Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by J. I. Cofer, a review examiner of the Department of Unemployment Assistance (DUA), to award unemployment benefits to the claimant. Benefits were granted on the ground that the claimant left work for urgent, compelling, and necessitous reasons pursuant to G.L. c. 151A, § 25(e).

The claimant had filed a claim for unemployment benefits, which was denied in a determination issued by the agency on July 6, 2012. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner reversed the agency's initial determination in a decision rendered on October 31, 2012. The employer sought review by the Board, which denied the appeal, and the employer appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On December 18, 2013, the District Court remanded the case to the DUA for additional findings of fact and conclusions of law based upon the existing record or after taking any necessary additional evidence. The Court set forth seven specific questions regarding the availability of additional leave from work. Consistent with this order, we reviewed the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal. We rendered further findings of fact from the existing record, and we afforded the parties an opportunity to submit written comments to the Board as to whether, under the facts as found, the claimant's failure to apply for further unpaid leave was reasonable. Both parties and the DUA responded.[1]

The issue before the Board is whether the review examiner's conclusion that the claimant left work under urgent, compelling, and necessitous circumstances, within the meaning of G.L. c. 151A, § 25(e), after having made sufficient efforts to preserve his employment prior to his separation is supported by substantial and credible evidence and free from error of law.

After reviewing the entire record, including all of the parties' written comments filed with the Board,[2] we affirm the review examiner's decision.

[1] The employer's responses was sent via U.S. Mail and received on February 27, 2014. Responses from the claimant and the DUA were hand-delivered to the Board on February 28, 2014.

[2] Although submitted after the Board's deadline for written comments, we have considered the issues raised in two additional letters from the employer, dated March 3 and 5, 2014.

Findings of Fact

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

1. The employer is a town. The claimant worked as a police sergeant for the employer. The claimant began work for the employer on 4/10/83. The claimant last performed work for the employer on 12/03/09.

2. The claimant ceased work for the employer because he remained physically unable to return to work after leave.

3. The claimant worked full-time for the employer. The claimant belonged to a labor union.

4. The claimant sustained an injury to his foot on 12/03/09. The claimant sustained this injury while on duty.

5. The claimant underwent surgery on his injured foot in March 2010.

6. The claimant underwent physical therapy after his surgery. The claimant's pain persisted and became worse. The claimant's doctor ordered a second opinion. The second doctor determined that the claimant required a second surgery. The claimant underwent a second surgery on 3/29/11. Doctors reconstructed the claimant's foot. The claimant underwent physical therapy after the second surgery. He experienced problems with balance and foot strength.

7. The claimant remained away from work from [sic] IOD leave ("injured on duty" leave) [] from 12/04/09 until November 2011. The employer requested an independent medical evaluation in November 2011. A doctor determined that the 12/03/09 incident no longer contributed to any persistent foot problem that the claimant experienced in November 2011.

8. The claimant grieved the employer's decision to end his IOD leave. This dispute is not resolved as of 9/21/12.

9. The employer told the claimant in November 2011 that it will not offer him light duty.

10. The claimant used his accumulated sick and vacation time after the employer ended his IOD leave. He then used donated sick bank time. The employer then offered the claimant FMLA leave.

11. The claimant remained away from work on FMLA leave from 12/12/11 until 3/03/12. The claimant visited his doctor regularly in this period.

12. The claimant visited his doctor on 2/13/12. The doctor prepared a certain note on 2/13/12. The note indicates that the claimant experienced "minor improvements since last visit. Still unable to perform police work."

13. The claimant sent a medical update to the employer on 2/13/12. The claimant sent this update via e-mail. The claimant indicated in the e-mail that he remains unable to return to work and that "it is unrealistic to believe that I will be able to return to work without limits and injury-free before expiration of my FMLA time (3/05/12)."

14. The claimant remained physically unable to return to his full police officer duties on 3/04/12.

15. The employer expected the claimant to return to work on 3/04/12. The claimant did not return to work on 3/04/12. The claimant did not return to work after 3/03/12.

16. The employer did not offer the claimant light duty for his anticipated March 2012 return. The employer did not maintain any light duty roles in March 2012.

17. The employer's human resources director sent a letter to the claimant. This letter is dated 3/08/12. The letter indicates that the claimant's leave expired on 3/03/12. The letter indicates "Having not returned to work, you are considered to have vacated your position and are hereby terminated from [the employer's] employ effective March 4, 2012." The employer sent a pre-drafted resignation letter to the claimant with the 3/08/12 letter. The employer wrote this letter. The employer anticipated that the claimant might sign this letter to elect resignation rather than discharge.

18. The claimant sent a letter to the employer. This letter is dated 3/09/12. This letter responds to the employer's 3/08/12 letter. The claimant's letter indicates that "I am in receipt of a registered letter sent by [the employer's human resources director] dated March 8, 2012 specifically advising me that my employment has been terminated by [the employer] effective March 4, 2012. There was an enclosed request that I provide a 'letter of resignation' to your office. Respectfully, there will be no 'letter of resignation' submitted by me to [the employer] or any of its representatives."

19. The claimant's doctor prepared a note dated 4/09/12. This note indicates that "please be advised that [the claimant] has been under my care for a chief complaint of pain in his right foot. He was last seen at my office on February 13, 2012. Patient complains of an inability to run and extreme difficulty walking on uneven surfaces. He described problems with balance, and states that he needs to use a cane. He complains of a limited ability to ambulate due to pain and weakness in his right foot."

20. The claimant filed a claim for unemployment benefits on 3/12/12.

21. The Department disqualified the claimant from receiving benefits, pursuant to Section 25(e)(1) of the law. The Department sent a disqualification notice to the claimant on 7/06/12. The claimant appealed the disqualification.

Based upon the record and in response to questions contained in Exhibit A of the Court's Order, the Board makes these further findings of fact:

22. The claimant was aware that he could have applied to the employer for an unpaid leave of absence for up to six months following the expiration of his FMLA leave.[3] Whether the leave would have been granted was at the employer's discretion and required the approval of the Chief of Police.[4]

23. If the claimant had applied for and been granted an additional leave without pay, and he was still disabled at the end of the additional leave, he would have been terminated.[5]

24. The claimant did not request any further unpaid leave after his FMLA leave expired; because he believed, based upon discussions with his doctor in February, 2012, that, even after additional leave, he would not recover sufficiently to do the kind of police work he had done prior to his injury, and the employer would not have any light duty positions in the foreseeable future.[6]

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we believe the review examiner reached the correct conclusion of law.

The employer challenges the Board of Review's authority to render additional findings and conclusions in lieu of remanding the case for another hearing before the review examiner. To the extent the court's order solicited additional conclusions of law or additional determinations in the nature of mixed fact and law, this is well within the province of the Board of Review. The Board's statutory authority and role within the DUA has long been settled. G.L. c. 151A, § 41(b), grants the Board authority to decide "whether the [review examiner's] decision was founded on the evidence in the record and free from error of law affecting substantial rights." In Dir. of Division of Employment Security v. Fingerman, the Supreme Judicial Court held that the

[3] *See* Exhibit 11.
[4] Testimony of employer's Human Resources Director from the transcript of the Sept. 21, 2012 hearing before Review Examiner Cofer, at page 22 ("Tr. at __.")
[5] Testimony of employer's Human Resource Director, Tr. at 22–23.
[6] Testimony of claimant, Tr. at 24, 32-33; 38; Testimony of Human Resources Director, Tr. at 42; Exhibit 13. This finding has been modified in response to comments submitted by the employer.

Board has primary authority within the DUA to decide questions of law, including mixed questions of fact and law. 378 Mass. 461, 463-464 (1979) ("[a]pplication of law to fact has long been a matter entrusted to the informed judgment of the board of review"). We note, particularly as to this case, that the issue of whether the claimant acted reasonably in deciding that further preservation efforts would be futile is ultimately a question of law. *Cf.*, Ducharme v. Comm'r of Department of Employment and Training, 49 Mass. App. Ct. 206, 208 (2000) (whether employer acted reasonably is an application of law to facts).

The District Court's Order remanded the case "[t]o the Department of Unemployment Assistance, ("DUA") for additional findings and conclusions based upon the record . . . ," and it emphasized that an additional hearing was mandated only if further evidence was necessary to answer the specific questions contained in Exhibit A.[7] Having thoroughly reviewed the existing record, the Board has determined that further evidence is not necessary. The three supplemental findings of fact rendered by the Board respond to the Court's specific factual questions[8], and they are derived solely from the unchallenged evidence contained in the record, as explained in the accompanying footnotes. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); City of Boston v. Downing, 73 Mass. App. Ct. 78, 79-80 (2008); Allen of Michigan, Inc. v. Deputy Dir. of Division of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005). Since questions 6b, c, and 7 require the application of law to facts, the Board responds to these questions in the body of this decision.

The issue in this case is governed by G.L. c. 151A, § 25(e), which provides, in pertinent part, as follows:

> An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

The legal standard for determining whether a claimant's reasons for leaving work are urgent, compelling, and necessitous has been set forth by the Supreme Judicial Court. We must examine the circumstances in each case, and evaluate "the strength and effect of the compulsive pressure of external and objective forces" on the claimant to ascertain whether the claimant "acted reasonably, based on pressing circumstances, in leaving employment." Reep v. Comm'r of Department of Employment and Training, 412 Mass. 845, 848, 851 (1991).

The review examiner found that the claimant separated from the employer on March 4, 2012, because he remained physically unable to perform full police officer duties. This finding is supported by medical evidence, dated February 13, 2012 (Exhibit 14), and by the claimant's detailed testimony in response to the review examiner's inquiry about the reason he could not return to police work at the end of his leave under FMLA. The claimant described his treatment history since his foot injury on December 9, 2009, including two surgeries to relocate a tendon and heel, to fuse bones, insert plates and screws, and two courses of recuperative physical

[7] Court's Decision on [Employer's] Motion for Reconsideration, or in the Alternative, Relief from Judgment, and including Exhibit A, dated December 18, 2013, ("District Court's Order").

[8] Consolidated finding #22 responds to questions 1-4 and consolidated finding #23 responds to questions 5-6a, posed in Exhibit A of the District Court's Order.

therapy.[9] He further explained that when he met with his physician on February 13, 2012, his physical therapist had reported that the claimant had reached a plateau, that it did not appear that more therapy would correct the problem, and that his physician stated that he could not assure the claimant that he could return to performing police work without some kind of prosthetic device.[10] The claimant reasonably interpreted this information as indicating that he could not return to regular police duties in the foreseeable future, if ever.

Personal circumstances, including a claimant's medical condition, may constitute compelling reasons to leave employment. *See* Carney Hospital v. Dir. of Division of Employment Security, 382 Mass. 691 (1981) (rescript opinion) (a recurrent, severe skin infection was an urgent, compelling, and necessitous reason); and Dir. of Division of Employment and Training v. Fitzgerald, 382 Mass. 159 (1980) (pregnant woman could not perform welding work).

The employer correctly points out that the medical documentation in evidence does not state that the claimant was at a medical end point at the time he separated, or that he would not have improved after another six-month period. However, the claimant was required to show only that he acted reasonably based upon all of the circumstances, including reasonable efforts to preserve his employment.

The claimant also made reasonable efforts to preserve his employment. Through his union, he was pursuing a grievance over the employer's decision to terminate his paid IOD leave. He had already taken a three-month unpaid leave of absence and inquired about light duty positions. The employer did not have any light duty assignments either in November, 2011, nor after the claimant's FMLA leave expired in March, 2012. To be sure, the claimant could have requested another unpaid leave of absence, hoping that his foot would heal or that the employer would make light duty work available, but he was not required to do so, especially without any reasonable basis for believing that either hope would materialize. The SJC has rejected the notion that an employee must request a leave of absence in order to be eligible for benefits. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 94 (1984). Moreover, it was not necessary that the claimant show that he had no choice but to leave his job. Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 766 (2006). We also note that, while such a leave of absence was theoretically possible, it was fully discretionary, and nothing in the employer's March 8, 2012 letter of separation suggested that any further leave would be granted.

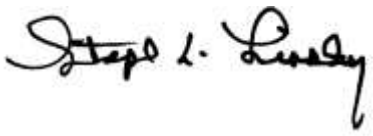
The District Court's Order asks us to decide whether it would have been futile to take further steps to preserve his employment after he received the employer's March 8, 2012 letter. The claimant believed it would have been futile, and in light of the circumstances, his belief was reasonable. The claimant was already grieving the employer's decision to end his paid IOD leave. He had not been able to obtain a light duty assignment. He had just gone through a three-month unpaid leave of absence and did not know if his injury would ever heal sufficiently to return to police work. Since the claimant had run out of options for paid employment or paid leave, we conclude that further preservation efforts would likely have been futile and were not

[9] Testimony of claimant, Tr. at 30–32.
[10] Testimony of claimant, Tr. at 33.

required for purposes of G.L. c. 151A, § 25(e). His decision not to return to police work or to seek additional unpaid leave was reasonable, based upon pressing circumstances.

We, therefore, conclude as a matter of law that the claimant's separation from employment was due to urgent, compelling, and necessitous reasons, within the meaning of G.L. c. 151A, § 25(e).

The review examiner's decision is affirmed. The claimant is entitled to benefits for the week ending March 17, 2012, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION – June 25, 2014

Stephen M. Linsky, Esq.
Member

Judith M. Neumann, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS 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.

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