

Very early in the pandemic, COVID-19 tests were unavailable, the claimant got sick with Coronavirus symptoms, and he self-quarantined per his employer’s protocol. When he felt better, he chose not to return to the same assignment working at large retail stores where personal protective equipment was not yet required. He reasonably believed the assignment would be a risk to his personal health. Board held that, under these circumstances, the claimant met the PUA eligibility criteria under the CARES Act, § 2102(a)(3)(A)(ii)(I)(ee).

**Board of Review
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Issue ID: N6-FL5T-RFNR

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 Pandemic Unemployment Assistance (PUA) benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and we reverse.

The claimant filed a claim for PUA benefits with the DUA, effective May 22, 2020, which was denied in a determination issued on October 2, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, the review examiner affirmed the agency’s initial determination and denied PUA benefits in a decision rendered on February 1, 2021. We accepted the claimant’s application for review.

Benefits were denied after the review examiner determined that the claimant had failed to establish that he was unemployed for a COVID-19 listed reason under the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, and, thus, the claimant was not eligible for PUA benefits. 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 about the reason the claimant declined work. The claimant 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 unemployed for an approved COVID-19 reason when he declined to return to his job in March, 2020, 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 and credibility assessment are set forth below in their entirety:

1. The claimant filed a claim for Pandemic Unemployment Assistance (PUA) which was determined to be effective March 22, 2020.
2. The claimant has a mailing address in Michigan and home address in Massachusetts.
3. On October 1, 2020, the claimant was issued a Notice of Non-Monetary Issue Determination (COVID-19 Eligibility). The notice states that beginning the week ending February 8, 2020, the claimant did not meet the eligibility requirements to qualify for benefits under the PUA program because he failed to provide the proper documentation by the due date.
4. Since August 2019, the claimant ha[d] been employed as a traveling retail merchandiser, working at different retail locations in Massachusetts. The claimant's job duty was stocking books at the books department during store hours.
5. In early March 2020, the claimant began experiencing COVID-19 symptoms including fever, body aches, shortness of breath, and pain in his lungs.
6. The claimant was not diagnosed or tested for COVID-19, because at the time he had COVID-19 symptoms, COVID-19 was a novel virus and tests were not yet available. The claimant did not consult with a health care provider about his symptoms and was not medically advised to quarantine.
7. During this time, the employer's protocol for when an employee experiences COVID-19 symptoms was to stay at home until further notice. The claimant notified his supervisor that he was feeling ill and did not go into work.
8. In early March of 2020, when the claimant was feeling ill, neither the employer nor the retail store locations the claimant worked in had precautionary rules in place for wearing face masks or face coverings.
9. Within a week, the claimant began to feel better and communicated with his supervisor that he had concerns about going into retail stores, where there were a lot of people, and that he [was] unable perform the job that he was hired for due to his fear of contracting the COVID-19 virus. The claimant did not have an underlying medical condition.
10. The claimant did not return to work after mid-March of 2020.
11. On April 2, 2020, the claimant received an email from his employer wishing him luck in his future endeavors, attached with severance information and separation forms.
12. The claimant's last paystub is dated April 3, 2020.

13. The claimant has continued to receive job opportunity emails from the employer. However, the positions were for work in Michigan, because his address with the employer is a Michigan address. The claimant did not apply to any of the job opportunities he received in his emails. The emails were not formal job offers.
14. Later, when the employer started to enforce precautionary rules, such as wearing masks, the claimant tried to go back to his original job in the same regional territory, but the job was already taken by someone else.

Credibility Assessment:

The claimant does not have documentary evidence showing that he was diagnosed with COVID-19 or got tested for COVID-19, because tests were not yet available in March 2020. The claimant credibly testified that although he was never diagnosed with COVID-19, he was certain that he had all the symptoms. The claimant does not remember the exact date when he started to feel ill, but believed it was in early or mid-March of 2020.

The claimant credibly testified that he did not formally quit his job but that he never returned to work after recovering from the symptoms. Although the claimant did not testify to having any underlying medical conditions, he was too scared to go into work, knowing what it feels like to have COVID-19 from the symptoms he experienced, and that going back to the same job and duties meant putting his health at risk.

As to his employment status after mid-March of 2020, the claimant testified that receiving the severance letter was, in his own words, a “soft lay-off” and that he was on “inactive status,” because he was still allowed to apply for different positions. The actual status of the claimant’s employment at the company after the severance email is unknown. The claimant offered evidence of receiving emails from the employer after the severance email. The emails were to inform the claimant of different positions that were available within the company, which the claimant did not apply for, because they were only available in Michigan. The claimant was never officially offered another position by 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 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 except to note that the record does not support the portion of Consolidated Finding # 9, which provides that the claimant felt better within a week, as discussed below. In adopting the remaining findings, we deem 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, based upon the consolidated findings, we disagree with the review

examiner's legal conclusion that the claimant did not have an approved COVID-19 reason for applying for PUA benefits.

The claimant in this case seeks PUA benefits, a new unemployment benefit program provided under § 2102 of the CARES Act of 2020 and administered by the U.S. Secretary of Labor.¹ DUA records show that he filed his claim on May 5, 2020, and the DUA made his effective date retroactive to March 22, 2020.

In order to qualify for PUA benefits, the claimant must show that he is a covered individual within the meaning of the CARES Act. Among the criteria for eligibility is that an individual is unable to reach his place of employment because of a quarantine imposed as a direct result of the COVID-19 health emergency. CARES Act, § 2102(a)(3)(A)(ii)(I)(ee). The U.S. Department of Labor (DOL) has stated that § 2102(a)(3)(A)(ii)(I)(ee) applies to an individual who is following a stay-at-home order that requires the person to quarantine in order to reduce the spread of COVID-19.²

In her original decision, the review examiner rightfully concluded that an individual who does not accept work due only to general concerns about COVID-19 exposure, who has not been advised by a health care provider to self-quarantine, and who does not meet any of the other COVID-19 listed criteria is not PUA eligible.³ In this case, however, the claimant has demonstrated more than a generalized fear of COVID-19 exposure.

In the present case, the consolidated findings show that after experiencing significant COVID-19 symptoms of fever, body aches, shortness of breath, and pain in his lungs in early March, 2020, the claimant stopped working, as required by his employer's protocol. *See* Consolidated Findings ## 5–7. Although Consolidated Finding # 9 indicates that the claimant felt better within a week, the claimant actually testified that he felt symptoms for about a week, then came off of them slowly. During the initial hearing, there was also a discussion between the claimant and the review examiner indicating that the claimant was in quarantine for 14 days. This suggests that it took longer than a week before the claimant was able to perform work.⁴ Since the claimant was not working because he was ill and following his employer's stay-at-home protocol, he met the CARES Act and DOL criteria as an individual who was unable to work for the listed COVID-19 reason under § 2102(a)(3)(A)(ii)(I)(ee).

At some point toward the latter part of March when he felt better, the claimant asked to return to work at a different assignment, which did not involve going into retail stores. He felt that his usual assignment put him at a substantial risk to his health, because his usual work duties required him to be exposed to hundreds of people inside large retail stores, there was little personal protective equipment being used at the time, people were walking around without masks, and he was afraid of catching the virus again. However, the employer did not offer anything within commuting

¹ Pub. L. 116-136 (Mar. 27, 2020), § 2102.

² *See* DOL Unemployment Insurance Program Letter (UIPL) 16-20, Change 1 (Apr. 27, 2020), Attachment I, question 40, p. I-10.

³ *See* UIPL 16-20, Change 1, Attachment I, F, question 41, p. I-10.

⁴ While not explicitly incorporated into the review examiner's findings, this testimony 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).

distance and severed the claimant's employment on or before April 2, 2020. *See Consolidated Findings ## 9–11.*⁵

The DOL has stated, "If an individual receiving PUA is offered and refuses work that unreasonably exposes him or her to COVID-19, the state may conclude that the work is not suitable."⁶ The DUA, in response to the public health emergency posed by the COVID-19 pandemic and as authorized by the federal government, has temporarily adopted the following definition of suitable work.⁷

Employment is not suitable if:

- It poses a substantial risk to the claimant's health or safety, or
- the individual's health or safety would be compromised due to an underlying medical or other condition if the claimant accepted employment, or
- the claimant has a reasonable belief that one of the above factors applies.

To be sure, the record would be stronger if the claimant had presented a positive COVID-19 test or a document from a medical provider that instructed him to avoid returning to his usual work duties. However, the claimant does not have such evidence because, at that time, COVID-19 tests were not available and he did not consult with a medical provider when he got sick. *See Consolidated Finding # 6.* It is important to note that, during these early days of the pandemic, DUA seemed to recognize the difficulty of presenting medical evidence. In UIPP 2020.05, issued on March 13, 2020, the DUA issued the following guidance concerning claimants who separated from employment due to COVID-19:

If an individual has left work due to a reasonable risk of exposure or infection (*i.e.* self-quarantine) . . . *no medical documentation will be required.* The claimant must establish only that his or her actions were reasonable under the circumstances.

(Emphasis in the original.)

The record shows that the claimant was recovering from what appeared to be a brief, but difficult bout with the Coronavirus. He did not want to return to his usual work assignment because he believed that it exposed him to re-infection and that he could get sick again. At the time, his employer was not yet enforcing what has since become standard public health measures like wearing masks. *See Consolidated Finding # 14.*⁸ Under these circumstances, we think that the claimant's actions were reasonable.

In sum, the claimant stopped working due to being sick with COVID-19 symptoms, remained out pursuant to his employer's protocol to self-quarantine, and then reasonably declined to return to his usual assignment. We, therefore, conclude as a matter of law that the claimant has met the

⁵ This testimony is also part of the unchallenged evidence in the record.

⁶ *See* UIPL 16-20, Change 2 (July 21, 2020), Attachment I, question 16, p. I-7.

⁷ *See* DUA Unemployment Insurance Policy and Performance Memorandum (UIPP) 2020.14 (Nov. 25, 2021).

⁸ *See also* Governor's Further Revised Order Regarding Face Coverings, COVID-19 Order No. 67 (Apr. 30, 2021), discussing the Federal Centers for Disease Control and Massachusetts Department of Public Health advisories to wear face coverings outside the home in order to prevent transmission of the highly contagious 2019 novel Coronavirus.

criteria for an individual who became unemployed within the meaning of CARES Act § 2102(a)(3)(A)(ii)(I)(ee).

The review examiner's decision is reversed. The claimant is entitled to receive PUA benefits for the week beginning March 22, 2020, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 9, 2021



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