

The claimant stopped working due to severe medical complications that arose from an earlier COVID-19 infection. He has been out of work on an employer-approved leave of absence. He did not sever the employment relationship and intends to return to the employer as soon as he is capable of working again. Because he did not permanently separate from the employer, G.L. c. 151A, § 25(e) does not apply. However, the claimant is ineligible for benefits under G.L. c. 151A, §§ 29(a) and 1(r)(2), because he has been unable to work at all since his leave began.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0069 1323 16

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 reverse.

The claimant filed a claim for unemployment benefits with the DUA, effective May 9, 2021. On June 15, 2021, the agency determined that the claimant was not entitled to unemployment benefits pursuant to G.L. c. 151A, §§ 29(a) and 1(r). The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on October 22, 2021. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant permanently separated from employment for urgent, compelling, and necessitous reasons and, thus, was not disqualified under G.L. c. 151A, § 25(e)(1). 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 employer's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant is eligible for benefits because he permanently separated from his job for non-disqualifying reasons pursuant to G.L. c. 151A, § 25(e)(1), 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 lives in [Town A], Massachusetts.

2. The claimant's parents (parents) live in Maryland.
3. Since August 26, 2020, the claimant has worked for the employer, a public school system, as a full-time (42.5 hours weekly) middle school English teacher.
4. The claimant's most [sic] and direct supervisor was the employer's director of rehabilitation (director).
5. Since the start of the COVID-19 pandemic (pandemic), the claimant mostly taught students remotely.
6. On or about December 16, 2020, the claimant began to feel ill and have COVID-19 symptoms. The claimant had body aches, fatigue, fever, sore throat and lost his sense of smell.
7. On December 20, 2020, the claimant tested positive for COVID-19 and quarantined for an indeterminate amount of time.
8. On or about December 29, 2020, the claimant began to suffer symptoms other than COVID-19 symptoms, such as nausea, vomiting, migraines, dizziness, inability to tolerate complex foods, and inability to touch his head.
9. The claimant recovered from COVID-19 but continued to have the symptoms his [sic] had since December 29, 2020.
10. The claimant resumed teaching remotely in January 2021 but continued to have various symptoms.
11. The claimant's last physical day at work with the employer was March 22, 2021.
12. By March 2021, the claimant's symptoms from December 2020 persisted and continued to feel worse.
13. On or about March 22, 2021, the claimant was hospitalized because of symptoms that remained arising [sic] from his COVID-19 infection.
14. The claimant concluded that, due to his hospitalization, his persistent symptoms from COVID-19, and his deteriorating health, he had no choice but to leave his employment with the employer.
15. On March 22, 2021, the claimant requested a leave of absence with the employer effective immediately. The claimant requested an initial end date of May 1, 2021. The employer approved the claimant's request.

16. The director approved the request and asked the claimant to submit medical documentation.
17. On March 22, 2021, the claimant began his leave of absence with the employer.
18. The leave of absence was unpaid.
19. The claimant would not have left his employment but for his hospitalization and persistent serious symptoms.
20. The claimant maintains contact with the employer.
21. The claimant was hospitalized for 8 days and was released in late-March 2021.
22. After the claimant was released, he went to his parents' home in Maryland to recover and see medical professionals.
23. The claimant could not return to work on his original return-to-work date of May 1, 2021.
24. The employer extended the claimant's medical leave of absence.
25. On May 13, 2021, the claimant filed a claim for unemployment benefits with the Department of Unemployment Assistance (DUA), with an effective date of May 9, 2021.
26. While in Maryland, the claimant was diagnosed by medical professionals with persistent perceptual postural dizziness, vestibular migraines, and occipital neuralgia. These neurological disorders came as a result of the claimant's COVID-19 infection in December 2020 and are long-term COVID symptoms.
27. The claimant, as a result of his neurological disorders, requires supervision from adults, has difficulty reading, difficulty viewing screens (such as televisions and computer monitors), cannot tolerate loud noises, sleeps at a 90-degree angle, and cannot be in a car for periods of time.
28. The parents care for the claimant and help him attend various medical appointments he has with a neurologist, therapist, nutritionist, and his primary care physician.
29. As of the hearing date, the claimant has not returned to work for the employer.
30. The claimant intends to return to work for the employer when his symptoms subside and can work. The claimant plans to return for the fall semester of 2022.

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. After such review, the Board adopts the review examiner's findings of fact except as follows. Findings of Fact ## 14 and 19, which suggest the claimant permanently separated from employment, are unsupported by the record and contradict other, supported findings, such as Findings of Fact ## 15, 16, 17, 20, 24 and 30, that show the claimant has instead been on an approved leave of absence since March 22, 2021. 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 G.L. c. 151A, § 25(e)(1), applies in the circumstances of this case. Rather, because the Findings of Fact indicate that the claimant did not permanently separate from his job, G.L. c. 151A, §§ 29 and 1, apply.

As noted above, the agency initially disqualified the claimant under G.L. c. 151A, §§ 29 and 1, while the review examiner applied the separation provisions of Chapter 151A to determine the claimant's eligibility for benefits in this case. Findings of Fact ## 14 and 19, which we have rejected for the reasons discussed above, suggested that the claimant permanently separated from his job. These findings purportedly serve as the basis for the review examiner's decision to conclude that the claimant left work for urgent, compelling, and necessitous reasons, and that, due to the severity of the claimant's medical condition, further attempts to preserve employment beyond the leave of absence he took would be futile.

However, the review examiner also found that the claimant requested a leave of absence with the employer, that the employer approved the claimant's request, and that, although the claimant has been unable to return to work for the employer, he nonetheless maintains contact with the employer and intends to return to work for the employer once his condition improves. Findings of Fact ## 15, 16, 17, 20, 23, 24, 29, and 30. Rather than a separation, it is undisputed that the claimant took a medical leave of absence when he stopped working on March 22, 2021. There is nothing in the record to suggest that the claimant quit his job. There is nothing in the findings that indicate that the claimant told the employer that he was not going to return, and there is nothing in the findings that show the employer told the claimant that he could not work or return to work when his medical condition improves. Based on the findings we have adopted, we conclude that the review examiner's conclusion that the claimant "left work involuntarily for urgent, compelling, and necessitous reasons" is not supported by the record. Because the claimant maintained some kind of employment relationship with the employer following March 22, 2021, the issue to be addressed next is whether the claimant was in unemployment after that date.

G.L. c. 151A, § 29(a), authorizes benefits to be paid to those in total unemployment. Total unemployment is defined at G.L. c. 151A, § 1(r)(2), which provides, in relevant part, as follows:

"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 if they are on a leave of absence from their regular employer. *See, e.g., Dir. of Division of Employment Security v. Fitzgerald*, 382 Mass. 159, 163–164 (1980). In this case, because the claimant seeks benefits as of May 9, 2021, the effective date of his claim, through the present, we must also consider 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 is in total unemployment while on any type of unpaid leave of absence, the claimant is 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 is related to COVID-19 and the claimant remains available for some type of suitable work.⁴

In this case, the claimant stopped working and began his leave of absence on March 22, 2021, and has not returned to work since that date. The record establishes that the claimant’s regular teaching job was no longer suitable for him as of that date for reasons related to COVID-19. Although the claimant’s inability to perform his usual job under these circumstances does not, by itself, disqualify him, the record further shows that he is not available for any other type of work.

To be considered in total unemployment, a claimant must be “capable and available for work,” but “unable to obtain any suitable work.” Here, the claimant testified, as did each of his parents, that he has not been able to work at all since March 22, 2021, as he is not capable of, or available for, any kind of work, due to the severity of his ongoing medical condition.⁵ *See Findings of Fact ## 27 and 28.* Thus, the claimant has withdrawn from the labor force while addressing his medical condition. For this reason, we cannot conclude that the claimant has been in unemployment at any time since March 22, 2021.

We, therefore, conclude as a matter of law that the review examiner’s decision to apply G.L. c. 151A, § 25(e), was an error of law, because the claimant has been out of work on an extended leave of absence and did not sever the employment relationship. We further conclude that the

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 *See* DUA UI Policy and Performance Memo (UIPP) 2020.14 (Nov. 25, 2020).

⁵ The extent of the detrimental effects of the claimant’s condition on his ability to work and perform other major life activities, while not explicitly incorporated into the review examiner’s findings, are 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).

claimant is not in unemployment within the meaning of G.L. c. 151A, §§ 29(a) and 1(r)(2), because the claimant's medical condition has removed him from the workforce.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning May 9, 2021, until he meets the requirements of the law.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 14, 2021



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.

JMO/rh