

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2012).

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1782**

Mary L. Johnson,
Relator,

vs.

Department of Employment and Economic Development,
Respondent.

**Filed May 28, 2013
Affirmed
Halbrooks, Judge**

Department of Employment and Economic Development
File No. 29828075-3

Jasper D. Berg, IAJ Law, LLC, Woodbury, Minnesota (for relator)

Lee B. Nelson, Colleen Timmer, Minnesota Department of Employment and Economic Development, St. Paul, Minnesota (for respondent Department of Employment and Economic Development)

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and Larkin, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Relator challenges the unemployment-law judge's (ULJ) determination that she was ineligible for benefits from July 2011 until conditions changed because she was unavailable for and not actively seeking suitable employment and because she was

retroactively deemed eligible for Social Security disability benefits beginning in January 2012 and did not meet the statutory requirements to simultaneously receive disability and unemployment benefits. Because the ULJ's conclusions are supported by sufficient evidence and because relator's other arguments are not supported by legal argument or authority, we affirm.

FACTS

Relator Mary Johnson worked as a nurse for 34 years until she developed chronic pain in her legs and hips. After being separated from her employment as a full-time registered nurse for Fairview Lakes Regional Healthcare in July 2011, she established a benefits account with respondent Minnesota Department of Employment and Economic Development (DEED) and applied for Social Security disability benefits. The Social Security Administration denied her initial claim, but she prevailed on appeal and was awarded disability benefits retroactive to January 2012.

Johnson learned of this decision in May 2012. She immediately stopped requesting unemployment benefits and notified DEED that she was no longer looking for work. On July 15, 2012, DEED issued a determination of ineligibility on the ground that Johnson was "unwilling or unable to seek or accept gainful employment." It concluded that she had not been eligible for benefits beginning July 11, 2011 "due to her medical condition" and had been overpaid \$24,276.

Johnson appealed, and a telephone hearing was held on July 12, 2012. Johnson initially indicated that she was only appealing the decision that she was ineligible from July 2011 to January 2012, the period in which the Social Security Administration

deemed her to be ineligible for disability benefits. At the suggestion of the ULJ, Johnson also argued that she was eligible for partial unemployment benefits from January 2012 until she stopped receiving benefits. The ULJ ruled that Johnson's exhibits were insufficient to qualify her for benefits, but left the record open so that Johnson could provide additional documentation. In a letter subsequently faxed to the ULJ, Johnson's physician stated that he was aware of the basis for Johnson's disability claim and that she "cannot do any bending turning twisting or walking for any length of time. If she had a job that was mostly sitting, she could work 4 hours daily."

The ULJ determined that Johnson did not meet the statutory requirements to receive partial unemployment benefits for the period that she also received disability benefits. The ULJ determined that the statement provided by Johnson's physician indicated that "[t]he limitations provided for Johnson to be able to work do not support that Johnson could be engaged in gainful employment for which she is qualified by experience or training." The ULJ also determined that "Johnson's ability and availability for suitable employment was no different from July 10, 2011 to January 2012, than after January 1, 2012 [when Johnson was deemed eligible for Social Security disability payments]."

The ULJ further concluded that the evidence did not support Johnson's argument that she had been actively seeking work since July 2011. The ULJ found that Johnson's testimony regarding her work search "was not credible because it was general, vague or non-specific, and not convincing." The ULJ affirmed the \$24,276 overpayment. Johnson filed a request for reconsideration, which was denied. This certiorari appeal follows.

DECISION

The eligibility of an applicant for unemployment benefits is a question of law, which this court reviews de novo. *Ress v. Abbott Nw. Hosp., Inc.*, 448 N.W.2d 519, 523 (Minn. 1989). We may reverse or modify the ULJ's decision if:

[T]he substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:

- (1) in violation of constitutional provisions;
- (2) in excess of the statutory authority or jurisdiction of the department;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) unsupported by substantial evidence in view of the entire record as submitted; or
- (6) arbitrary or capricious.

Minn. Stat. § 268.105, subd. 7(d) (2012). But whether an applicant is available for and actively seeking suitable employment is a factual determination. *Goodman v. Minn. Dep't of Emp't Servs.*, 312 Minn. 551, 553, 255 N.W.2d 222, 223 (1977); *see also* *McNeilly v. Dep't of Emp't & Econ. Dev.*, 778 N.W.2d 707, 711-12 (Minn. App. 2010) (reviewing for substantial evidence).

A reviewing court views the “factual findings in the light most favorable to the decision” and will not disturb the findings if they are substantially sustained by the evidence. *Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). Substantial evidence is “(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” *Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

“Credibility determinations are the exclusive province of the ULJ” and we do not disturb them on appeal. *Bangtson v. Allina Med. Grp.*, 766 N.W.2d 328, 332 (Minn. App. 2009). If the credibility of a witness “has a significant effect on the outcome of a decision,” however, the ULJ must explain her reasons for crediting or discrediting that witness’s testimony. Minn. Stat. § 268.105, subd. 1(c) (2012).

A reviewing court will not reach issues in the absence of adequate briefing. *State Dep’t of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997). An argument is waived if it is based on mere assertion and not supported by argument or authority, unless prejudicial error is obvious on inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997).

I.

Johnson alleges that the ULJ’s decision is unsupported by substantial evidence, in excess of statutory authority or jurisdiction, made upon unlawful procedure, arbitrary and capricious, and effected by other errors of law. She also alleges violations of her constitutional rights, in particular her right to procedural and substantive due process.

Substantial Evidence Supports the ULJ’s Decision

An applicant is eligible to receive unemployment benefits for a given week if she is “available for suitable employment.” Minn. Stat. § 268.085, subd. 1(4) (2012). To be available for suitable employment, an applicant must be “ready, willing, and able to accept suitable employment” and may not place any restrictions “self-imposed or created by circumstances, temporary or permanent, that prevent accepting suitable employment.” *Id.*, subd. 15(a) (2012).

“Suitable employment means employment in the applicant’s labor market area that is reasonably related to the applicant’s qualifications.” Minn. Stat. § 268.035, subd. 23a(a) (2012). An applicant who has restrictions on the hours of the day that he or she can work that are not “normal for the applicant’s usual occupation or other suitable employment” does not meet the requirement of being available for suitable employment. Minn. Stat. § 268.085, subd. 15(d) (2012).

An applicant for unemployment benefits must be determined unavailable for suitable employment for any week in which she receives primary Social Security disability benefits unless they meet one of two exceptions. *Id.*, subd. 4(c) (2012). First, an applicant may receive full unemployment benefits if she received Social Security disability benefits for each month the applicant was employed during the base period. *Id.* Second, an applicant may receive benefits if she can provide “a statement from an appropriate health care professional who is aware of the applicant’s Social Security disability claim and the basis for that claim, certifying that the applicant is available for suitable employment.” *Id.* If only the second exception applies, then the applicant’s weekly unemployment benefits will be reduced by 50% of her weekly Social Security disability benefits. *Id.*

Sufficient evidence exists to support the ULJ’s determination that Johnson was not available for suitable employment beginning June 2011 because she was unable to perform any work for which she was qualified by experience or training. The undisputed evidence shows that Johnson worked as a nurse for 34 years prior to 2011, but, as of at least 2011, was no longer qualified to perform that work due to restrictions caused by her

medical condition. Johnson stated that although she had applied for some nursing jobs, she would probably be unable to do those jobs because “most nursing jobs are at least an eight hour shift and require a lot of physical activity.”

In addition to being unable to work as a nurse, the ULJ determined that the evidence did not support the conclusion that Johnson would be able to engage in other forms of employment for which she was qualified by experience or training. The ULJ found that Johnson’s testimony as to what work she could perform was “not believable” because the few examples provided “show [that] a potential employer would need to make significant accommodations for Johnson’s restrictions.” We will not disturb that credibility determination, and there is nothing else in the record to contradict the ULJ’s conclusion.

Substantial evidence also supports the ULJ’s determination that Johnson failed to meet the requirements to earn either full or partial unemployment benefits while also receiving Social Security disability benefits. There is no dispute that Johnson was not receiving disability benefits during her base period of April 1, 2010 to March 31, 2011, when she was employed full-time as a registered nurse. She filed for disability benefits to begin on July 10, 2011, but was deemed to be eligible effective January 2012. Therefore, she would only qualify for unemployment benefits, less 50% of her weekly disability benefit, for the period beginning January 2012 if she provided “a statement from an appropriate health care professional who is aware of the applicant’s Social Security disability claim and the basis for that claim, certifying that the applicant is available for suitable employment.” *See* Minn. Stat. § 268.085, subd. 4(c)(2).

Johnson submitted two documents from the physician who had treated her for 20 years. The first document stated that Johnson was unable to stand or walk and that this condition had existed since 2011. This fails to satisfy the requirement that the documentation certify that Johnson is available for suitable employment because it indicates that she is restricted from accepting employment related to her qualifications, experience, or training. It also does not reference Johnson's Social Security disability claim. While the second document states that the physician was familiar with Johnson's disability claim, it fails to establish that she was available for suitable employment, stating that she could work four hours a day in a job that was mostly sitting and did not require "any bending turning twisting or walking for any length of time." As Johnson herself testified, this would restrict her from working as a nurse, and she was unable to provide credible evidence as to other work she would be qualified to perform given these limitations.

Finally, substantial evidence supports the ULJ's conclusion that Johnson's medical conditions existed by July 2011, even though the Social Security Administration did not find that she qualified for disability benefits until January 2012. There is nothing in the record to indicate that Johnson's physical restrictions changed in January 2012, other than the fact that the Social Security Administration deemed her eligible for benefits at that time. Johnson's Social Security function report stated that her conditions had existed for two years. Johnson testified that she was terminated from her employment in July 2011 because she was no longer able to work as a nurse at that time due to the restrictions caused by her medical condition. And documentation from her physician indicated that

her medical condition dates back to her initial application for Social Security disability benefits in July 2011.

Johnson argues that the ULJ's decision is unsupported by substantial evidence because (1) "Johnson didn't view herself as having work restrictions until the ULJ advised Johnson of unemployment rules allowing Johnson a 50 percent deduction of Social Security benefits provided she meets certain criteria," (2) "Johnson was available for work due to the fact she never addressed an issue about her hourly work restrictions with her doctor," (3) "Johnson's doctor meant Johnson was limited to 4 hours of work after July 19, 2012 because the letter was a prediction versus a response to Johnson's medical history," and (4) the decision that Johnson's original medical documentation did not show that Johnson's physician was familiar with her disability-benefits claim was contradicted by the documentation itself.

The record reflects that Johnson considered herself restricted in the work she could perform before the ULJ raised the question of whether Johnson qualified for partial benefits. Johnson testified that she was terminated from her employment in July 2011 because she was no longer able to perform the work necessary to be a nurse. That this testimony came after the ULJ explained how Johnson could show that she was eligible for partial unemployment benefits during the period that Johnson was receiving disability benefits is irrelevant.

The fact that Johnson did not specifically discuss hourly work restrictions with her physician does not outweigh the evidence supporting the ULJ's decision. And the assertion that the ULJ erred by ruling that Johnson's original medical documentation did

not state that Johnson's physician was familiar with her disability-benefits claim is contrary to the record, given that the document states nothing whatsoever about Johnson's disability claim.

Finally, the assertion that the July 19, 2012 letter only applied to Johnson's ability to work after July 19, 2012 is illogical and contrary to the record. Johnson submitted the letter from her physician for the express purpose of establishing that she was eligible for unemployment benefits during the period that she was receiving disability benefits. The letter references Johnson's original disability claim, made in June 2011. There is ample evidence in the record that Johnson's medical issues extended back at least to June 2011. And even if the letter refers only to the period following July 19, 2012, then Johnson is ineligible for benefits starting January 2012 because she has not submitted the documentation required to receive unemployment benefits while also receiving disability benefits.

Johnson's Additional Arguments Are Waived for Inadequate Briefing

Johnson argues that the ULJ's decision is in excess of statutory authority or jurisdiction, made upon unlawful procedure, arbitrary and capricious, affected by other errors of law, and in violation of constitutional provisions. These arguments are duplicative and unsupported by legal argument or authority. Her brief consists largely of assertions of error followed by statements of fact, with little if any effort made to connect facts and assertions to legal authority. We will consider an appellant's arguments waived if they are based on mere assertion and not supported by argument or authority, unless prejudicial error is obvious on inspection. *Modern Recycling, Inc.*, 558 N.W.2d at 772.

Johnson does not identify any provisions of the unemployment statute that she claims the ULJ's actions exceeded and makes no argument concerning jurisdiction. She asserts that the ULJ's findings, inferences, conclusion, and decision were affected by other errors of law, but does not cite any specific error. And she asserts that the ULJ's findings, inferences, conclusions or decision were made upon unlawful procedures, but provides no legal argument or authority in support of her assertions. Johnson's assertions that the ULJ's decision was an abuse of discretion are contradicted by the record and unsupported by legal authority. And other than general citation to various constitutional rights, Johnson offers no support for the proposition that the ruling relied on factors not intended by the legislature. As no obvious prejudicial error is apparent, these arguments are waived.

Finally, Johnson argues that her constitutional rights were violated in four ways. First, she asserts that DEED violated her right to substantive due process by "impos[ing] their will onto Johnson and assum[ing] Johnson did not refuse medical treatment or medical recommendations made by her doctor." Second, she argues that the ULJ violated her right to privacy by advising her to communicate with her physician but failing to ask her to "consent to a release of the medical statements provided subsequent to her hearing" and failing to confirm that she "understood she was responsible for any costs related to the completion of information provided by Johnson's doctor." Third, she claims that the ULJ violated her right to procedural due process by refusing to allow her to call her physician as a witness. Finally, she argues that the ULJ's decision "was in violation of constitutional provisions" because the ULJ "decided during Johnson's

unemployment hearing that Johnson did not provide a statement from an appropriate healthcare professional that was aware of Johnson's disability claim and the basis for that claim, certifying she was available for suitable employment.”

Johnson's arguments are without merit and largely unsupported by legal argument or authority. Johnson quotes the Due Process Clause of the United States Constitution, and cites broad statements concerning the existence of a right to privacy and a right to refuse unwanted medical treatment. But she provides no legal authority or argument for the proposition that it is a violation of her right to privacy for the ULJ to rely on information that she voluntarily provided concerning her work restrictions or for the ULJ to request documentation to supplement that evidence. The ULJ did nothing more than inform Johnson of the requirements of the unemployment-law statute, and Johnson does not allege that the statute itself is unconstitutional. Further, Johnson does not provide any legal or logical explanation for how DEED violated her right to refuse unwanted medical treatment by requesting documentation of a medical condition in order to appeal a determination of ineligibility.

Johnson is correct that recipients of government welfare benefits must be given an opportunity to confront and cross-examine the witnesses relied upon by a government agency. *See Goldberg v. Kelly*, 397 U.S. 254, 270, 90 S. Ct. 1011, 1021 (1970). But Johnson's physician did not testify at the hearing, and she did not challenge any of the written evidence he provided—evidence introduced by Johnson herself—until now. The ULJ relied on that evidence to reach a conclusion not in Johnson's favor. An adverse

decision gives Johnson the right to an appeal, but provides no legal or logical support for the conclusion that the ULJ denied Johnson the right to cross-examine a witness.

Finally, Johnson does not specify which constitutional provisions were violated by the ULJ's determination that Johnson's original documentation did not meet the requirements of Minn. Stat. § 268.085, subd. 4(c). We have found no authority supporting a cause of action for violation of "constitutional provisions." And there is no prejudicial error when the ULJ determined that Johnson's initial documentation was insufficient to meet the statutory requirements and left the record open to allow Johnson to rectify the problem.

Johnson offers no support for the assertion that the wording of the medical statement is "against public policy," that it is "unfair" for an applicant to bear the costs related to obtaining medical documentation, or that it is unreasonable to ask that she return the documentation within seven days. On its face, the document fails to comply with the statutory requirement that the physician state that he or she is familiar with the applicant's Social Security claim. And although Johnson could argue that it is unfair and overly burdensome for her to have to repay benefits when the Social Security Administration did not consider her disabled and DEED failed to apply its own standard to disqualify her in the first instance, the unemployment-benefits law does not allow this court to provide an equitable remedy. *See* Minn. Stat. § 268.069, subd. 3 (2012) ("There is no equitable or common law denial or allowance of unemployment benefits.").

II.

Johnson contends that the ULJ erred in determining that she was not actively seeking suitable employment. Johnson argues that this determination is unsupported by substantial evidence and is arbitrary and capricious because she testified that she looked for jobs outside of hospitals and the medical field.

An applicant for unemployment benefits must be “actively seeking suitable employment” in order to be eligible for benefits. Minn. Stat. § 268.085, subd. 1(5) (2012). “‘Actively seeking suitable employment’ means those reasonable, diligent efforts an individual in similar circumstances would make if genuinely interested in obtaining suitable employment under the existing conditions in the labor market area.” *Id.*, subd. 16(a) (2012). An applicant is not actively seeking suitable employment if she limits her search “to positions that are not available or are above the applicant’s training, experience, and qualifications.” *Id.*

The ULJ found that Johnson’s testimony concerning her job search “was not credible because it was general, vague or non-specific, and not convincing.” We do not disturb the ULJ’s credibility determinations on appeal. *Bangtson*, 766 N.W.2d at 332. And there is substantial evidence in the record to support the ULJ’s conclusion that Johnson was not actively looking for work as required by section 268.085.

Johnson testified that she applied for at least four nursing jobs, but that she probably could not have accepted any of those jobs because of her medical restrictions. These applications therefore do not count as actively seeking employment because the positions were outside of her physical capacity. Johnson testified that she had applied for

jobs outside of the medical field that she could perform with her medical restrictions, but provided few specifics as to what these jobs were and admitted that she would require additional training or experience for many of the positions she named. Because the record does not indicate that Johnson was actively seeking employment that she was qualified to perform and because we will not disturb the ULJ's credibility determinations, the ULJ did not err.

Affirmed.