

The claimant was unable to obtain regular childcare due to the COVID-19 pandemic, and therefore had good cause for declining suitable work. As the record shows that she was able to work periodically throughout the period she certified for benefits, she met the temporary flexible eligibility requirements for PUA benefits.

**Board of Review
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Issue ID: 0058 4956 26

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 April 26, 2020, which was denied in a determination issued on May 21, 2021. 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 August 26, 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. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

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 due to a lack of childcare, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant opened a claim for benefits with an effective date of April 26, 2020.
2. The claimant began employment as a per diem nursing assistant with the employer prior to April 26, 2020.

3. The claimant is still employed by the employer.
4. Due to COVID-19, the claimant had difficulty finding a babysitter for her daughter.
5. Beginning April 26, 2020, the claimant was unable to accept/work all available hours for the employer due to lack of childcare.
6. The employer requires per diem employees to work at least one week-day and two week-end days in a month in order to keep their positions.
7. From April 26, 2020, the claimant accepted and worked at least the minimum number hours required by the employer to maintain her status as a per diem employee.
8. The claimant's mother cared for her daughter while she worked.
9. The claimant's mother works full-time and was not available to care for the claimant's daughter on a full-time basis.

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 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 findings of fact and deems 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 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 the week of April 26, 2020, through July 25, 2020, 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 was related to COVID-19 and the claimant remains 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

Beginning the week of April 26, 2020, the claimant was unable to obtain consistent childcare for her child due to the impact of the COVID-19 pandemic. Finding of Fact # 4. The claimant worked when she could in order to ensure that she remained employed with the instant employer. Finding of Fact # 7. The claimant’s paystubs, admitted into evidence as Exhibit 5, show that the claimant worked between 6.25 and 31.75 hours during 10 of the 12 weeks that she requested benefits.⁵ Thus, the record indicates the claimant was available for some type of work during the period that she certified for benefits. Pursuant to the flexible definition of suitable work adopted by DUA in response to the COVID-19 public health crisis, the claimant may not be disqualified, as she could not work due to a lack of childcare and remained available for some type of suitable work. The claimant met the modified availability requirements from April 26, 2020, through July 25, 2020.

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.

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).

⁴ This flexible policy ended on September 4, 2021. *See* UIPP 2020.12 (Sept. 9, 2021); and UIPP 2020.04 (Sept. 9 2021).

⁵ Exhibit 5, while not explicitly incorporated into the review examiner’s findings, 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 weeks of April 26, 2020, through July 25, 2020, if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 30, 2021



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.

LSW/rh