

The claimant limits her availability to part-time work because she is only looking to supplement her Social Security income. She is not in unemployment as meant under G.L. c. 151A, §§ 29 and 1(r), while limiting her availability for this reason.

**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 affirm.

The claimant filed a claim for unemployment benefits with the DUA, effective on April 19, 2020. On February 17, 2021, the agency issued a determination denying benefits to the claimant. 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 to deny benefits, but modified the dates of ineligibility in a decision rendered on November 18, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment when limiting her availability and, thus, was disqualified under G.L. c. 151A, § 29(a),(b), 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 work. Only the claimant participated in the remand hearing. Thereafter, the review examiner issued her 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 when restricting her availability, is supported by substantial and credible evidence and is free from error of law, where the claimant's restrictions were related to several issues, including COVID-19, a wrist injury, and her receipt of Social Security benefits.

Findings of Fact

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

1. The claimant filed an initial claim for unemployment insurance benefits, effective 4/19/20. Prior to filing her initial claim, the claimant worked as a caregiver for two health care businesses. During the base period of the claimant's 2020 claim, April 1, 2019, through March 31, 2020, the claimant

worked part-time between all of her employers. The claimant limited her availability to part-time hours during the base period because working full-time would be too difficult because of her age and because the work was exhausting on her physical and mental energies. The claimant was looking for part-time work to supplement her [S]ocial [S]ecurity income. The claimant continued to limit her availability to part-time hours for the same reason during the benefit year.

2. The claimant's second employer called her on March 22, 2020, and notified her that they would be taking a break from her services due to COVID-19 concerns.
3. The claimant's physician did not tell the claimant that even though she had to make the ultimate decision regarding whether or not to continue working as a caretaker, the physician recommended that the claimant not continue working in that field. The physician advised the claimant to be careful. The physician recorded a note in the claimant's medical record from a visit on 3/19/20 where this matter was discussed. The note reads in part: "She is very concerned about the coronavirus. We did spend some time talking about social isolation and washing hands with soap and water and limiting visits from her grandchildren. I also did tell her to be careful as she helps elderly citizens with the day-to-day lives." The physician recorded a note in the claimant's medical record following a visit on 5/27/20. The note reads in part: "We did go over PPE protection with face mask, gloves and to keep 6 feet distance and her likelihood of getting COVID from the providers of PT and OT would be negligible. Patient agreed with the plan."
4. The claimant began working for the instant employer on 2/15/19; her last day of work was 4/12/20. At the time of hire, the claimant was assigned to provide care for one client who resided in an apartment building. The claimant worked 15-17 hours per week and was paid \$17 per hour.
5. After learning that the client may have been in contact with someone who had a positive COVID-19 test, the employer notified the claimant not to go to the client's home. The claimant notified the employer that she was unwilling to go to any elderly housing facility and was willing to do only private home care because of concerns related to COVID-19. The client was subsequently cleared, and the employer resumed providing services on 5/10/20.
6. When the claimant mentioned private homes during the initial hearing, she was referring to single family homes. The claimant was unwilling to work in elderly facilities or nursing homes.
7. The claimant was 74-years-old in 2020 and suffered from asthma at the time. The claimant was concerned that her age and medical condition made her more susceptible to severe symptoms from COVID-19, and this is the reason why she did not want to work in elderly housing facilities and only wanted to work in private homes. The claimant believed that she would be safer in private homes

because she depended on the agencies to have information on the clients' families, whether the client and family tested for COVID-19, where the family members work, and who goes in and out of the clients' residences.

8. On March 11, 2020, the claimant communicated to the employer her concerns about COVID-19 and the limitations to her availability.
9. The employer had work available in a private home sometime between April 19, 2020, and October 23, 2020. The employer notified the claimant that work was available with a client in a private home. The claimant did not accept the work because the employer was unable to answer the claimant's questions as to whether the client was tested for COVID-19, who goes in and out of the client's home, whether they work and whether they wear masks. The claimant asked these questions due to fear of COVID-19 and the severity of the pandemic. The claimant concluded that the employer had no knowledge of the safety of the home. The claimant declined the one position offered during this time.
10. Between April 19, 2020, and October 23, 2020, the claimant did not decide that she no longer wanted to work outside of her home and/or in the healthcare field due to COVID-19 concerns. The claimant was willing to work outside of her home if she deemed the situation appropriate and that the employer had done their due diligence in obtaining information about the client and the client's home environment.
11. Sometime in approximately September, 2020, the employer assigned the claimant work, providing care for a client in that client's home. After visiting the home on one occasion, the claimant chose not to return because she found that the client's husband was not wearing a mask when he went out in public and did not believe in wearing a mask. The claimant did not feel safe returning to the home.
12. On May 18, 2020, the claimant broke her wrist. The claimant underwent surgery on May 22, 2020, and remained at home recovering for one week following the surgery. The claimant notified the employer that she was limited but could do something, such as companion work. The office staff told the claimant that because she was unable to work with a broken wrist they were going to take her off the schedule. The claimant was subsequently told that she would be deactivated; the claimant does not recall when this occurred. The scheduler contacted the claimant one time, that contact could have occurred in May or October, the claimant does not recall. The claimant does not have any documents related to communication between herself and the employer.
13. The claimant's ability to work was affected by the diagnosis of a brain tumor on July 31, 2020, because it made her more vulnerable to COVID-19. The claimant did not submit any medical documentation to the DUA regarding this diagnosis or how it may have affected her ability to work.

14. The claimant planned to eventually return to work with the employer. On 10/23/20, the claimant notified the employer that she could no longer do caregiving work per her doctor's orders. The claimant moved to a senior living facility and considered herself retired.
15. On 7/7/21, the claimant completed a DUA fact-finding questionnaire, indicating that she broke her wrist on 5/18/20, underwent surgery on 5/22/20, that she was diagnosed with a tumor on 7/31/20 and underwent surgery on 12/3/20, and was unable to work.
16. On 2/17/21, the DUA issued the claimant a Notice of Disqualification, finding her ineligible for benefits under Section 29(a) & 1(r) of the law for the week beginning 9/13/20 and indefinitely thereafter.
17. On 2/22/21, the claimant appealed the Notice of Disqualification.

Credibility Assessment:

The testimony offered by the claimant during the initial hearing and remand hearing was inconsistent. For example, during the initial hearing, the claimant testified to having told the employer on 10/23/20 that she could no longer do caregiving work per her doctor's orders. During the remand hearing, the claimant testified that she was capable of working between July and December, and her availability for work was affected only by pre-surgical appointments. No medical documentation was submitted to support the claimant's testimony.

During the initial hearing, the claimant testified that her physician recommended she not continue working in the field of caregiving. During the remand hearing, the claimant clarified that the physician did not make any such recommendation and told the claimant to be careful. This testimony is supported by the physician's notes. Yet, with the submission of the medical documents, the claimant included a written statement alleging that the physician warned her against continuing her work and recommended that she think about halting her work. The claimant's written statement was given no weight; her sworn testimony, which is supported by the medical evidence, is reflected in the consolidated findings. Likewise, during the remand hearing, the claimant testified to having spent one week recovering following wrist surgery. In her written submission, the claimant reported being unable to work for two weeks.

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. However, we note that Consolidated Finding # 14, which states that the claimant notified the employer on October 23,

2020, that she could no longer do caregiving work per her doctor's orders and was retired, appears to be partly based on the review examiner's erroneous belief that the claimant provided this testimony during the initial hearing. The record establishes that this was solely the employer's testimony.

G.L. c. 151A, § 29, 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.

The Consolidated Findings indicate that the claimant was on an informal leave of absence from the start of her claim, April 19, 2020, through October 22, 2020.¹ We remanded this case to obtain clarification on the factors affecting the claimant's capability and availability for work during the relevant period.

After remand, the review examiner found that the claimant decided to limit her availability to part-time during the base period and the benefit year of her 2020 claim, because she did not feel physically and mentally strong enough to work full-time in her seventies. The review examiner further found that the claimant was looking for part-time work to supplement her Social Security income. *See* Consolidated Finding # 1. As the claimant is restricting her availability to part-time work because she already receives Social Security benefits and is only looking to supplement that income, she has not shown that she is in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r). These provisions provide for the payment of benefits only to those who are unable to secure a full-time weekly schedule of work. *See Crane v. Comm'r of Department of Employment and Training*, 414 Mass. 658, 662 (1993) (a claimant who quit his job rather than accept full-time hours so as not to jeopardize his SSI benefits, was not entitled to unemployment benefits).

We note that the evidence presented during the initial and remand hearings shows that other factors, such as COVID-19 and various health conditions affected the claimant's capability and availability for work during the benefit year of her claim. *See* Consolidated Findings ## 3, 5, 7, 9, and 12–13. These circumstances did not necessarily make the claimant ineligible for unemployment benefits during the benefit year, as Massachusetts regulations allow claimants to limit their availability to part-time work under limited circumstances, and DUA policies during the period at issue further allowed for the relaxation of the definition of suitable work and expanded

¹ We note the information contained in the DUA's electronic record-keeping system, UI Online, which shows that the claimant's separation from the instant employer has been adjudicated with a start date of October 23, 2020.

the circumstances under which claimants may limit their availability to part-time work, including for COVID-19 related reasons.² However, because the claimant's ongoing limitation on her availability due to receiving Social Security benefits is disqualifying, it is not necessary to decide how these other circumstances affected her eligibility.

We, therefore, conclude as a matter of law that pursuant to G.L. c. 151A, §§ 29(a), (b), and 1(r), the claimant was neither in partial nor total unemployment while on a leave of absence.

The review examiner's decision is affirmed. The claimant is denied benefits for the weeks ending April 18, 2020, through October 17, 2020.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 30, 2022



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. 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.

SVL/rh

² See 430 CMR 4.42-4.45; DUA UI Policy and Performance Memo (UIPP) 2020.14, (Nov. 25, 2020), p. 2-3; UIPP 2021.02, (Jan. 22, 2021) p. 2; and UIPP 2021.08 (Sept. 9, 2021).