IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jill A. Levandowski, Petitioner	:	
v.	:	No. 1286 C.D. 2010
	:	Submitted: January 21, 2011
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: March 18, 2011**

In this appeal, Jill A. Levandowski (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board) that determined her ineligible for emergency unemployment compensation (EUC) benefits under Section 402(a) of the Unemployment Compensation Law (Law) (refusal of suitable work).[1] Claimant contends the Board's finding that the offered position would not require Claimant to be on call "24/7" is not supported by substantial evidence. Claimant also contends the Board erred in basing its decision in part on her failure to provide evidence of her efforts to obtain child care and in failing to find she had good cause for declining the offered position. We affirm.

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(a). Section 402(a) of the Law provides "[a]n employe shall be ineligible for compensation for any week … [i]n which [her] unemployment is due to failure, without good cause, either to apply for suitable work … or to accept suitable work when offered to [her] … by any employer …." 43 P.S. §802(a).

Background

From September, 2001 until January, 2007, Claimant worked for the Pennsylvania Board of Probation and Parole (Employer) as a Parole Agent II/Field (Field Agent). As a Field Agent, Claimant worked "controlled hours," which allowed her to choose which hours she worked as long as she worked 40 hours per week.

Claimant then transferred to a Parole Agent II/Institutional (Institutional Agent) position, where she worked until her last day in September, 2008. She considered this position more of a desk job.

In September, 2008, Claimant took a medical leave of absence, and she gave birth to a baby. Thereafter, Employer approved an extended "sick, parental and family care" leave for Claimant from December, 2008, until September, 2009. During Claimant's extended absence, Employer filled her Institutional Agent position.

Employer's extended leave policy provided that upon return, if the employee's prior position is unavailable, Employer may place her in an equal or equivalent vacant position. In September, 2009, Employer notified Claimant her leave would end in one week. Upon obtaining clearance and consulting with its Erie district office, Employer offered Claimant a Field Agent position at the same rate of pay as her previous Institutional Agent position. Claimant, now a mother of an infant, declined the offer for health and safety reasons.

Claimant then applied for EUC benefits. The local service center denied benefits under Section 402(a) of the Law (refusal of suitable work). The service center also determined Claimant incurred a fault overpayment subject to recoupment.

Claimant appealed. Thereafter, she testified at a hearing before a referee. Claimant decided not to accept the Field Agent position because she just had a child and could not be available 24/7. Claimant further testified the duties of a Field Agent are significantly more dangerous than those of an Institutional Agent. She also stated she could no longer physically perform the duties of Field Agent, which include apprehending parole violators.

Conversely, Employer's Director of Human Resources, Brenda Estep (HR Director) testified that Employer does not distinguish between the Institutional Agent and Field Agent positions; rather, they are both Parole Agent II positions with the same rate of pay. HR Director further testified Claimant worked as a Field Agent from September, 2001 through January, 2006. Employer also obtained clearance to return Claimant to a Field Agent position. In rebuttal to Claimant's testimony, HR Director testified Employer does not require Field Agents to take calls 24/7. If a Field Agent does not take a call during off hours, she is not punished.

Based on Claimant's testimony, the referee found Claimant's concerns for her physical safety provided good cause for her failure to accept the

Field Agent position. Therefore, the referee ruled her eligible for benefits under Section 402(a).

Employer appealed, and the Board reversed. In so doing, the Board reasoned as follows:

> Based on the record before the Board, the Board concludes that [Employer] has established that [Claimant] was offered suitable employment. Here, Employer credibly established that it offered [Claimant] a position that she previously held for a number of years. …
>
> Here, [Claimant] simply refused because she was in a different stage in her life with a baby. While [Claimant] asserted that she could not be available 24/7 because of her child, [Claimant] failed to credibly establish with any specific testimony or evidence what efforts she made to determine if she could have child care for this position. Furthermore, [Employer] is credible that [Claimant] was not required to immediately respond to notifications. Indeed, [Claimant] herself testified this position had controlled hours which gave [Claimant] flexibility in her work hours. The Board specifically rejects [Claimant's] testimony otherwise as not credible that she would be required to be available 24/7. Rather, it is clear that [Claimant] as a new mother simply did not wish to have this type of job. While the Board understands [Claimant's] desires on this issue, given that [Claimant] and [sic] been on her leave of absence for six months, the Board concludes that [Claimant's] refusal of suitable work was not reasonable or substantial given that six months had passed since her last position.

Bd. Op., 06/01/10, at 3.[2] Claimant petitions for review.[3]

[2] The Board also determined Claimant incurred a *non*-fault overpayment.

Contentions

First, Claimant contends the Board's Finding of Fact No. 6, that the Field Agent position would not require Claimant to be on call 24/7, is not supported by substantial evidence. Second, Claimant asserts the Board erred in considering her failure to provide evidence of her efforts to obtain child care, which lacks any relevance to the issue of whether the Field Agent and Institutional Agent positions were equivalent. Third, Claimant argues the Board erred in finding that the Field Agent position is suitable work and that she failed to established good cause for not accepting the position, which is more demanding and dangerous than the Institutional Agent position.

Discussion

Substantial Evidence

Claimant contends substantial evidence does not support the Board's finding that "[Employer] does not require a parole agent to take calls 24/7 and if [Claimant] did not take such calls there would be no punishment." Bd. Op., Finding of Fact (F.F.) No. 6. To the contrary, she argues the referee correctly found "[C]laimant was … required to be available 24 hours a day/7 days a week." Referee's Op., 01/22/10, F.F. No. 11.[4]

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[3] Our review is limited to determining whether the necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Oliver v. Unemployment Comp. Bd. of Review, 5 A.3d 432 (Pa. Cmwlth. 2010).

[4] The Board asserts Claimant failed to cite any legal authority or identify what evidence supports her argument. Therefore, the Board argues Claimant waived this issue by failing to

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Here, HR Director testified on rebuttal that Employer does not require Field Agents to handle calls 24/7 and that Employer will not punish them for not handling something 24/7. Notes of Testimony (N.T.), 01/04/10, at 20. "[Claimant] is correct that they may get those calls but if they don't take them there is no punishment for not taking the call." Id.

The Board, as the ultimate fact finder in unemployment cases, may reverse any referee's determination based on the evidence previously submitted. Section 504 of the Law (powers of Board over claims), 43 P.S. §824; McLean v. Unemployment Comp. Bd. of Review, 686 A.2d 908 (Pa. Cmwlth. 1996). The Board accepted HR Director's testimony as credible and rejected Claimant's testimony to the contrary as not credible. Bd. Op. at 3. Matters of credibility and the weight to be given conflicting testimony fall within the Board's province. Oliver v. Unemployment Comp. Bd. of Review, 5 A.3d 432 (Pa. Cmwlth. 2010). HR Director's testimony provides substantial evidence[5] for Finding of Fact No. 6.

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adequately develop it. See Ruiz v. Unemployment Compensation Board of Review, 911 A.2d 600 (Pa. Cmwlth. 2006) (where appellant did not properly develop issues in brief, they are waived). Unlike Ruiz, where the claimant failed to challenge any specific finding, Claimant here specifically challenges Finding of Fact No. 6 in her petition for review and brief. We therefore address this issue.

[5] Substantial evidence is defined as evidence that a reasonable mind might accept as sufficient to support the conclusion reached. Bruce v. Unemployment Comp. Bd. of Review, 2 A.3d 667 (Pa. Cmwlth. 2010). Where substantial evidence supports the Board's findings, they are conclusive on appeal. Id. Moreover, it is irrelevant whether the record contains evidence supporting findings other than those made by the Board; the proper inquiry is whether the record supports the findings actually made. Id. Also, in reviewing the record to determine whether substantial evidence exists, 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 reasonable and logical

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Child Care

Claimant next contends the Board's decision is based on an error of law because the Board considered Claimant's failure to present evidence of her efforts to obtain child care. She argues the child care issue bears no relevance to the fundamental issue in the case: whether the safety hazards of the Field Agent position distinguish it from the Institutional Agent position and provide good cause for declining Employer's offer.

Because she did not cite any authority to support her argument, the Board counters that Claimant waived this issue by failing to adequately develop it. Nevertheless, the Board acknowledges that an inability to obtain child care may constitute good cause for refusing an offer of suitable work. See Truitt v. Unemployment Comp. Bd. of Review, 527 Pa. 138, 589 A.2d 208 (1991) (sudden physical disability of trusted babysitter and an unavailing search for a replacement constituted a necessitous and compelling reason for a voluntary quit under Section 402(b) of the Law, 43 P.S. §802(b)). Conversely, the Board further asserts that a lack of specificity in a claimant's testimony regarding child care concerns may result in a denial of benefits. See e.g., Moore v. Unemployment Comp. Bd. of Review, 520 A.2d 80 (Pa. Cmwlth. 1987) (claimant with two ill parents who testified only that her home responsibilities included laundry, cleaning and house care, failed to prove necessitous and compelling circumstances for a voluntary quit).

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inferences that can be drawn from the evidence. Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review, 949 A.2d 338 (Pa. Cmwlth. 2008).

Claimant raised this issue in her petition for review. Although she did not cite any legal authority, she essentially argues her efforts at obtaining child care are irrelevant to the central issue of whether the Field Agent position is too dangerous to be considered suitable work for a new mother. In light of the parties' discussion of the child care issue, we briefly address it.

Given Claimant's testimony that she could no longer be available 24/7, we discern no error in the Board responding to the child care issue. Indeed, Claimant invited a response by her testimony.

Moreover, we reject Claimant's assertion that the Board based its eligibility determination in any part on her lack of testimony regarding her efforts at securing child care 24/7. The Board ultimately rejected Claimant's testimony that a Field Agent must be available 24/7.[6] The Board also noted Claimant's testimony that a Field Agent can set her own hours as long as she works 40 hours per week.

Rather, the Board determined Claimant did not wish to accept the Field Agent position, which she performed in the past, because she believed it to

[6] At hearing, when asked why she did not accept the Field Agent position, Claimant responded, "I'm in a different state in my life. I just had a child and I can't do the position. I can't do the hours. Like I said, I just had a baby. I can't be available 24/7." N.T. at 19 (emphasis added).

Conversely, in her letter declining the Field Agent position, Claimant advised HR Director she would accept her prior Institutional Agent position if it became available. See Reproduced Record (R.R.) at 7a. Viewing this information in a light most favorable to the party prevailing before the Board, Claimant did not foresee any availability problems related to working 8:30 to 5:00 Monday through Friday.

be too dangerous for the mother of an infant. See Bd. Op., F.F. No. 14 ("[Claimant] refused the offer of employment of [Field Agent] because she was in a different stage in her life.") Although the Board understood Claimant's desires, it found her refusal of suitable work unreasonable given her lengthy unemployment.

The most important factor in a suitability of work analysis is the length of unemployment; as the length of unemployment increases, a claimant's right to insist on her previous job decreases. Commonwealth (Dep't of Educ.) v. Unemployment Comp. Bd. of Review, 890 A.2d 1232 (Pa. Cmwlth. 2006). Given the Board's reasons for ruling Claimant ineligible under Section 402(a), we discern no merit in Claimant's assertion the Board erred by considering her efforts at securing child care.

Suitable Work; Good Cause for Refusal

Claimant contends the Board erred in determining that the Field Agent position constituted suitable work and that she lacked good cause for refusing the Field Agent position.[7] Claimant asserts the Field Agent position is a law enforcement position with a heightened risk of bodily injury. Conversely, without

[7] Again, the Board counters, Claimant waived this argument by failing to properly develop it. Ruiz; Rapid Pallet v. Unemployment Comp. Bd. of Review, 707 A.2d 636 (Pa. Cmwlth. 1998). We disagree. Claimant raised this issue in her petition for review. In her brief, she argues the Board erred or abused its discretion by failing to consider the health and safety risks associated with the Field Agent position as required by Section 4(t) of the Law, 43 P.S. §753(t). Therefore, we will address this issue.

citing any supporting authority, Claimant asserts the Institutional Agent position is non-law enforcement position with a much lower health and safety risk and regular day-time hours.

> Section 4(t) of the Law, defines "suitable work" as follows:
>
> **"Suitable Work"** means all work which the employe is capable of performing. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to [her] health, safety and morals, [her] physical fitness, prior training and experience, and the distance of the available work from [her] residence. The department shall also consider among other factors the length of time [she] has been unemployed and the reasons therefore ….

43 P.S. §753(t) (underline added).

Claimant points out Field Agents are issued, among other items, 9 mm handguns, bullet proof vests, batons and shackles. Institutional Agents are not. Field Agents are directly involved in apprehending and arresting parolees. Institutional Agents are not. Claimant argues the Board's decision wholly discounts and disregards these significant distinctions between the two parole agent positions. Therefore, she urges, the Board erred in finding the Field Agent position suitable and equivalent to the Institutional Agent position.

In determining eligibility for benefits under Section 402(a), the issues of suitability of work and good cause for refusal are separate issues involving distinct concepts. Rising v. Unemployment Comp. Bd. of Review, 621 A.2d 1152

(Pa. Cmwlth. 1993). The claimant bears the burden of proof on both issues. Id. In addition, these issues are questions of law subject to *de novo* appellate review. Id.

Where the claimant previously performed the position, there is usually no question she is capable of performing the work.[8] Id. Here, Claimant satisfactorily performed the Field Agent position from late 2001 until January, 2007. Because Employer offered Claimant a position she previously held, the Board found the Field Agent position suitable. The Board also properly considered the duration of Claimant's unemployment. See Dep't of Educ. (as the length of unemployment increases, the claimant's right to insist on her previous job decreases); Rising (same).

As to safety, Claimant failed to establish the Field Agent position is more dangerous now then when she previously performed it. Although we understand Claimant's concerns as a new mother, Section 4(t) does not specify parenthood as a factor in determining whether work is too dangerous to be considered suitable employment for an individual. In addition, Claimant cites no legal authority for this proposition.

Given these facts, we discern no error or abuse of discretion in the Board's determination that the Field Agent position constituted suitable work for purposes of Section 402(a). Rising.

[8] HR Director testified Employer received clearance for Claimant to return to work in September, 2009. N.T. at 13. At that time, no Institutional Agent positions were available. Id. Employer consulted with its Erie district office and they agreed that a Field Agent position would be suitable for Claimant. Id. at 14.

We now turn to the closely related issue of whether Claimant had good cause to refuse the Field Agent position.[9] Here, Claimant refused a position she previously performed for more than five years. To refuse work that is reasonably similar to former work, without a trial, is indicative of a lack of good faith. Rising; Barillaro v. Unemployment Comp. Bd. of Review, 387 A.2d 1324 (Pa. Cmwlth. 1978).

As noted, Claimant refused the Field Agent position because she entered a different stage in her life: motherhood. Bd. Op., F.F. No. 14. Although Claimant's reasons are understandable, they do not constitute the substantial, reasonable reasons for refusal of otherwise suitable work where Claimant has been unemployed for at least six months. Rising; Barillaro; Lynch v. Unemployment Comp. Bd. of Review, 384 A.2d 1379 (Pa. Cmwlth. 1978). We therefore discern no error or abuse of discretion in the Board's decision. Rising.

For this reason, we are constrained to affirm.

ROBERT SIMPSON, Judge

[9] "Good cause" for refusing suitable work must be real, not imaginary, substantial, not trifling, and reasonable, not whimsical. It is synonymous with good faith. Barillaro v. Unemployment Comp. Bd. of Review, 387 A.2d 1324 (Pa. Cmwlth. 1978); Lynch v. Unemployment Comp. Bd. of Review, 384 A.2d 1379 (Pa. Cmwlth. 1978). In this context, good cause includes positive conduct on claimant's part which is consistent with a genuine desire to work and be self-supporting. Id. Unwillingness to give the offer a trial or perform that job until another position becomes available is not consistent with a genuine desire to work. Rising; Lynch.

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O R D E R

AND NOW, this 18th day of March, 2011, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge