

The claimant had to take a medical leave of absence from her job. She demonstrated that after the first week of her claim, she was capable of, available for, and actively seeking other, more sedentary part-time work, which she could perform given her medical condition. Pursuant to G.L. c. 151A, §§ 29 and 1(r), and 430 CMR 4.45(3), she was then eligible for benefits.

**Board of Review
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Issue ID: 0076 7428 78

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 took a leave of absence from the employer on April 15, 2022. She filed a claim for unemployment benefits with the DUA effective on May 8, 2022. On May 27, 2022, the agency issued a determination denying benefits. 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 31, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment while on a leave of absence and, thus, was disqualified under G.L. c. 151A, §§ 29(a) 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 pertaining to the claimant's availability and employment status. Both parties 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 was not in unemployment while on a leave of absence, is supported by substantial and credible evidence and is free from error of law, where it was found after remand that the claimant had become available for other work or light duty work.

Findings of Fact

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

1. The claimant worked part-time as a crew member for the employer, a food and beverage coffee house, from 11/1/21 to 4/15/22.

2. On 4/15/22, the claimant was experiencing chest tightness and called her mother at 9:00 a.m. to bring her to the emergency room.
3. The claimant went into cardiac arrest and her heart stopped three times.
4. The claimant's mother notified the employer the claimant would need to be out of work for an indefinite period.
5. The claimant was hospitalized for five days.
6. The employer indicated the claimant could return to work when she was able.
7. The claimant requested benefits for the weeks ending 5/14/22 and 5/21/22 and indicated she was not capable or available for work but was keeping in touch with her supervisor at the coffee shop.
8. The claimant was evaluated by her physician on 5/18/22 and was told that she would not be able to return to her position at the coffee house but may be able to do some other part-time work.
9. The claimant began to look for other part-time (up to 20 hours) work, such as receptionist and other office jobs.
10. The physician indicated they would reevaluate on 6/27/22.
11. The claimant was evaluated by her physician on 6/3/22 and was released to return to work with restrictions, for up to 25 hours, on 6/6/22. The restrictions included taking frequent breaks to sit down and to go slow and take her time.
12. Health issues were the only thing preventing the claimant from working full-time.
13. The claimant called the employer on 6/7/22, indicating she was ready to return to work.
14. The employer's work environment is very fast paced and required crew members to be on their feet at all times.
15. There was no light duty work available.
16. The supervisor agreed to put the claimant on the schedule for June 9th, but the claimant had a doctor's appointment that day.
17. The claimant sent her supervisor a list of her medical appointments.
18. The claimant shared her medical restrictions with the employer.

19. The claimant was unable to do the job without restrictions.
20. The claimant was told her job was waiting for her when she was able to return.
21. The claimant did not hear from the employer after 6/9/22.
22. The claimant did not contact the employer after 6/9/22.
23. The employer was waiting for clearance without restrictions.
24. The employer left the claimant on the employee roster for months.
25. The claimant is still unable to perform the coffee house job without restrictions.
26. The claimant was not able to work full-time due to her health issues and doctor's appointments.
27. The claimant was seeking part-time work.
28. The claimant was cleared to return to work with self-limited activities and accommodations on 10/12/2022.

Credibility Assessment:

There appeared to be some confusion between the claimant and the employer about whether she could return to her part-time job with accommodations in June, 2022. The employer was holding her job until she was able to resume her regular duties. The claimant was waiting for the employer to put her on the schedule but at no point was she able to perform the duties of the job. Otherwise, the testimony of both the claimant and the employer witness during both hearings was largely free of disagreement or conflict with regard to the fact that both parties initially agreed the claimant was on a leave of absence for health reasons. The claimant continuously reported that she was only able to work part-time, but after being disqualified, alleged she had been released by her doctor to work full-time in September, 2022 and had documentation to confirm this. However, the letters she submitted from her physician do not state she can return to work full-time, only that she is cleared to work with restrictions, and are dated in October, 2022, just after the remand hearing.

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. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. We further believe that the

review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was not in employment after the first week of her claim.

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

(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. . . .

The claimant took a leave of absence from the instant employer on April 15, 2022, after suffering a cardiac arrest. *See Consolidated Findings ## 2–6.* The claimant was later diagnosed with postural orthostatic tachycardia syndrome. *See Remand Exhibit # 7* (medical letter dated October 11, 2022). Prior to May 18, 2022, the claimant was unable to perform any type of work, but, on this date, her medical provider cleared her to perform part-time work that would allow her to sit, such as employment in an office setting. *See Consolidated Finding # 8 and Remand Exhibit # 5* (healthcare provider's statement of capability dated May 18, 2022). The claimant's medical condition, however, prevented her from working at the instant employer's fast-paced coffee house, as she was experiencing symptoms such as shortness of breath and difficulty with her balance. *See Consolidated Findings ## 8 and 14, and Remand Exhibit # 5* (healthcare provider's statement of capability dated May 18, 2022).¹

An employee is not disqualified from receiving benefits if she is temporarily disabled from doing the employer's work, while capable of and available to do other work and making serious efforts to find other work. *See Dir. of Division of Employment Security v. Fitzgerald*, 382 Mass. 159, 163–164 (1980). Because the claimant was incapable of working at all prior to May 18, 2022, we agree that she was not in unemployment and she is not eligible for benefits during the first week of her claim, the week beginning May 8, 2022.

However, the record indicates that the claimant was cleared to perform other, more sedentary work on a part-time basis as of May 18th, and she began to search for such work. *See Consolidated Findings ## 8 and 9; see also Remand Exhibit 5.* The statutory language in G.L. c. 151A, §§ 29 and 1(r), provides for the payment of benefits only to those who are unable to secure a full-time

¹ While not explicitly incorporated into the review examiner's findings, Remand Exhibits 5 and 7 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).

weekly schedule of work. However, there are a limited number of circumstances, set forth under the DUA regulations at 430 CMR 4.45, that permit a claimant to restrict her availability to part-time work. In relevant part, these regulations state as follows:

(3) . . . [A]n otherwise eligible individual . . . may limit his/her availability for work during the benefit year to part-time employment provided, that the individual is:

- (a) a qualified individual with a disability;
- (b) provides documentation to the satisfaction of the commissioner substantiating an inability to work full-time because of such disability; and
- (c) establishes to the satisfaction of the commissioner that such limitation does not effectively remove himself/herself from the labor force.

Here, the claimant has presented medical documentation, which confirms that her medical condition affected her major life activity of working. *See, e.g.*, Remand Exhibit 5. Despite her medical condition, the findings indicate that as of the week beginning May 15, 2022, she was both capable of and available for part-time work that allowed her to sit down while she worked. *See Consolidated Findings ## 8, 9, 11–13, and 26–28.* Thus, she had not removed herself from the labor force.

We, therefore, conclude as a matter of law that the claimant was not in unemployment within the meaning of G.L. c. 151A, §§ 29(a) and 1(r), during the first week of her claim. We further conclude that she was in total unemployment within the meaning of G.L. c. 151A, §§ 29(a) and 1(r), and 430 CMR 4.45(3), thereafter.

The review examiner’s decision is affirmed in part and reversed in part. The claimant is denied benefits for the week beginning May 8, 2022. However, she is entitled to receive benefits as of the week beginning May 15, 2022, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 8, 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.

SVL/rh