

During his leave from the employer, the claimant was either not available for work or only available for five hours per week and restricted to light duty work, which effectively removed him from the labor force. Therefore, he was not in unemployment during that period of time.

**Board of Review
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Issue ID: 0062 5658 10

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 affirm in part and reverse in part.

The claimant went on a medical leave of absence from the employer on January 13, 2021. He filed a claim for unemployment benefits with the DUA with an effective date of January 17, 2021. Benefits were denied in a determination issued on June 2, 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 December 31, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment while out on a leave of absence and, thus, was disqualified under G.L. c. 151A, §§ 29(a), 29(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.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was not in unemployment while on a leave of absence, is supported by substantial and credible evidence and is free from error of law, where the claimant was capable of performing light duty work but was only available to perform such duty for five hours per week after being discharged from the hospital.

Findings of Fact

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

1. The claimant filed an initial claim for unemployment insurance benefits, effective 1/17/21. Prior to filing his claim, the claimant worked full-time covering and securing sheet rock for the employer's transportation business. The claimant began

working for the employer in November 2014. The claimant worked a regular schedule of 6:00 a.m. until 2:30 p.m. on Monday through Friday and was paid \$18.75 per hour.

2. On 1/7/21, the employer issued the claimant written notice that reads in part: "...due to being out for personal reasons you will be placed on a 30-day leave beginning 1/13/21..." The claimant was absent from work due to requiring surgery for colon cancer. The claimant underwent surgery on 1/13/21. The claimant does not know the specific surgery that was performed on him. The claimant's physician advised that the claimant not work due to his medical condition. The employer advised the claimant to file a claim for unemployment insurance benefits. The employer did not provide the claimant any pay during his absence. The claimant was required to pay his health insurance premiums during his absence. The employer subsequently extended the claimant's leave until he was medically cleared to return to work on 3/15/21.
3. During his leave of absence, the claimant was capable of performing light duty work. The claimant became capable of performing light duty work after being discharged from the hospital. The claimant does not recall the date when he was discharged; the date was two weeks after the date of surgery.
4. The claimant was capable of working for the employer with medical restrictions to perform light duty work. The claimant notified the employer that he was able to perform light duty work.
5. The claimant sought light duty work with other employers. The claimant sought a sewing position with a local business.
6. The claimant was available to work five hours per week during the leave of absence.
7. On 6/2/21, the DUA issued the claimant a Notice of Disqualification, finding the claimant ineligible for benefits under Section[s] 29(a) & 1(r) of the law for the week beginning 1/3/21 and indefinitely thereafter.
8. On 6/2/21, the claimant appealed the Notice of Disqualification.

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, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant was not in unemployment during the entirety of the relevant period before us.

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 claimant took a leave of absence from the instant employer on January 13, 2021, in order to undergo surgery for colon cancer. *See* Consolidated Finding # 2. The claimant was in the hospital for two weeks, and, upon discharge, he was capable of performing light duty work, such as sewing. *See* Consolidated Findings ## 3–5. Because the claimant informed the employer that he was available for light duty work, but he remained on a leave of absence until being fully cleared to work by his medical provider on March 15, 2021, we can reasonably conclude that the employer did not have light duty work available for the claimant while he was on leave. *See* Consolidated Findings ## 2 and 4.

An employee is not disqualified from receiving benefits if he is temporarily disabled from doing the employer's work, while capable of and available to do other work and making serious efforts to find such work. Dir. of Division of Employment Security v. Fitzgerald, 382 Mass. 159, 163–164 (1980). As stated above, during his leave of absence, the claimant was capable of performing light duty work upon his release from the hospital on January 27, 2021, and through March 15, 2021, when he was fully cleared to return to his regular duties with the employer. The claimant was also looking for work with other employers during this time period.¹ *See* Consolidated Finding # 5.

However, because the claimant was not available for work while in the hospital between January 13, 2021, and January 26, 2021, and he was only available for five hours of work per week between January 27, 2021, and March 15, 2021, he is disqualified from the receipt of benefits during the entirety of his leave of absence. In our view, the combination of the claimant’s significantly limited hours of availability and the restrictions on the type of work he could perform reduced the claimant’s chances of realistically obtaining work to the point that he was effectively removed from the labor force. *See* Board of Review Decision 0032 4899 92 (Jun. 17, 2020). Thus, the claimant did not meet the availability requirements under G.L. c. 151A, §§ 29(a) and 1(r), between the weeks ending January 16, 2021, and March 13, 2021.

¹ 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; UIPPP 2021.02, p. 2. The work search requirement was subsequently reinstated on June 15, 2021. *See* UIPPP 2021.04. Thus, we note that, even if the claimant had not been seeking work during his leave of absence, such circumstances would not have affected his qualification for benefits.

We can reasonably infer that this changed, with the claimant once again available for full time work, once he was medically cleared to work and his leave of absence ended on March 15, 2021.

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

The review examiner's decision is affirmed in part and reversed in part. We affirm the part of the decision which states that the claimant is not entitled to receive benefits between the weeks ending January 16, 2021, and March 13, 2021, as the claimant was not in unemployment during these weeks. However, we reverse the portion of the decision denying benefits to the claimant as of the week ending March 20, 2021, as he may be entitled to benefits, if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 25, 2022



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