

Following eye surgery, the claimant was not medically capable of working until approximately November 6, 2021. After that date, the claimant had no restrictions on his ability to work and was conducting daily work search activities. He was, therefore, in unemployment and eligible for benefits under G.L. c. 151A, §§ 29 and 1(r), until he began a new full-time job with another employer on January 3, 2022.

**Board of Review
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Issue ID: 0073 4656 71

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 filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 3, 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 June 9, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment during the period he certified for benefits and, thus, 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 information about the claimant's unemployment status prior to the date he started his new full-time job. Only the claimant attended the remand hearing. Thereafter, the review examiner issued his 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 during the period he certified for benefits because he was placed on a leave of absence after failing a vision test, 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 are set forth below in their entirety:

1. On 09/16/16 the claimant began working approximately 30 hours per week as a union part-time Surface Operator (Bus Driver) for this employer's public transit authority.

2. The claimant obtained the union Bus Driver job by winning a job lottery.
3. At the time of hire, the claimant was only working in part-time positions because he wanted to work daytime shifts because of his vision (safety) issues and because of his work homelife balance needs, because the union rules had new fulltime employees working the late evening and weekend shifts. All the “good” fulltime day schedules went to workers with the most union seniority.
4. The claimant has anxiety and OCD issues and because work as a Bus Driver is very stressful, the claimant preferred the schedule flexibility of the part-time union positions. The claimant noted that he is 38 years old but after working as a Bus Driver, his hair turned almost completely gray.
5. Prior to 07/07/21, the claimant was capable of and available to be working full-time hours but not as a Driver for the instant employer due to the union restrictions and his vision safety needs to work only daytime shifts.
6. If the instant employer had offered full-time non-driving work, the claimant would have accepted that full-time work.
7. While working part-time hours for the instant employer, the claimant was earning more than he had when working full-time for his past employers.
8. The claimant’s last full day working as a Driver was on 07/09/21. At that time, the claimant was being paid at a union rate of approximately \$34.68 per hour.
9. On 07/12/21 when the claimant arrived at work, he was directed to report to the employer’s clinic for a work physical.
10. On 07/12/21 when examined by the medical staff, the claimant failed the eye exam portion. The claimant had first been diagnosed with vision issues in 2014 but those issues had worsened with time.
11. The claimant was told by the medical staff that he needed eye surgery and corrective specialized contact lenses before being re-evaluated to meet the vision requirements for a Driver.
12. The claimant had moved from New York to Massachusetts to attend school at [University]. The claimant attended one year at Northeastern before he decided to leave school and focus on work only.
13. Before working for the instant employer as a Bus Driver, the claimant had worked in other jobs with other employers in fields such as: customer service, hospitality work, and in retail work. The claimant had worked as a waiter and coffee server and had been a shift supervisor while working in these “entry

- level” jobs. The claimant’s job with this instant employer as a CDL licensed Driver was the claimant’s most challenging and highest paying level of work.
14. On 07/13/21, the claimant began a series of paid and then unpaid medical leaves of absence granted by this employer.
 15. From 07/13/21 until 11/08/21 or 11/09/21, the claimant was out on a paid leave of absence under the paid FMLA program (PFMLA). In the past, the claimant had used FMLA for his asthma issues and reapplied due to his vision issues. All paid leave exhausted by 11/09/21.
 16. The claimant understood the paid leave was from a state paid leave program and an employer leave program administered by the MBTA employer’s vendor [Vendor] of [City], Pennsylvania.
 17. In September of 2021, the claimant had eye surgery and he ordered the special recommended contact lenses recommended by his treating physicians.
 18. The claimant’s insurance required the claimant to have surgery on only one eye at a time. The first eye surgery was on 09/07/21 and the second eye surgery was on 09/13/21.
 19. After the surgery, the claimant was not yet able to work and was in in recovery for a period of 6 to 8 weeks while he awaited the arrival of the specialized contact lenses he needed following the surgery. These specialized contact lenses cost approximately \$1,600.00 per contact lens and were designed and fitted specifically for the claimant.
 20. From 07/13/21 through 12/08/21, the claimant was not seeking employment while recovering from surgery because he hoped to return to his Driver job after recovering from surgery and being fitted for his specialized contact lenses.
 21. On 10/19/21, the claimant filed a claim for unemployment benefits effective 10/17/21.
 22. On 12/03/21, the claimant was sent a Notice of Disqualification beginning 07/11/21 noting that the claimant was out of work on an indefinite period of medical leave of absence granted by the employer and he is not in unemployment. The claimant requested a hearing.
 23. On 12/09/21, after the eye surgery and with the corrective contact lenses, the claimant was still not able to pass the vision test so he could not return to his past Driver job.
 24. From 12/09/21 until his final separation from this employment on 05/31/22, the claimant was on an unpaid leave of absence while he participated in an alternative job search program offered by the employer.

25. The alternative job search program was unpaid and consisted of actively seeking new job opportunities in other types of work for the instant employer. There was no specific number of hours that the claimant was required to spend searching for new internal work opportunities. The claimant applied for many other jobs with the instant employer, but he was not offered any new job opportunity. The claimant was not able to find an alternative job with this employer.
26. While attending the alternative job search program, the claimant was capable of and available for full-time work that did not involve work as a driver, due to his vision issues.
27. If the instant employer had offered the claimant a full-time job in a non-Driver position, the claimant would have accepted the position.
28. While participating in the alternative job search program, the only requirement was to meet with the employer's leave administrator each Friday to go over the claimant's internal job search activities.
29. During the period from 12/09/21 to 01/03/22, the claimant was looking for work six to seven days per week with other new potential employers. The claimant was seeking full-time work with new employers doing work tasks other than working as a Driver.
30. The final period of unpaid leave with this employer ended on 05/31/22, when the claimant permanently separated from this employment because he was not physically able to perform the job as a Driver.
31. On 01/03/22, while on his unpaid leave from the transit authority employer, the claimant was hired to work full-time for a different employer, [Employer B], as a Manager Support Worker in the hospital's Food Service Department. The claimant continues to work full-time for the new employer hospital currently.

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 Consolidated Finding # 20 as inconsistent with the evidence of record. 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 was not in unemployment during the entire period on appeal.

To be eligible for unemployment benefits, the claimant must show that he is in a state of unemployment within the meaning of the statute. G.L. c. 151A, § 29, authorizes benefits to be

paid to those in total or partial unemployment. Those terms are 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.

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 though 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).

Because he failed the vision portion of an employer-mandated physical examination, the claimant was placed on an unpaid leave of absence as of July 17, 2021. Consolidated Findings ## 9 and 10. However, as the claimant’s 2021-01 claim has been determined to be effective October 17, 2021, we consider only his eligibility for benefits as of that date.

The claimant underwent eye surgery on September 7, 2021, and September 13, 2021, and was unable to work for 6–8 weeks while recovering from these surgeries. Consolidated Findings ## 18 and 19. Accordingly, he cannot have been in unemployment from the effective date of his claim through November 6, 2021.

However, we believe the record shows the claimant was in total unemployment beginning November 7, 2021. After recovering from surgery, the claimant explained that he had no medical or physical restrictions on his ability to work full-time positions that did not require him to operate a vehicle. He further testified that, while he hoped he would be able to return to his job as a surface operator for the employer, he was conducting work search activities on a daily basis because he understood he might not be able to pass the vision test even after undergoing surgery.¹ Given his previous experience in customer service, retail, and hospitality work, we believe that the claimant showed he was capable of, available for, and actively seeking suitable work following his recovery from surgery. *See Consolidated Finding # 13.*

Because the claimant was unable to return to his surface operator position with the employer on December 9, 2021, the employer continued his unpaid leave of absence and placed him in an alternative job search program. Consolidated Finding # 24. The claimant remained capable of,

¹ The employer’s uncontested testimony in this regard is 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).

and available for, full-time work while participating in this program. Consolidated Finding # 26. As he continued to conduct independent work search activities daily, we do not believe the claimant's unemployment status changed during this period. See Consolidated Finding # 29.

The claimant began new full-time employment with another employer on January 3, 2022. Consolidated Finding # 31. Accordingly, he cannot have been in unemployment beginning the week of January 2, 2022.

We, therefore, conclude as a matter of law that the claimant was in total unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), from November 7, 2021, through January 1, 2022.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the period between October 17, 2021, and November 6, 2021. He is entitled to receive benefits from November 7, 2021, through January 1, 2022, if otherwise eligible. The claimant is not entitled to benefits beginning January 2, 2022.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September [19, 2022]



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

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

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.

LSW/rh