IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Marie-Lisa Francois,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1059 C.D. 2010
	:	
Unemployment Compensation Board of Review,	:	Submitted: November 12, 2010
	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: April 13, 2011**

Marie-Lisa Francois (Claimant) petitions for review of the Order of the Unemployment Compensation Board of Review (Board) that found Claimant ineligible for unemployment compensation (UC) benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law).[1] On appeal, Claimant argues that the Board's finding that Claimant did not call off work is not supported by substantial evidence and that the Board erred in holding that Claimant's actions constituted willful misconduct that rendered her ineligible for UC benefits. For the following

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

reasons, we vacate the Board's Order and remand to make findings of fact and credibility determinations in accordance with this Opinion.

United Healthcare Services (Employer) discharged Claimant from her employment and her last day of work was August 31, 2009. Claimant applied for UC benefits, which the Unemployment Compensation Service Center (Service Center) denied. Claimant appealed, and the matter was assigned to an Unemployment Compensation Referee (Referee) for a hearing. Prior to the hearing, both Claimant and Employer advised the Referee that they had conflicts and would be unable to attend the hearing on the scheduled date. Employer requested a continuation, which the Referee denied. On the date of the hearing, neither Claimant nor Employer appeared. Nevertheless, the Referee proceeded and concluded that, based on the only competent evidence of record, Employer did not establish that Claimant's conduct constituted willful misconduct. Therefore, the Referee reversed the Service Center's determination. Employer appealed the Referee's decision and order to the Board, asserting that the Referee had improperly denied its continuation request and erred in finding Claimant eligible for benefits. The Board remanded the matter for a hearing to accept evidence regarding the parties' reasons for not attending the prior hearing and evidence on the merits. At that hearing, Claimant testified on her own behalf and Employer presented the testimony of Laura Phillips, an Intake Supervisor. After reviewing the parties' reasons for their non-attendance, the Board agreed with Employer that the Referee erred in not continuing the original hearing and, therefore, addressed the merits of Employer's appeal.

Based on the record made on remand, the Board made the following relevant findings of fact:

> 1. The claimant was last employed as an intake coordinator by [Employer] from July 1, 2007, at a final rate of $31,000 per year, and her last day of work was August 31, 2009.
>
> 2. The claimant was on an approved leave of absence and was scheduled to return to work on September 1.
>
> 3. The claimant did not return to work on September 1 or September 2.
>
> 4. The claimant did not have any more PTO [(planned time off)] time left to use.
>
> 5. The claimant did not return to work due to unexpected problems related to her internship and her internship supervisor was on vacation.
>
> 6. The claimant was participating in an internship as part of her graduate studies.
>
> 7. The claimant did not call off.
>
> 8. The claimant was discharged for being no call/no show on September 1 and September 2, 2009.

(Findings of Fact (FOF) ¶¶ 1-8.) Relying on these findings, the Board held that Claimant's actions rose to the level of disqualifying willful misconduct because she "did not return from her leave of absence and did not report or call off on September 1 and September 2," and did not have good cause for her absence. (Board Op. at 3.)

Accordingly, the Board reversed the Referee and found Claimant ineligible for benefits. Claimant now petitions this Court for review.[2]

Claimant first argues that the Board's Order should be reversed because Finding of Fact 7, which states that Claimant did not call off, is not supported by substantial evidence in the record. The Board asserts that this finding is supported by substantial evidence. Alternatively, the Board contends that even if it is not supported by the evidence, this lack of evidence is not grounds to reverse the Board's order because this finding was not necessary to its final determination.

The Board's findings of fact are conclusive on appeal if the record, taken as a whole, contains substantial evidence to support those findings, even if there is evidence that supports contrary findings. Ryan v. Unemployment Compensation Board of Review, 547 A.2d 1283, 1286 (Pa. Cmwlth. 1988). Substantial evidence is "defined as 'such relevant evidence a reasonable mind might accept as adequate to support a conclusion.'" Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 275, 501 A.2d 1383, 1387 (1985) (quoting Murphy v. Department of Public Welfare, 480 A.2d 382, 386 (Pa. Cmwlth. 1984)). In making this determination, we "must view the record in the light most favorable to the party which prevailed before the Board, giving that party the benefit of all logical and reasonable inferences deducible from the evidence." Stringent v. Unemployment Compensation Board of Review, 703 A.2d 1084, 1087 (Pa. Cmwlth. 1997).

[2] Our standard of review is limited to determining whether the Board's decision is in violation of constitutional rights, whether an error of law has been committed, or whether the factual findings are supported by substantial evidence. Nolan v. Unemployment Compensation Board of Review, 797 A.2d 1042, 1045 n.4 (Pa. Cmwlth. 2002).

Our examination of the record reveals that the only evidence of whether Claimant called to advise Employer that she would not be at work on September 1 and 2, 2009, was Claimant's testimony that she called Employer on August 31, 2009, to advise Employer that she "couldn't be back" and that she "made another call and [she] got the letter stating that [she] was terminated." (Hr'g Tr. at 7, February 9, 2010, R.R. at 8a.) On cross-examination, Claimant denied that she was "advised by the Employer *when you called in* that if you didn't show up for work for these two days that it would be considered job abandonment." (Hr'g Tr. at 8, R.R. at 9a (emphasis added).) She likewise denied that Employer advised her during the call that she did not have any PTO available. (Hr'g Tr. at 7, R.R. at 8a.) Ms. Phillips did not testify that Claimant did not call off; she testified that Employer sent the letter discharging Claimant on September 3, 2009, and that Claimant would have been aware that she would have had no PTO days available for September 1 and 2, 2009. (Hr'g Tr. at 7-8, R.R. at 8a-9a.) The following exchange took place at the hearing:

> ET [Employer's Representative]: *Ms. Phillips, was that* [(that Claimant would be discharged if she did not show up for work on September 1 and 2, 2009)] *communicated to the Claimant at the time of the call*? When was that communicated to her?
>
> EW [Employer's witness]: Actually[,] this was the policy itself, the policy was reviewed with the Claimant previously in May due to a corrective action plan for attendance.

(Hr'g Tr. at 8, R.R. at 9a (emphasis added).) The reason Ms. Phillips gave for Claimant's discharge was because "[Claimant] did not show up for work on . . . 9/1 and 9/2 of 2009," and "[n]o show to work, job abandonment." (Hr'g Tr. at 6, R.R. at 7a.) Likewise, Employer's separation questionnaire made no reference to Claimant's alleged failure to call Employer before being absent on September 1 and 2, 2009;

rather, it indicated that Claimant was "an active employee currently on a paid leave of absence." (Employer's Separation Questionnaire, September 10, 2009, O.R. Item 2.) Even viewing the evidence in the record, including all reasonable and logical inferences deducible therefrom, in the light most favorable to Employer, we conclude that Finding of Fact 7 is not supported by substantial evidence.

This does not end our appellate review in this matter because the Board asserts that Finding of Fact 7 is not a necessary finding to support its conclusion that Claimant committed disqualifying willful misconduct by "fail[ing] to report to work without good cause." (Board's Br. at 9.) However, we cannot resolve this question based on the Board's current Findings of Fact and opinion because the Board's Findings contain an invalid finding of fact. "[R]emand is necessary if the agency did not afford a fair hearing or made an invalid or inadequate finding[] of fact. . . ." Shoemaker v. Unemployment Compensation Board of Review, 588 A.2d 100, 102 (Pa. Cmwlth. 1991). Moreover, it is well settled that, "in order for this Court to properly exercise its appellate review, the Board must make adequate findings of fact resolving all crucial issues raised by the testimony." Spicer v. Unemployment Compensation Board of Review, 407 A.2d 929, 930-31 (Pa. Cmwlth. 1979).

Here, the Board found that Employer discharged Claimant for no call/no show on September 1 and 2, 2009. (FOF ¶ 8.) However, a cursory review of Employer's evidence reveals that this was not the reason why Employer discharged Claimant. As noted above, Ms. Phillips testified that Employer discharged Claimant because "[Claimant] did not show up for work on . . . 9/1 and 9/2 of 2009," and for "[n]o show to work, job abandonment." (Hr'g Tr. at 6, R.R. at 7a.) Likewise, Employer's

separation questionnaire made no reference to Claimant's alleged failure to call Employer before being absent on September 1 and 2, 2009. (Employer's Separation Questionnaire, September 10, 2009, O.R. Item 2.) Employer's other argument against Claimant's eligibility for benefits was based on Claimant taking September 1 and 2, 2009, off without having any PTO remaining. (Hr'g Tr. at 6, 9, R.R. at 7a, 10a.) An examination of the record reveals that the impetus of the "no call/no show" rationale was based on a question asked by the *Referee*. The Referee asked Claimant, "All right, so will – is, was there a rule regarding no call, no shows?" (Hr'g Tr. at 7, R.R. at 8a.) Claimant responded "I called on August 31st." (Hr'g Tr. at 7, R.R. at 8a.) We conclude that the Board made an invalid and/or inadequate finding to resolve the crucial issue of why Employer discharged Claimant, not based on the evidence presented by Employer, but as a result of a question asked by the Referee. This invalid or inadequate Finding of Fact on this crucial issue hinders our ability to properly exercise appellate review in this matter. Shoemaker, 588 A.2d at 102; Spicer, 407 A.2d at 930-31. Accordingly, we must vacate the Board's order and remand this matter for valid, adequate Findings of Fact on the crucial issue of why Employer discharged Claimant based on the existing record. In addition, we note that the Board did not make any credibility determinations that would assist this Court in performing its appellate review; thus, we direct the Board to make such determinations on remand.

Accordingly, the Board's Order is vacated, and this matter is remanded in accordance with this opinion.

RENÉE COHN JUBELIRER, Judge

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O R D E R

NOW, April 13, 2011, the Order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **VACATED**, and this matter is **REMANDED** to the Board to make findings of fact and credibility determinations in accordance with this Opinion.

Jurisdiction relinquished.

RENÉE COHN JUBELIRER, Judge