IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Christopher P. Lutz,	:	
Petitioner	:	
	:	
v.	:	No. 1035 C.D. 2011
	:	SUBMITTED: October 28, 2011
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED: December 23, 2011**

Claimant Christopher P. Lutz petitions for review of the order of the Unemployment Compensation Board of Review (Board) that affirmed the referee's decision denying him unemployment compensation benefits under Section 402(b) of the Unemployment Compensation Law (Law),[1] which provides that an employee is ineligible for benefits during any week "[i]n which his [or her]

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(b).

unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature." We affirm.[2]

After a hearing, the referee made the following findings of fact:

> 1. [C]laimant was last employed as a full-time splicing technician by [Employer] Verizon from March 28, 1988, until February 2, 2010, at a final rate of pay of $1300 per week.
>
> 2. In the beginning of 2010, [E]mployer announced that it was seeking to downsize its workforce by approximately 12,000 employees.
>
> 3. In Spring 2010, [E]mployer offered [C]laimant an Enhanced Income Security Plan Incentive Offer.
>
> 4. [C]laimant was offered in excess of $100,000 in a bonus to accept the Incentive Offer.
>
> 5. [E]mployer identified a surplus in splicing technicians.
>
> 6. [E]mployer encouraged [C]laimant and other employees to accept the incentive officer [sic].
>
> 7. [C]laimant applied for the Enhanced Incentive Offer.
>
> 8. [C]laimant could have continued to work for [E]mployer after July 3, 2010 if she [sic] had not accepted the incentive offer.
>
> 9. [C]laimant filed an application for benefits effective July 4, 2010, establishing a weekly benefit amount of $564.
>
> 10. [C]laimant filed for and received $550 plus an $8 dependant allowance for each of the claim weeks ending

[2] A determination of whether necessitous and compelling cause for leaving employment exists is a question of law, subject to plenary review by this Court. *Johnson v. Unemployment Comp. Bd. of Review*, 869 A.2d 1095 (Pa. Cmwlth. 2005).

> between July 17, 2010 and August 28, 2010, totaling $3,906.

Referee's Findings of Fact Nos. 1-10. The referee affirmed the UC Service Center's denial of benefits, determining that there was no imminent threat to Claimant's job and that even though Claimant's acceptance of the financial incentive may have been reasonable under his personal circumstances, it did not constitute a necessitous and compelling cause to leave his employment, given the fact that continuing suitable work was available.

The Board affirmed, adopting and incorporating the referee's findings and conclusions.[3] Additionally, the Board found:

> The claimant did not voluntarily quit for medical reasons and did not make his employer aware of his medical condition prior to his voluntary quit. If the claimant had made the employer aware of his medical condition, the employer would have accommodated the claimant's medical condition. Additionally, the board cannot consider after[-]submitted factual evidence.[4]

Board's April 14, 2011 Decision at 1 (footnote added). Claimant appealed the Board's order, and Employer intervened in the appeal.[5]

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[3] The facts as found by the Board are conclusive on appeal as long as the record, in its entirety, contains substantial evidence to support those findings. *Guthrie v. Unemployment Comp. Bd. of Review*, 738 A.2d 518 (Pa. Cmwlth. 1999).

[4] At the telephone hearing, counsel for Claimant offered into evidence two letters purporting to be from Claimant's physicians. Despite the fact that the parties were directed to submit all evidence to the referee's office five days prior to the hearing, the referee accepted them into evidence presumably because Employer's representative did not object. We will not consider these letters, however, in light of the Board's evidentiary ruling. The Board is the final arbiter of evidence, *Fitzpatrick v. Unemployment Compensation Board of Review*, 616 A.2d 110 (Pa. Cmwlth. 1992), and we will not overturn its evidentiary determination on appeal, absent an abuse of discretion, which we do not find here.

[5] The Board indicated that it would not be filing a brief in this matter.

A claimant bears the burden of proving necessitous and compelling cause for leaving his or her job. *Brunswick Hotel & Conference Ctr., LLC v. Unemployment Comp. Bd. of Review*, 906 A.2d 657 (Pa. Cmwlth. 2006). In order to show such cause, the claimant must establish that: "(1) circumstances existed which produced real and substantial pressure to terminate employment; (2) such circumstances would compel a reasonable person to act in the same manner; (3) the claimant acted with ordinary common sense; and, (4) the claimant made a reasonable effort to preserve [his or] her employment." *Id*. at 660. When a voluntary early retirement incentive is involved, there is no necessitous and compelling cause where continuing work was available and no evidence that the employee was in danger of losing his job if he or she declined to participate. *Davila v. Unemployment Comp. Bd. of Review*, 926 A.2d 1287 (Pa. Cmwlth. 2007).

Moreover, when a claimant is alleging health problems as necessitous and compelling cause, he or she must: (1) present competent evidence of an adequate health reason justifying termination of employment; (2) have informed the employer of the health problems; and (3) be able and available to perform work which is not inimical to his health, if a reasonable accommodation is made by the employer. *Ridley Sch. Dist. v. Unemployment Comp. Bd. of Review*, 637 A.2d 749 (Pa. Cmwlth. 1994). A failure to meet any of these requirements results in ineligibility. *Ruckstuhl v. Unemployment Comp. Bd. of Review*, 426 A.2d 719 (Pa. Cmwlth. 1981).

Claimant argues that the Board erred in determining that his quit was voluntary where Employer's "Enhanced Income Security Plan Incentive Offer" was a subpart of a master program entitled "Involuntary Separation Program," thus

indicating that his termination was involuntary. Further, he maintains that the Board erred in concluding that he did not have necessitous and compelling cause to terminate his employment in that the only potential jobs that he would have been physically capable of performing given his health status were one hundred eighty miles away. He contends, therefore, that the Board erred in not concluding that a reasonable person acting with ordinary common sense would have felt real and substantial pressure to voluntarily terminate his employment.

In this matter, we are bound to view the evidence, and every reasonable inference deducible therefrom, in the light most favorable to Employer as the prevailing party. *Penn Hills Sch. Dist. v. Unemployment Comp. Bd. of Review*, 496 Pa. 620, 437 A.2d 1213 (1981). At the hearing, Claimant admitted that he never officially requested a transfer to accommodate his alleged medical condition. December 6, 2010 Hearing, Notes of Testimony ("N.T.") at 9. In addition, Employer's witness testified that, if Claimant had requested a transfer, Employer could have offered him alternative positions in Pittsburgh, Philadelphia or Harrisburg to accommodate his situation. *Id*. at 12. The evidence of record thus supports Employer's argument that Claimant cannot now assert that his medical condition constituted a necessitous and compelling reason to voluntarily terminate his employment.

Moreover, as Employer maintains, Claimant admitted in his September 2010 claimant questionnaire that continuing work was available to him if he did not accept Employer's incentives. Certified Record ("C.R."), Item No. 5 at 1. He confirmed his acknowledgement of this fact at the subsequent December 2010 hearing. N.T. at 8. In addition, the employer questionnaire, which the referee accepted into evidence without objection, indicates that Claimant's job was

protected by a union contract. C.R., Item No. 6 at 1. This Court has upheld the denial of benefits where the claimant could have retained his job had he not accepted a retirement plan and was not facing imminent layoff. *Davila*.

Accordingly, we affirm the Board's denial of benefits.

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BONNIE BRIGANCE LEADBETTER,
President Judge

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Unemployment Compensation Board of Review, Respondent	:	

O R D E R

AND NOW, this 23rd day of December, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge