

While on a leave of absence from her in-person retail job, the claimant remained available for full-time remote work. Where the employer testified that it did not have remote work to offer the claimant, the review examiner erred in denying benefits on the ground that the claimant did not request any remote work. Held the claimant was in total unemployment during her leave pursuant to G.L. c. 151A, §§ 29 and 1(r).

**Board of Review
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Issue ID: 0075 7516 98

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 on March 1, 2022. She filed a claim for unemployment benefits with the DUA, effective March 6, 2022, which was denied in a determination issued on March 28, 2022. 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 initial determination and denied benefits in a decision rendered on August 6, 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, she was disqualified under G.L. c. 151A, §§ 29 and 1(r). 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 claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was ineligible for benefits during her leave of absence because she did not ask her employer for remote work, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

The review examiner's findings of fact and credibility assessment are set forth below in their entirety:

1. The claimant began working full time as a cashier for the employer, a retailer, on August 24, 2011.
2. The claimant's job duties required in person work.

3. The employer did not have remote work available for the claimant.
4. At an unknown date, the claimant's husband suffered two strokes and was diagnosed with terminal liver cancer.
5. On February 4, 2022, the claimant began an intermittent leave of absence to provide care for her husband.
6. On February 6, 2022, the claimant returned to work intermittently.
7. On February 27, 2022, the claimant worked her last physical day for the employer.
8. On March 1, 2022, the claimant began a leave of absence to provide care for her husband. The leave of absence was unpaid. The claimant was scheduled to return to work on August 1, 2022.
9. At an unknown date, the claimant's leave was extended to September 1, 2022.
10. The claimant's husband was scheduled to have surgery on July 28, 2022. The husband was expected to be bedridden for approximately two more weeks.
11. During the claimant's leave, she was not available for in person work because she was providing care for her husband.
12. At an unknown date, the claimant determined that she could be available for remote work.
13. The claimant did not request remote work from the employer.

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. To the extent Finding of Fact # 12 suggests that the claimant was not available for remote work throughout her leave of absence, we decline any such inference. 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 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).

Although the claimant’s job remained available to her, she took the leave of absence because the need to care for her husband rendered her unable to perform her in-person job duties. *See Findings of Fact ## 2, 8, and 11.* Her regular job had become unsuitable. The question before us is whether she nonetheless remained capable of and available for other suitable work while on this leave.

In his decision, the review examiner states, “Although the claimant contended that she could have worked remotely, the claimant admitted that she did not request remote work from the employer. Therefore, she was not available for work and cannot be considered to be in total unemployment under Section 29(a) of the Law.” He reaches this conclusion, even though the employer’s witness testified that the employer did not have remote work available for the claimant. Finding of Fact # 3. We decline to penalize a claimant for failing to go through the futile exercise of asking for remote work, where no such work is available.

During the hearing, the review examiner asked the claimant if she was both physically capable of and available for remote work during her leave of absence, and she responded that she was.¹ The review examiner asked no further clarifying questions as to whether she had been available to perform remote work from the beginning of her leave of absence. Perhaps, realizing that he had not asked, he entered a finding stating that she became available for remote work *at an unknown date*. *See Finding of Fact # 12.* Since there is nothing in the record to suggest that the claimant was unavailable to work from home at any point during her leave, she may not be disqualified on this basis.

Simply put, the record shows that the claimant was capable of, available for, and actively seeking² full-time remote work during her leave of absence. She has met her burden to show that she was in total unemployment while unavailable to perform her regular in-person job.

¹ 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 Although not in the findings, the claimant also offered undisputed testimony that, during her leave of absence, she had been actively searching for other work.

We, therefore, conclude as a matter of law that the claimant was in total unemployment pursuant to G.L. c. 151A, §§ 29 and 1(r).³

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning March 6, 2022, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 28, 2023



Paul T. Fitzgerald, Esq.
Chairman



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.

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³ Our decision today is in harmony with a hearing decision before a different review examiner in Issue ID # 0075 9992 50, where the claimant was held to be able, available, and actively seeking work pursuant to G.L. c. 151A, § 24(b), during the same time period.