

**While on a leave of absence from his driving job, the claimant remained available for other, sedentary work and actively sought such work. Held the claimant was in total unemployment during the portion of his leave that he was available for other work pursuant to G.L. c. 151A, §§ 29 and 1(r).**

**Board of Review  
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**Issue ID: 334-FHJ5-PP34**

### 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 resigned from his position with the employer on January 7, 2025. He had previously filed a claim for unemployment benefits with the DUA while on a leave of absence. That claim was effective on December 8, 2024, and was denied in a determination issued on January 8, 2025. 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 February 7, 2025. 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 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 employment status and capability. After the claimant missed the first scheduled remand hearing, both parties attended a subsequent 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 medical leave of absence, is supported by substantial and credible evidence and is free from error of law where, after remand, the review examiner found that the claimant was capable of performing work other than his usual duties for the employer and was searching for such work.

### Findings of Fact

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

1. The claimant filed a claim for unemployment benefits on December 10, 2024, with an effective date of December 8, 2024.
2. The claimant last worked part-time, up to 24 hours per week, as a driver for the employer, a meal delivery service to the elderly, from April 12, 2022, until January 7, 2025.
3. The claimant had an assigned route that took 4 hours per day to complete.
4. The claimant last worked for the employer on June 7, 2024.
5. The claimant began a leave of absence under Paid Family Medical Leave (PFML) on June 10, 2024.
6. The claimant's PFML was extended from August 1, 2024, to January 1, 2025.
7. The employer held the claimant's driving route for him until he returned from leave.
8. As of December 8, 2024, the effective date of the claim, the claimant believes he could work up to 4 hours per day in an office setting.
9. The claimant did not inform the employer that he could perform work other than driving as of December 8, 2024, or at any other time.
10. The claimant did not inquire, nor did the employer inform the claimant, whether other jobs were available.
11. The claimant is 73 years old and has been diagnosed with the onset of Parkinson's Disease and diabetes.
12. The claimant's doctor has instructed the claimant that he cannot drive.
13. The claimant believes he could still drive if someone else was in the car with him.
14. The employer does not allow anyone to ride with its drivers for liability reasons.
15. The claimant cannot stand on his feet for more than 4 hours due to neuropathy in his feet.
16. On December 26, 2024, the claimant called the employer's human resources representative (HR) and told HR that he was not sure if he was returning to work on January 1, 2025, because he wanted to work fewer hours and that he would follow up after he visited with his doctor on January 4, 2025.

17. The claimant could have returned to work prior to January 1, 2025, if the position did not include driving.
18. HR told the claimant his job was available to him and also suggested the claimant work as a substitute driver which would allow the claimant to work less hours because there were shorter routes.
19. Hours for substitute drivers are not guaranteed and can be as little as zero hours per week.
20. On January 4, 2025, the claimant's doctor cleared the claimant to return to work with the restriction that he does not operate a vehicle.
21. On January 4, 2025, the claimant spoke with HR and told HR he could not drive and was not returning to work.
22. On January 7, 2025, the claimant submitted his resignation to HR via email with an effective date of January 1, 2025.
23. On January 14, 2025, the claimant contacted HR and stated he wanted to return to work as a driver because his UI claim had been denied, but he could not work 4 hours per day.
24. HR told the claimant he had quit and offered him the substitute driver position because there were no other routes available.
25. HR also told the claimant the employer required a doctor's note for the claimant to return to work.
26. The claimant declined to work as a substitute driver.
27. On January 15, 2025, HR sent a request to the claimant's doctor for a status of his capability assessment to return to work.
28. On January 15, 2025, the employer sent the claimant an acceptance of resignation letter stating that because he had quit his employment, if he were to return, he would have to reapply as a new employee.
29. On January 30, 2025, the claimant's doctor sent back the employer's request for a capability assessment. The doctor listed the actions the claimant could not perform pending a neurology appointment in February as being: no driving, no repetitive body motions, no lifting, no climbing stairs, no extended periods of sitting or standing, and no reaching below knee level.
30. The claimant does not have limitations on the hours he can work.

31. Since December 8, 2024, the claimant has performed at least three work-search activities each week.
32. Since December 8, 2024, the claimant has sought part-time work in data entry or in a help desk position but would consider full-time work in a sitting position.
33. Since December 8, 2024, the claimant has been available for positions other than remote work but cannot work in retail due to the requirement that he be on his feet.
34. The claimant has a bachelor's degree in management and associate's degrees in computer science and liberal arts.

### 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 the portion of Consolidated Finding # 6, which states that the claimant's PFML was extended to January 1, 2025, to the extent that it indicates that the claimant continued to be paid through January 1<sup>st</sup>. The claimant testified during the initial hearing that his payments ceased in November, 2024, although his leave continued through January 1, 2025.<sup>1</sup> 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 original legal conclusion that the claimant is not eligible 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 his leave of absence, the issue before us is whether he was in total unemployment within the meaning of G.L. c. 151A, § 1(r)(2).

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<sup>1</sup> 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).

Although the claimant's job as a driver remained available to him, he took a leave of absence because his medical condition rendered him unable to perform his driving duties. Consolidated Findings ## 2, and 5–6. Thus, his regular job had become unsuitable. The question before us is whether he nonetheless remained capable of and available for other suitable work while on this leave.

An employee is not disqualified from receiving benefits if he 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. Dir. of Division of Employment Security v. Fitzgerald, 382 Mass. 159, 163–164 (1980) (welder who was medically unable to perform her welding duties because of pregnancy was nevertheless in unemployment and eligible for benefits while on maternity leave, because there were other light duty jobs that she was capable of performing and she actively sought work); *see, also*, Evancho v. Dir. of Division of Employment Security, 375 Mass. 280, 282–283 (1978) (claimants have the burden to show that their continued unemployment is not due to their own lack of diligence) (citations omitted).

Here, the review examiner found that, as of the effective date of the claim, December 8, 2024, the claimant was capable of performing work other than driving. Specifically, the record indicates that the claimant is capable of performing other types of work in an office setting. *See* Consolidated Findings ## 8 and 32. Although the claimant did not ask the employer for other work, the employer's witness testified during the remand hearing that she “tend[s] to think” that the employer did not have any other work. *See* Consolidated Finding # 10. We will not penalize the claimant for failing to go through the futile exercise of asking for other work, where it is unlikely that such work was available.

The review examiner further found that, as of December 8, 2024, the claimant was looking for employment and performing at least three work-search activities per week. Consolidated Finding # 31. Thus, the consolidated findings show that the claimant was capable of, available for, and actively seeking both part-time and full-time work during a portion of his leave of absence — the period of December 8, 2024, through January 7, 2025, when the claimant resigned from his employment. Consolidated Findings ## 22 and 32. The claimant has met his burden to show that he was in total unemployment while unavailable to perform his regular driving job.

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).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning December 8, 2024, and for subsequent weeks if otherwise eligible. We note that the claimant's eligibility for benefits after his separation from the employer on January 7, 2025, will be determined separately.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - May 22, 2025**



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](http://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