

The review examiner committed error by ignoring the claimant's undisputed testimony about her capability and availability to perform work other than her usual work as a massage therapist. Instead, his finding that the claimant was unable and unavailable for any type of work during her leave of absence is based exclusively on a physician statement, which merely indicated that she could not return to her prior work. Because it is unsupported by substantial evidence, held the claimant is eligible for benefits under G.L. c. 151A, §§ 29 and 1(r).

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

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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 was on a leave of absence from her position with the employer from June 6, 2021, through January 27, 2022. In connection with a previously filed claim, the DUA denied unemployment benefits beginning June 6, 2021, in a determination issued on February 5, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner modified the agency's initial determination and denied benefits from June 6, 2021, through January 27, 2022, in a decision rendered on June 7, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was neither in total nor partial unemployment and, thus, was disqualified under G.L. c. 151A, §§ 29 and 1(r). Our decision is based upon a review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was not able or available for any type of work while on her leave of absence, 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. From August 28, 2013, until June 5, 2021, the claimant worked for the employer, a massage spa, as a full-time (40 hours weekly) massage therapist.

2. The claimant's most recent and direct supervisor was the employer's general manager (GM).
3. The claimant's duties as massage therapist required extensive usage of her hands.
4. The claimant was diagnosed with carpal tunnel syndrome for both hands in 2018. The claimant had difficulty using her hands, as a result of having carpal tunnel.
5. The claimant did not "take care" of her carpal tunnel "properly" and continued to have issues with her hands, due to the carpal tunnel.
6. On March 21, 2021, the claimant filed a claim for unemployment benefits with the Department of Unemployment Assistance, with an effective date of March 21, 2021.
7. By June 5, 2021, the claimant's carpal tunnel had worsened her condition with her hands.
8. The claimant's last physical day at work with the employer was June 5, 2021.
9. The claimant decided to leave her employment with the employer, due to the carpal tunnel syndrome for both of her hands.
10. On June 5, 2021, the claimant requested a medical leave of absence from the manager, effective immediately. The manager approved the request.
11. On June 6, the claimant began her medical leave of absence as a result of her carpal tunnel syndrome of both hands.
12. The claimant's leave of absence was unpaid.
13. On June 7, 2021, the claimant's physician (physician) stated in a certificate of school or work (certificate), that the claimant was seen on that day by the physician and that she was "unable to work". The physician stated that the claimant would be re-evaluated on June 22, 2021.
14. On June 22, 2021, in a certificate by the physician, the physician stated that the claimant was seen on June 22, 2021, and that the claimant was "unable to work" due to "pending MRI results".
15. From June 6, 2021, to January 27, 2022, the claimant was unable to work due to her carpal tunnel.
16. From June 6, 2021, to January 27, 2022, the claimant was unavailable to work due to her carpal tunnel.

17. The claimant has no work experience with remote work and would not be available or able to work remotely, due to her hand injury.
18. On January 27, 2022, the claimant quit her employment with the employer, due to new work.
19. As of the hearing date, June 6, 2022, the claimant has not been officially cleared to return to work by any medical professional.
20. Since June 5, 2021, the employer has had work available to the claimant.

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 conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. We accept Findings of Fact ## 15–16, only insofar as they refer to the claimant's inability and unavailability to perform massage work. We reject Finding of Fact # 17, as it is unsupported by the evidence in the 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 is ineligible for benefits.

G.L. c. 151A, § 29, authorizes benefits to 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. . . .

Since the claimant did not work at all during her leave of absence, the issue before us is whether she was in total unemployment within the meaning of G.L. c. 151A, § 1(r)(2). The review examiner disqualified the claimant from receiving benefits on the ground that she was not capable and available for work while on her leave. We do not believe the record supports this conclusion.

Specifically, Findings of Fact ## 15 and 16, as written, indicate that, during her leave of absence, the claimant was not capable of, or available for, any type of work. In our view, this sweeping generalization is unsupported by the record.

In rendering these findings, the review examiner ignores the claimant's repeated testimony that she was able and available for work other than massage work throughout her leave of absence, including that she briefly accepted a position in a clothing store and ultimately found a job bagging groceries. Instead, he relies exclusively upon the June 7 and June 22, 2021, medical certificates. See Findings of Fact ## 13 and 14. However, a close look at these physician's certificates, entered as Exhibits 3–5, show that a hand surgeon circled the words “unable” and “work” within a phrase that states, “unable/able to return to school/work/gym,” with few accompanying remarks.¹ It is apparent that the review examiner overlooked the portion of this phrase referring to *returning* to work.²

Moreover, there is nothing in the record to support Finding of Fact # 17, which provides that the claimant had no remote work experience and would not have been available or able to work remotely due to her hand injury during her leave of absence. During the hearing, the review examiner merely asked the claimant whether *the employer* had remote work for her, to which she responded that they do not have any massage remote work. The review examiner did not ask whether she had ever worked remotely in the past or whether she was able and available to perform any other type of remote work during her leave.

In short, the review examiner's conclusion that the claimant had been unable and unavailable for work during her leave of absence is not supported by substantial evidence.

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), during her leave of absence.

¹ Exhibit 3 is a physician's certificate from June 7, 2021. Exhibits 4–5 are a physician's certificate from June 22, 2021. The language of these exhibits, as well as the portions of the claimant's testimony referenced in this decision, are not explicitly incorporated into the review examiner's findings. However, they are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

² He also disregarded claimant testimony about conversations that she had with her physician, who said that the way the claimant's hands were, she could not do massage work anymore.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the period June 6, 2021, through the week ending January 29, 2022, if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 26, 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.

AB/rh