

**During her medical leave from the employer, the claimant was able, available and actively seeking other work. Therefore, she was in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), during that time.**

**Board of Review  
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**Issue ID: 0065 0588 09**

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant went on a medical leave of absence from the employer on January 12, 2021. She filed claims for unemployment benefits with the DUA with the effective dates of May 10, 2020, and May 9, 2021. Benefits were denied in a determination issued on May 20, 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 reversed the agency's initial determination and awarded benefits in a decision rendered on October 28, 2021. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was in unemployment while out on a leave of absence and, thus, was not 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 employer's appeal, we remanded the case to the review examiner to give the employer an opportunity to testify and provide other evidence. Only the employer attended 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 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 working, but was unable to travel to the employer's location due to a medical driving restriction and a lack of other commuting options.

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 a claim for unemployment benefits with an effective date of May 10, 2020. The Department of Unemployment Assistance calculated the

claimant's weekly benefit amount as \$579.00 and her earnings disregard as \$193.00.

2. The claimant worked part-time as a direct support professional for the employer, a residential group home, from May 31, 2019, until July 21, 2021, when she separated.
3. The claimant's immediate supervisor was the program director.
4. The claimant worked the overnight shift for the employer.
5. The claimant has a diagnosis of epilepsy.
6. The claimant last worked for the employer overnight from January 11, 2021, to January 12, 2021.
7. On January 12, 2021, the claimant had an epileptic seizure.
8. On January 12, 2021, a family member of the claimant contacted the employer and informed the employer that the claimant had an epileptic seizure.
9. On January 26, 2021, the human resources director emailed the claimant asking her to contact her. The claimant did not respond.
10. On February 20, 2021, the claimant contacted the program director about returning to work.
11. On February 20, 2021, the human resources director emailed the claimant about FMLA paperwork and requested a doctor's note. The claimant did not respond to the email.
12. On February 22, 2021, the human resources director emailed the claimant about her projected return to work on February 28, 2021, and requested a doctor's note. The claimant did not respond to the email.
13. In March, 2021, the program director left messages for the claimant to contact her. The claimant did not respond.
14. The claimant did not contact the employer after February 20, 2021.
15. The claimant did not submit medical documentation to the employer at any time.
16. The claimant's only medical restriction was that she could not drive for six months.
17. The employer had work available for the claimant.

18. The claimant lives in [Location A]. The workplace is in [Location B].
19. There is no public transportation from [Location A] to [Location B].
20. No remote work was available because the claimant provided direct care to residents of a group home and was required to work in person.
21. On July 8, 2021, the claimant had abdominal surgery and was medically restricted to light duty work until July 21, 2021.
22. The claimant was cleared to drive without restrictions on July 21, 2021.
23. From the week beginning January 17, 2021, through the week ending July 3, 2021, the claimant's only medical restriction was that she could not drive.
24. From the week beginning July 4, 2021, through the week ending July 24, 2021, the claimant was capable of light duty work within her medical restriction of lifting no more than 10 pounds.
25. From the week beginning January 17, 2021, through the week ending July 24, 2021, the claimant was capable of and available for work within her medical restrictions.
26. The claimant was looking for work within her medical restrictions but was unable to find suitable work that did not require her to drive.
27. Although the claimant did not submit FMLA paperwork to the employer to be approved for a leave of absence, the employer did not separate the claimant from her job from February 20, 2021, through July 20, 2021. It was understood by the employer and the claimant that the claimant was still employed during she [sic] time she could not drive to work. The claimant's time out of work was unpaid and unrelated to the COVID-19 pandemic.
28. On July 21, 2021, the employer terminated the claimant's employment for job abandonment.

#### Credibility Assessment:

In this case, it was undisputed that the claimant had an epileptic seizure on January 12, 2021. Although the human resources director testified that the claimant did not submit FMLA paperwork for a leave of absence, the employer's written responses to fact finding questionnaires stated that the claimant was on a leave of absence, and the claimant testified that she was granted a leave of absence. Consequently, it is found that both parties understood that the claimant was on a leave, even if implied, due to her epileptic seizure and inability to drive for six months.

Therefore, the dispute between the parties was whether the claimant was capable of and available for work and unable to obtain suitable work. The claimant credibly testified that she lived in [Location A], and it was undisputed that the workplace was in [Location B]. There is no public transportation available between [Location A] and [Location B]. The claimant's credible testimony, supported by a note from her medical provider, established that she was capable of work within her medical restriction of [not] driving from the week beginning January 17, 2021, through the week ending July 24, 2021. The claimant's testimony established that because of surgery on July 8, 2021, she was capable of light duty work within her medical restriction of lifting no more than 10 pounds from the week beginning July 4, 2021, through the week ending July 24, 2021. The claimant credibly testified that she was available for work during this time and was actively seeking work close to her home.

Although the human resources director testified that the employer did not receive a doctor's note from the claimant, it is reasonable to infer that the employer was aware that the claimant could not drive for a period of six months after the claimant's seizure, given that the employer terminated the claimant's employment on July 21, 2021, which was the date the claimant was medically cleared to drive. It was undisputed that a remote option was not available from the employer because of the in-person nature of the claimant's job duties.

### 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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject the portion of Consolidated Finding # 11 which states that the employer sent an email to the claimant on February 20, 2021, as the evidence in the record shows that the email was sent on January 18, 2021.<sup>1</sup> In adopting the remaining findings, we deem them to be supported by substantial and credible evidence.

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 . . . .

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<sup>1</sup> We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. 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).

(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 12, 2021, after suffering an epileptic seizure.<sup>2</sup> See Consolidated Finding # 7. The seizure did not affect the claimant’s ability to work, but she was restricted from driving for six months. See Consolidated Finding # 16. Because the claimant did not have any public transportation or other commuting options available from her home in [Location A] to her worksite in [Location B] during the six months that she could not drive, and the employer did not have remote work available, the claimant’s leave of absence continued through July 21, 2021. See Consolidated Findings ## 18–20, 22 and 27.

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. Fitzgerald, 382 Mass. at 163–164. During her leave of absence, apart from her driving restriction, the claimant was capable of working and available to perform any type of work through July 3, 2021, and she was capable of light duty work through July 24, 2021. See Consolidated Findings ## 23–24. The claimant was also looking for work during this time period. See Consolidated Finding # 26. Based on these consolidated findings, the claimant is not disqualified from the receipt of benefits.<sup>3</sup>

We, therefore, conclude as a matter of law that the claimant was in total unemployment within the meaning of G.L. c. 151A, §§ 29(a) and 1(r), and she is entitled to benefits during her leave of absence.

The review examiner’s decision is affirmed. The claimant is entitled to receive benefits between the weeks ending January 23, 2021, and July 24, 2021, if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - March 29, 2022**



Charlene A. Stawicki, Esq.  
Member



Michael J. Albano  
Member

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<sup>2</sup> The fact that an employment relationship persisted did not mean that “total unemployment” could not exist under the statute. See Dir. of Division of Employment Security v. Fitzgerald, 382 Mass. 159 (1980).

<sup>3</sup> 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; and UIPP 2021.02, p. 2. The work search requirement was subsequently reinstated on June 15, 2021. See UIPP 2021.04. Thus, we note that even if the claimant had not been seeking work, her qualification for benefits would not be affected during the initial five months of her leave.

Chairman Paul T. Fitzgerald, 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](http://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