 2019 until 9/12/2020, when she last performed work before opening her claim for unemployment benefits, which was established with an effective date of 9/6/2020.
2. Between 9/13/2020, and 10/6/2020, was [sic] the claimant was not able to perform any kind of work in a full or part time capacity with no restrictions due to a painful foot requiring surgery.
3. Between 9/13/2020, and 10/6/2020, the claimant was not able to stand or walk, however she was able to perform any full-time work in a seated position, based on a Health Care Provider's Statement of Capability completed on 10/5/2020.
4. Between 9/13/2020, and 10/6/2020, the claimant did not perform any work since the employer did not have any seated work available. The employer only had driving work available which the claimant could not perform.
5. The claimant is no longer a patient of the doctor who completed the original Health Care Provider's Statement of Capability.
6. The doctor did not complete any updated Health Care Provider's Statement of Capability for the period effective 10/6/2020 because the doctor did not feel it was needed.
7. The claimant's doctor informed her that she needed foot surgery on 10/6/2020.
8. The claimant asked the employer of [sic] they had any managing work available which the claimant had performed for other employers, but no such work was available with this employer.
9. The claimant was hoping to arrange driver's routes, handle route issues and file paperwork, which she had done in the past.
10. The claimant spoke with the employer and informed them that she was unable to perform driving work and would need time off.
11. The claimant told the employer that she could return to work in December or January when medically cleared to drive.
12. The employer informed the claimant that she would have a driving position when she is able to return.
13. The employer did not require any medical documentation from the claimant.
14. The claimant had surgery on 10/6/2020.

15. The claimant was in a walking boot after surgery on 10/6/2020 and could have began [sic] performing seated work full-time immediately.
16. The claimant was evaluated by her doctor on 11/24/2020 and cleared to return to work without any restrictions effective 12/11/2020.
17. The claimant's doctor did not provide her with any medical documentation clearing her to return to work.
18. The claimant contacted the employer and returned to work on 12/22/2020 performing full-time driving 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. Consolidated Finding # 18 incorrectly refers to the claimant's return to work date as December 22, 2020, when the record establishes, through both parties' testimony, that the claimant returned to work on December 11, 2020. In adopting the remaining findings, we deem 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 ineligible for benefits while she was on a medical leave of absence.

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.

The review examiner disqualified the claimant from the period beginning September 13, 2020, through December 5, 2020, which coincides with the period for which the claimant seeks unemployment benefits.

The record indicates that the claimant sustained a non-work-related foot injury in June, 2019.¹ As a result of this injury, the claimant's physician restricted her ability to work full-time by allowing only work that could be performed in a seated position. *See Consolidated Findings ## 3-4.* Because the employer could not accommodate the claimant's restriction, as it only had driving positions available, the claimant took a medical leave of absence from the employer. *See Consolidated Findings ## 4, 8, and 10.*

The claimant's circumstances are similar to those in 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). A claimant is not disqualified from receiving benefits if she is temporarily disabled from doing her employer's work if she is capable of and available to do other work and makes serious efforts to find other work. *Id.* at 163-164. Here, the record shows that the claimant was capable of and available to perform work other than the instant employer's driving job when she filed for benefits effective September 6, 2020, and there is no indication in the record that she has not been looking for full-time work.²

We, therefore, conclude as a matter of law that the review examiner's decision to disqualify the claimant under G.L. c. 151A, §§ 29 and 1(r), on the ground that she was incapable of working during her leave of absence is neither supported by substantial evidence nor consistent with the applicable appellate law.

¹ This is based upon the claimant's testimony and the Health Care Provider Statement of Capability, entered into the record as Remand Exhibit 5. While not explicitly incorporated into the review examiner's findings, this evidence 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).

² In response to the COVID-19 pandemic, the DUA adopted a policy waiving the work search requirement as of March 8, 2020. *See DUA UI Policy and Performance Memo (UIPP) 2020.15*; *DUA UI Policy and Performance Memo (UIPP) 2021.02*, p. 2. The work search requirement was subsequently reinstated on June 15, 2021. *See DUA UI Policy and Performance Memo (UIPP) 2021.04*. Thus, we note that, even if the claimant had not been seeking work, her qualification for benefits would not be affected.

Incidentally, the claimant testified and stated in her appeal that she had been seeking alternative work with other employers to no avail. The claimant's testimony is part of the unchallenged evidence in the record, as is her appeal, which the review examiner entered into evidence as Remand Exhibit 2.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning September 13, 2020, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 29, 2021



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

JMO/rh