

The claimant was scheduled to return to work in June 2020 following maternity leave. However, her childcare fell through due to the COVID-19 pandemic, and she was unable to obtain alternative care. As there was no indication from the record that the claimant could not have performed remote work, she met the temporary, flexible eligibility requirements for benefits.

**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 reverse.

The claimant filed a claim for unemployment benefits with the DUA, effective November 11, 2020, which was denied in a determination issued on February 20, 2021. 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 June 17, 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 G.L. c. 151A, §§ 29 and 1(r), and, thus, she was not eligible for benefits. 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 information about claimant's availability for work. 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 not in unemployment because she was not available to work, 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 full-time as a server, for the employer, a restaurant, between June of 2019 and 02/19/2020, when she began a maternity leave of absence.
2. The claimant's leave was scheduled to last between eight (8) and twelve (12) weeks.
3. While pregnant with her unborn child, the claimant was diagnosed with pregnancy carpal tunnel syndrome.
4. Pregnancy carpal tunnel syndrome caused the claimant's arms and hands to go numb.
5. This diagnosis caused the claimant to be unable to continue working her job as a server, as the claimant was required to carry trays and plates of food. As a result, she went out on the leave of absence.
6. The claimant gave birth to her son on 03/06/2020 by means of an emergency cesarean section (C-Section).
7. Due to the C-Section, the claimant suffered an infection and was admitted into the hospital.
8. While in the hospital, the claimant needed a blood transfusion and ripped out the staples in her stomach from the C-Section.
9. The claimant received \$311.00 a week of disability payments from the State of Rhode Island from 02/19/2020 until 03/06/2020.
10. The claimant did not receive the disability payments on a weekly basis. She received a one-time lump sum payment of \$2,488.00 in April of 2020.
11. The April 2020 lump sum represented the claimant's disability payments from 02/19/2020 to 03/06/2020.
12. The claimant's leave of absence was supposed to end on 06/20/2020.
13. The employer recalled the claimant from her leave in June of 2020.
14. The claimant was unable to return to work when she was recalled, because the claimant was unable to find childcare that allowed her to return to work.
15. On a bi-weekly basis, beginning in June of 2020, the employer and the claimant would attempt to find shifts that would allow the claimant to work. No workable shifts were ever found.

16. The claimant intended to leave her child with her parents when she returned to work; however, she was unable to do so because of their increased risk of infection of COVID-19.
17. As a result of the COVID-19 public health emergency, the claimant was unable to find suitable childcare once the claimant's maternity leave ended.
18. For the weeks ending 08/08/2020 through 10/24/2020, the claimant received unemployment benefits from Rhode Island in the amount of either \$262.00 or \$265.00.
19. For the week ending 10/31/2020, the claimant received \$79.00 in unemployment benefits from Rhode Island.
20. The claimant filed a new claim for unemployment benefits in Massachusetts, effective 11/01/2020.
21. The Department of Unemployment Assistance (DUA) determined that the claimant was monetarily eligible to receive weekly unemployment benefits in the amount of \$269.00, with an earnings disregard of \$89.67.
22. The claimant was not capable of working while on her leave of absence, as a result of the complications from her pregnancy and giving birth.

Credibility Assessment:

There were no major differences between the claimant's or the employer's testimony. Both parties offered credible testimony and documentation, including the documentary evidence presented at the original and remand hearings. Neither party was certain when the claimant's leave of absence was supposed to end. The employer testified that it was to end June 20, 2020. The claimant testified that it was to end on May 6, 2020. It is determined that the leave of absence was supposed to end on June 20, 2020, as the employer testified that the leave was for approximately two and half to three months. This period extends beyond May 6, 2020, which the claimant testified to, and is closer to the June 20, 2020, which is the date the employer testified to.

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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was not in unemployment during the period on appeal.

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; provided, however, that certain earnings as specified in paragraph (b) of section twenty-nine shall be disregarded . . .

(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 though they are on a leave of absence from their regular employer. *See Dir. of Division of Employment Security v. Fitzgerald*, 382 Mass. 159, 163–164 (1980). In this case, because the claimant seeks benefits from November 1, 2020, through the present, we must also consider application of the 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, 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 was in total unemployment while on any type of unpaid leave of absence, the claimant was 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 remained available for some type of suitable work. This included lack of child-care due to COVID-19. *See DUA UI Policy and Performance Memo (UIPP) 2020.14* (Nov. 24, 2020), pp. 3 and 4.⁴

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* IPL 10-20, 4(b).

⁴ This flexible policy ended on September 4, 2021. *See* UIP 2020.12 (Sept. 9, 2021); and UIP 2020.14 (Sept. 9, 2021).

Following the birth of her child, the claimant was scheduled to return to work from maternity leave on June 20, 2020. Consolidated Findings ## 1, 2, and 12. She had initially arranged for her parents to watch her child when she returned to work, but they were unable to provide such care because exposure to COVID-19 posed a substantial risk to their health and safety. Consolidated Finding # 16. Despite searching, the claimant was unable to secure alternative childcare because of the ongoing limitations caused by the COVID-19 pandemic. Consolidated Findings # 17. Therefore, pursuant to the flexible definition of suitable work adopted by the DUA in response to the COVID-19 public health emergency, the claimant may not be disqualified from receiving benefits on the grounds that she was unable to obtain childcare.

While the claimant could not perform her normal duties as a server from home, nothing in the record suggests she was precluded from performing other suitable work remotely. In the absence of such evidence, we believe the claimant met the modified availability requirements as of the week beginning November 1, 2020, the effective date of her claim.⁵

We, therefore, conclude as a matter of law that the claimant may not be disqualified under G.L. c. 151A, §§ 29(a) and 1(r), because she has met the temporary eligibility requirements adopted by the DUA in response to the COVID-19 pandemic.

⁵ We also note that, in accordance with the EUISSA and the DOL guidance, effective November 2, 2020, the DUA waived “work search requirements until such time as the COVID-19 emergency measures have been lifted.” DUA UI Policy and Performance Memo (UIPP) 2020.15 (Nov. 25, 2020), p. 2. The work search requirement was reinstated as of the week beginning June 13, 2021. UIPP 2021.04 (May 20, 2021).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week of November 1, 2020, and for subsequent weeks if otherwise eligible.



Charlene A. Stawicki, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 30, 2021



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.

LSW/rh