

The claimant was not in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), while on a medical leave of absence, because she was not capable of performing any work during this period of time.

**Board of Review
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Issue ID: 0054 8086 21

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. We affirm the denial of benefits but modify the end date of the disqualification.

The claimant filed a claim for unemployment benefits with the DUA with an effective date of September 20, 2020. On October 27, 2020, the agency determined that the claimant was not entitled to benefits beginning on September 20, 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 and denied benefits in a decision rendered on September 1, 2021. However, the review examiner implemented an end date of October 31, 2020, to the disqualification. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment while on a 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 obtain additional evidence pertaining to the claimant's capability and availability for other work while on leave, and to clarify the date the claimant returned to work from her leave. Only the claimant participated in the remand hearing. Thereafter, the review examiner issued his 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 was not in unemployment while on a medical leave of absence, because she was not capable of working, 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. On July 25, 2019, the claimant began working part-time as a call agent for the employer, an automotive insurance and assistance company.

2. The claimant worked her scheduled shift on September 23, 2020.
3. On September 25, 2020, the claimant underwent a planned surgery.
4. The claimant could not perform light duty work after her surgery.
5. The claimant encountered complications related to her surgery that kept her out of work longer than originally anticipated.
6. The claimant was given medication that sedated her.
7. The claimant was not medically cleared to perform any work.
8. The claimant could not have performed her regular work, or any other work, with any accommodations because of the medical complications and medication she was taking.
9. The claimant could not perform her job duties remotely because of the medical complications and medication she was taking.
10. The claimant returned to work on December 1, 2020.
11. The claimant was on an approved, partially paid, leave of absence from September 24, 2020 until November 30, 2020.
12. On October 27, 2020, the Department of Unemployment Assistance (DUA) issued the claimant a Notice of Disqualification effective September 20, 2020; stating she was not eligible for benefits. The claimant appealed the determination.
13. The claimant appealed the determined [sic].

Credibility Assessment:

The claimant's testimony is credible. She amended the date she returned to work from the previous hearing. The claimant was clear and consistent regarding her testimony that she was not able to work in any capacity following her surgery. The claimant's medication sedated her and made her incapable of performing her job with any accommodation, remotely or not.

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. 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. Furthermore, as discussed more fully below, we believe that the review examiner's consolidated findings of fact support the original conclusion that the claimant was not in unemployment while she was out on a medical leave of absence.

The issue before the Board is whether the claimant was in unemployment within the meaning of the Massachusetts Unemployment Insurance statute. Consequently, we analyze the claimant's eligibility for 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. . . .

After remand, the review examiner found that the claimant took a medical leave of absence from the employer between September 24, 2020, and November 30, 2020, due to a planned surgery, from which she experienced complications that kept her out of work longer than she had initially anticipated. *See Consolidated Findings ## 3–5 and 10–11.* The review examiner had originally denied benefits to the claimant for the duration of her leave of absence after concluding that the claimant was not in unemployment, as she was not capable of performing any work during her leave. We remanded the case to obtain additional evidence to clarify the dates of the claimant's medical leave, as well as to consider the claimant's capability of and availability for other work.

An employee is not disqualified from receiving benefits if she is temporarily disabled from doing the employer's work while capable of and available to do other work and making serious efforts to find other work. *See Dir. of Division of Employment Security v. Fitzgerald*, 382 Mass. 163–164 (1980). After hearing the claimant's testimony during the remand hearing and reviewing the totality of the evidence in the record, the review examiner once again found that the claimant was not capable of performing any work during her medical leave of absence, due to complications from her surgery that included medications which sedated her and rendered her unable to perform her regular work, or any other work (including remote work). *See Consolidated Findings ## 4–9.* The claimant's medical condition during her leave of absence effectively removed her from the labor force during that relevant period of time.

We, therefore, conclude as a matter of law that the claimant was not in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), while on her medical leave of absence.

The review examiner's decision is affirmed, although the period of disqualification is modified. The claimant is denied benefits from September 20, 2020, through the week ending November 28, 2020.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 24, 2022



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

**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.

JPCA/rh