

**While on a medical leave of absence from her bus driving position due to a back injury, the claimant demonstrated that she remained capable of, available for, but unable to obtain other suitable work, including remote telephone or computer work. She was in total unemployment pursuant to G.L. c. 151A, §§ 29 and 1(r).**

**Board of Review  
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**Issue ID: 0055 7096 27**

### 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 reverse.

The claimant took a leave of absence from her position with the employer in January, 2020. She filed a claim for unemployment benefits with the DUA, effective March 15, 2020, and was initially approved. However, in a determination issued on December 2, 2020, she was disqualified. 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 determination and denied benefits in a decision rendered on July 22, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that, while on her leave of absence, the claimant was not medically able to perform work, and, thus, she was disqualified under G.L. c. 151A, §§ 29 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 about the claimant's ability to perform work during her leave. Only the claimant attended 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 did not meet the definition of unemployment under G.L. c. 151A, §§ 29 and 1(r), because she could not physically perform 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's educational background was that she finished high school and completed two years at a community college.

2. The claimant focused her studies on the medical field.
3. Prior to working for the employer, the claimant worked for the post-office as a letter carrier and for a car company.
4. The claimant once applied for a computer-based job with the employer that required a master's degree, so the claimant was not selected for the position because she did not meet the minimum qualifications.
5. Beginning July 11, 2011, the claimant worked for the employer, a transit authority, as a full-time (40 hours weekly) bus driver.
6. The claimant's direct supervisor was the employer's superintendent of the claimant's assigned station.
7. The claimant's job duties for the employer included driving a bus.
8. The claimant had ongoing issues for approximately three years with her back and leg.
9. The claimant began experiencing worsening leg pain, leg numbness, and back pain in January 2020, so she sought medical attention with her doctor.
10. In January 2020, the doctor diagnosed the claimant with lumbar disc disease and nerve damage in her leg caused by years of sitting and driving.
11. The claimant's doctor declared the claimant unable to complete her job duties due to the number of hours the claimant was required to sit and drive the buses for her job.
12. The doctor prescribed a course of treatment that included an MRI to evaluate the extent of the injury, then physical therapy and cortisone shots, for approximately six months, depending on what the MRI showed and the claimant's progress.
13. The claimant did not make any requests for light duty or accommodations, nor did the claimant receive a letter from her physician stating that she was cleared to do light duty in January 2020.
14. The claimant did not apply for a leave of absence under the Family and Medical Leave Act in January 2020.
15. In January 2020, the claimant spoke to her union barn captain, and he instructed her to apply for a leave of absence under the Americans with Disabilities Act.

16. The claimant applied for a leave of absence from the employer under the Americans with Disabilities Act.
17. On January 24, 2020, the claimant requested a leave of absence from the employer's disability department. The employer approved her leave of absence.
18. On January 24, 2020, the claimant began a leave of absence.
19. The claimant experienced delays in the treatment for her conditions due to the COVID-19 pandemic.
20. On July 30, 2020, the claimant had an MRI related to her medical condition.
21. The leave of absence was scheduled to end on July 30, 2020, but the claimant required medical clearance to return to work.
22. The claimant was unable to physically work for the employer during the leave of absence due to her injury.
23. The employer required that their own physician would clear the claimant to return to work, given the nature of the claimant's job as a bus driver and the safety regulations governing the claimant's position.
24. The leave of absence was unpaid, but the claimant opted to use some of her accrued sick time, as partial payment during the leave of absence.
25. On March 16, 2020, the claimant filed for unemployment benefits with the Department of Unemployment Assistance (DUA), with an effective date of March 15, 2020.
26. The claimant's leave of absence was extended until December 15, 2020, due to the claimant not being able to obtain medical clearance to return to work by July 30, 2020.
27. During her leave of absence, the claimant kept in touch with the employer.
28. During the entire leave of absence, the claimant searched for a variety of different types of jobs approximately 3-5 times a week.
29. On December 2, 2020, the DUA issued a Notice of Disqualification (Notice), disqualifying the claimant of [sic] unemployment benefits effective March 15, 2020.
30. On December 10, 2020, the claimant's physician wrote a letter, which stated in part, "[Claimant] was on a medical leave of absence from 1/24/2020 to 10/1/2020 due to an acute injury. She is able to work with accommodations

going forward for light duty and the ability to take intermittent time off for physical therapy and specialty appointments. Her medical absence has been prolonged due to delays in care related to the COVID-19 pandemic. Her last lumbar spine MRI was on 7/30/2020.”

31. The claimant was able to physically work with accommodations beginning December 10, 2020.
32. From January 24, 2020 until December 10, 2020, the claimant was unable and unavailable to work due to her back injury and her subsequent recovery.
33. The claimant returned to work on December 15, 2020 because the claimant was medically cleared to do so.
34. During the leave of absence, the claimant was able to complete remote work from home, if she were able to locate such work, for which she was qualified.
35. The claimant was able to complete telephone or computer work from home.
36. The claimant had one child at home, who was five years old at the time of the remand hearing.
37. The claimant resided with her child and her child’s father during the leave of absence.
38. The child’s father was not able to help the claimant with childcare due to his work schedule at the time.
39. The claimant lived in a two-family house, where the claimant, her child, and the child’s father occupied one unit and the claimant’s mother occupied the other unit.
40. The claimant’s mother provided childcare for the claimant prior to January 2020.
41. The claimant’s mother had to stay home with the claimant’s two nephews during the pandemic because the nephews’ school closed due to the pandemic in March 2020.
42. The claimant’s mother was unable to care for the claimant’s child, along with the nephews because one of the nephews had special needs.
43. In December 2020, when the claimant returned to work, she was able to work a shift that did not conflict with the child’s father’s work schedule.
44. The child’s father worked during the day and the claimant was able to work at night beginning December 2020.

### Credibility Assessment:

The claimant failed to submit any additional documents to be added to the record to demonstrate her ability to do any work in January 2020 and when questioned if she had any additional documents to be considered in this matter, the claimant responded that she did not have any additional documents. The claimant submitted no documents to show that she was cleared to complete any type of light duty in January 2020 or that she requested light duty in January 2020. The claimant also had no documentation to show that the employer did not have any light duty work available to her or that the employer denied any type of request for light duty. The doctor's letter the claimant previously submitted indicated that the claimant was cleared to return to work in December 2020 with certain restrictions. Therefore, the claimant's testimony that she requested light duty and was able to work light duty beginning in January 2020 is not corroborated, directly conflicts with the only doctor's letter that she submitted, and therefore is not credible and has no indicia of reliability. The doctor's letter in December 2020 clears the claimant for light duty beginning in December 2020 and fails to mention any light duty clearance during the leave of absence period. Therefore, the claimant failed to demonstrate that she was cleared to complete any work, even light duty, beginning in January 2020 or that she requested any light duty from the employer at that time. As such, it is concluded that the claimant was not cleared to complete light duty work in January 2020 and that the claimant did not have any documentation to indicate that she was able to complete the light duty work.

The claimant's timeline of events regarding her course of treatment was vague. The claimant could not recall any specific dates for her course of treatment or what occurred when. As such, the claimant's testimony regarding her prescribed course of treatment was not credible and had no indicia of reliability. The only event in the claimant's course of treatment that could be verified, came from the doctor's letter, which confirmed that the claimant had an MRI on July 30, 2020. Therefore, the July 30, 2020, MRI date is the only substantial or credible evidence in the record regarding the claimant's course of treatment.

### 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 # 13, which states that the claimant did not make any requests for light duty work, as both parties testified that she did. We accept Consolidated Findings ## 31 and 32 only to the extent that they are referring to the claimant's physical inability to perform her work as a bus driver for the employer prior to December 10, 2020, as such an interpretation is consistent with Consolidated Findings ## 22, 34, and 35. Additionally, we accept Consolidated Finding # 38 only insofar as it reflects the inability

of the child's father to help with childcare during his work hours, as Consolidated Finding # 43 indicates that the father was able care for the claimant's son during his non-work hours.

In adopting the remaining findings, we deem 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 is ineligible for benefits.

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: 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.

There is no question that the claimant had to stop performing her bus driving job in January, 2020, due to a back injury. *See* Consolidated Findings ## 8–12. Consequently, she took an unpaid medical leave of absence from January 24 through December 14, 2020. *See* Consolidated Findings ## 16–18, 24, 26, and 33. To meet the above definition of "total unemployment" while on this leave, the claimant must demonstrate that she nonetheless remained capable and available for some type of suitable work, even if she could not perform her usual job as a bus driver. We believe that she has.

To be sure, the claimant produced only a single medical record, a brief letter from the claimant's physician, which is captured in Consolidated Finding # 30. In her credibility assessment, the review examiner relies heavily on this letter, particularly the statement, "She is able to work with accommodations going forward for light duty. . ." and it seems to be the basis for the portions of Consolidated Findings ## 22, 31, and 32, which state that the claimant was unable to physically work for the employer during her leave of absence, that she was unable to work due to her back injury from January 24, 2020, until December 10, 2020, and that she was able to physically work with accommodation beginning December 10, 2020.

Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). "The test is whether the finding is supported by "substantial evidence." *Lycurgus v. Dir. of Division of Employment Security*, 391 Mass. 623, 627 (1984) (citations omitted). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" *Id.* at 627–628, *quoting New*

Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted). Based upon the record before us, we do not believe the portions of the findings which indicate that the claimant was incapable of performing any work are reasonable in relation to the evidence presented.

First, it is reasonable to infer from the date of the physician's letter that it was written for the claimant's return to work from her leave of absence and the conditions under which she could return. The letter does not state that she was incapable of working with accommodations or incapable of performing light duty work prior to that. *See* Consolidated Finding # 30. Second, during the hearing, *both* parties testified that, during her leave, the claimant had been physically capable of working with accommodations, that she had asked for light duty work, but that the employer did not have any light duty work available.<sup>1</sup> Third, Consolidated Findings ## 34 and 35 make clear that the claimant was indeed physically capable of performing other suitable work, including remote telephone or computer work from home during her leave of absence.

The definition of "total unemployment" under G.L. c. 151A, § 1(r)(2), states that the individual must be capable and available for *any* suitable work. The requirement is not job-specific, and, in this case, it does not mean that the claimant had to show that she was capable and available for the work which her employer was able to offer. Given her educational background and employment history, we are satisfied that remote telephone or computer work was suitable. Based upon Consolidated Finding # 43, we are also satisfied that the claimant was available for such work during a shift that did not conflict with the work schedule of her child's father.

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

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the period March 15, 2020, through December 12, 2020, if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - February 25, 2022**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

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<sup>1</sup> During the initial hearing, the employer's Senior Manager for Human Resources read from a health care provider's statement for the claimant, "She is able to perform the essential functions of the job, but would need some type of accommodation for medical appointments." He further testified that they had a record that the claimant did ask for light duty work. Throughout both hearings, the claimant testified that she sought accommodations or light duty work before requesting a leave of absence. 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).

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](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.

AB/rh