

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Diane Vesay,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1833 C.D. 2009
	:	Submitted: February 5, 2010
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: March 22, 2010

Representing herself, Diane Vesay (Claimant) petitions for review from an order of the Unemployment Compensation Board of Review (Board) that denied her benefits under Section 402(b) of the Unemployment Compensation Law (Law) (regarding necessitous and compelling cause for voluntarily terminating employment).¹ Concluding the Board failed to make necessary findings regarding Claimant's credibility, we vacate and remand.

Claimant worked for the Mary E. Walker House (Employer or House) as a full-time resident assistant. The House offers transitional housing for homeless women veterans. Claimant's employment was contingent upon her

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

residence at the House. Thus, Claimant's employment and her place of residence were inextricably linked.

In October, 2008, Claimant left the House and entered a seven-week treatment program for Post Traumatic Stress Disorder (PTSD) at an out-of-state facility. Thus, Claimant simultaneously left her place of residence and voluntarily ended her employment with Employer. As a result of the treatment, Claimant was unavailable to work during the PTSD program.

Upon leaving the PTSD program, Claimant returned to Pennsylvania and entered a VA domiciliary home for further treatment. As a result of that treatment, Claimant was unavailable to work until January 29, 2009.

In March, 2009, Claimant returned to the House to reside. Although Claimant was able and available to return to work, Employer did not have any available positions.

Before returning to the House, Claimant applied for unemployment compensation benefits, which the local service center denied. Claimant appealed, and a hearing was scheduled before a referee.

Neither Claimant nor a witness for Employer attended the first hearing. Claimant, however, informed the hearing office that she was running late to the hearing due to traffic. As a result, the referee delayed the hearing 10 minutes, but Claimant did not arrive in time for the hearing.

Because Claimant did not attend the hearing, the referee determined she failed to prove she had necessitous and compelling cause to voluntarily terminate her employment. Thus, the referee denied Claimant benefits. Claimant appealed, requesting a remand hearing. The Board granted Claimant's request.

On remand, the referee, acting as hearing officer for the Board, conducted a second hearing for the purpose of receiving evidence on Claimant's reason for not appearing at the previous hearing as well as to allow the parties to provide evidence on the merits. At the second hearing, Claimant and a witness for Employer appeared and testified.²

At the conclusion of the hearing, the Board made the following relevant findings of fact:

2. The [House] offers transitional housing for homeless, veterans and [women]. The [House] also provides group therapy for its residents.
3. The claimant's employment was contingent upon her residence at the [House].
4. The claimant left the facility and entered a seven week program in Fort Thomas, Kentucky to deal with alleged traumatic issues.
5. The claimant was in the above program in Kentucky from October 2008 until November 27, 2008.
6. On November 27, 2008, the claimant then entered a domiciliary in Coatesville, Pennsylvania for treatment.

² Employer did not contest Claimant's eligibility for benefits.

7. The claimant was prohibited from working until January 29, 2009 because of the program that she entered into in Coatesville, Pennsylvania.

8. The claimant returned to the [House] on March 3, 2009.

9. The claimant did not resume her employment at the [House].

Board Op., Findings of Fact (F.F.) Nos. 2-9.

Based on these findings, the Board concluded Claimant voluntarily terminated her employment by entering the treatment program for PTSD. Furthermore, the Board determined Claimant did not offer any medical evidence to substantiate that the treatment program was necessary for her alleged mental condition. The Board reasoned that without sufficient medical evidence to substantiate Claimant's need to enter into this program, her decision to enter the program was purely personal. Accordingly, the Board concluded Claimant did not prove necessitous and compelling cause for voluntarily terminating her employment and, thus, the Board denied benefits.³ Claimant now appeals to this Court.⁴

³ The Board also determined Claimant had good cause for her failure to appear at the first hearing. Thus, the Board based its decision on Claimant's testimony and evidence on the merits.

⁴ Our review is limited to determining whether the Board's necessary findings are supported by substantial evidence, whether the Board committed an error of law, or whether the Board violated constitutional rights. Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review, 949 A.2d 338 (Pa. Cmwlth. 2008).

On appeal, Claimant argues Employer terminated her employment and did not prove she committed willful misconduct. In the alternative, Claimant argues that if she voluntarily terminated her employment, she had necessitous and compelling cause to do so because of her mental health condition.

First, we address Claimant's argument that her separation from employment constituted a discharge. The Board counters that Claimant's contention that Employer terminated her employment is inconsistent with her testimony.

In a voluntary quit case, a claimant bears the burden of proving her separation from employment constituted a discharge. Bell v. Unemployment Comp. Bd. of Review, 921 A.2d 23 (Pa. Cmwlth. 2007). Furthermore, whether a claimant's termination was voluntary or a discharge is a question of law for the court to determine from the totality of the record. Id.

"A finding of voluntary termination is essentially precluded unless the claimant has a conscious intention to leave his employment." Fekos Enters. v. Unemployment Comp. Bd. of Review, 776 A.2d 1018, 1021 (Pa. Cmwlth. 2001) (citing Monaco v. Unemployment Comp. Bd. of Review, 523 Pa. 41, 565 A.2d 127 (1989)). "In determining the intent of the employee, the totality of the circumstances surrounding the incident must be considered." Id.

Furthermore, the Board is the ultimate fact-finder in unemployment compensation cases. Hessou v. Unemployment Comp. Bd. of Review, 942 A.2d 194 (Pa. Cmwlth. 2008). "[T]he weight to be given the evidence and the

credibility to be afforded the witnesses are within the province of the Board as finder of fact” Peak v. Unemployment Comp. Bd. of Review, 509 Pa. 267, 272, 501 A.2d 1383, 1386 (1985). In addition, we must “examine the testimony in the light most favorable to the party in whose favor the fact-finder has ruled, giving that party the benefit of all logical and reasonable inferences from the testimony” Penn Hills Sch. Dist. v. Unemployment Comp. Bd. of Review, 496 Pa. 620, 630, 437 A.2d 1213, 1218 (1981).

Here, it is clear that Claimant’s employment was contingent upon her residence at the House. F.F. No. 3. It is also clear that Claimant voluntarily left her residence at the House to enter a remote PTSD program. F.F. No. 4. Because Claimant’s residence and employment were inextricably linked, we agree with the Board that when Claimant left her place of residence she voluntarily separated from her employment. Accordingly, Claimant’s contention that Employer terminated her because she no longer resided at the House is unpersuasive. Thus, the Board did not err in determining that Claimant voluntarily left her employment.

Next, we address whether Claimant had necessitous and compelling cause to voluntarily terminate her employment. The Board contends Claimant did not offer medical evidence establishing that her relocation to the PTSD program was medically required. The Board submits that Claimant’s testimony alone is simply not enough to prove she had a mental health condition that required her to relocate to another facility. As a result, the Board argues Claimant did not show that her alleged mental health condition established necessitous and compelling cause to voluntarily terminate her employment.

The issue of what constitutes a “necessitous and compelling” reason for a voluntary quit is a legal question subject to appellate review. Craighead-Jenkins v. Unemployment Comp. Bd. of Review, 796 A.2d 1031 (Pa. Cmwlth. 2002). The employee bears the burden of proving necessitous and compelling reasons for quitting. Id. An employee who claims necessitous and compelling reasons for quitting must show “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 her employment.” Brunswick Hotel & Conference Ctr., LLC v. Unemployment Comp. Bd. of Review, 906 A.2d 657, 660 (Pa. Cmwlth. 2006).

It is well established medical problems can create “necessitous and compelling” cause to leave employment. Deiss v. Unemployment Comp. Bd. of Review, 475 Pa. 547, 381 A.2d 132 (1977). To establish health as a compelling reason for quitting a job, a claimant must offer 1) competent evidence that at the time of termination adequate health reasons existed to justify the voluntary termination, 2) she communicated such reasons to her employer, and 3) she was available to work if reasonable accommodations could be made. See Nolan v. Unemployment Comp. Bd. of Review, 797 A.2d 1042 (Pa. Cmwlth. 2002); Donaldson v. Unemployment Comp. Bd. of Review, 434 A.2d 912 (Pa. Cmwlth. 1981) (requiring a claimant to offer competent evidence to show her mental health

problem established necessitous and compelling cause to voluntarily terminate her employment).⁵

Furthermore, this Court explained:

[A]nxiety and emotional distress can be necessitous and compelling cause for terminating one's employment, and ... a claimant does not necessarily have to present expert medical evidence in order to establish that he had compelling medical reasons for terminating his employment, but instead may establish that fact by any competent evidence such as claimant's own testimony and/or documentary evidence.

Judd v. Unemployment Comp. Bd. of Review, 496 A.2d 1377, 1379 (Pa. Cmwlth. 1985) (citations omitted) (emphasis added); see also Steffy v. Unemployment Comp. Bd. of Review, 499 Pa. 367, 453 A.2d 591 (1982). In Goettler Distributing, Inc. v. Unemployment Compensation Board of Review, 508 A.2d 630 (Pa. Cmwlth. 1986), this Court held the disjunctive language in Judd appears to be a better approach to establish whether a claimant's mental health problem constituted necessitous and compelling cause to voluntarily terminate her employment.

Here, the Board relies on Jordan v. Unemployment Compensation Board of Review, 684 A.2d 1096 (Pa. Cmwlth. 1996), to argue that a claimant must offer expert testimony to prove a mental health condition. However, Jordan

⁵ If a claimant meets the third requirement, the burden then shifts to the employer who must show it offered suitable work to the claimant consistent with her medical limitations. Beattie v. Unemployment Comp. Bd. of Review, 500 A.2d 496 (Pa. Cmwlth. 1985).

is factually distinguishable from the present case. In Jordan, the employer discharged a claimant for willful misconduct, failing to report off work or to work. This Court held the claimant could not prove his mood disorder caused his unreasonable and unjustifiable conduct without offering expert testimony, and the claimant himself was not qualified to offer an expert opinion. Jordan.⁶

Unlike the claimant in Jordan, however, Claimant here did not assert that her mental health problem compelled an uncontrollable action or irresponsible decision, which was therefore not willful. These types of assertions clearly require expert opinion. Instead, Claimant here asserted advice for remote treatment resulted in her conscious, reasonable decision to seek that treatment. Accordingly, the Board's reliance on Jordan is misplaced. Rather, in this case the Judd standard is appropriate for determining whether Claimant proved a compelling reason to leave her employment. Cf. Capasso v. Workers' Comp. Appeal Bd. (RACS Assocs., Inc.), 851 A.2d 997 (Pa. Cmwlth. 2004) (claimant may establish motive to retire through his own testimony, but fact-finder need not accept uncorroborated testimony); Scalise Indus. v. Workers' Comp. Appeal Bd. (Centra), 797 A.2d 399 (Pa. Cmwlth. 2002) (no requirement that physician testify that he recommended claimant retire; claimant may establish motivation to retire through his own testimony).

⁶ The Board also relies on Brady v. Unemployment Compensation Board of Review, 539 A.2d 936 (Pa. Cmwlth. 1988) and Department of Navy v. Unemployment Compensation Board of Review, 632 A.2d 622 (Pa. Cmwlth. 1993), which, similar to Jordan, both involve situations where a claimant attempted to prove a mental health condition caused his misconduct. Neither case is a voluntary quit case.

Claimant testified that she is a veteran and that while residing at the House she saw a psychologist and underwent therapy in order to get her “life started over again.” Notes of Testimony (N.T.), 5/27/09, at 5. In addition, Claimant testified that both the program director and her psychologist suggested that she leave the House to partake in the out-of-state PTSD program “to deal with some of [her] traumatic issues.” Id. at 6. This testimony explained Claimant’s subsequent actions and was not subject to a hearsay objection. Id. The testimony has further significance because it establishes communication between Claimant and Employer concerning her mental health problems.

Furthermore, the record contains a letter from a staff nurse at the PTSD facility, corroborating Claimant’s testimony that she was participating in the PTSD program. Certified Record (C.R.) at Item 2. The letter from the staff nurse provides:

[Claimant] was admitted to and is participating in the [PTSD] Program here at Ft. Thomas VAMC a part of the Cincinnati station. She was admitted on October 14th, 2008, and her discharge is November [28th,] 2008.

Id.⁷

In addition, Claimant testified that upon leaving the PTSD program, she entered a VA domiciliary home in Pennsylvania for further treatment. N.T. at

⁷ In Claimant’s brief, she offered a second letter from a clinical psychologist at the PTSD facility. Claimant’s brief at App. 14. However, the second letter is auxiliary information and not part of the certified record. Id.; see also Tener v. Unemployment Comp. Bd. of Review, 568 A.2d 733 (Pa. Cmwlth. 1990) (holding when reviewing matters in an appellate capacity, this Court is bound by the facts certified in the record on appeal).

7. Finally, Claimant testified that in January, 2009, after her treatment at the PTSD program and the domiciliary home, she was able and available for work. Id. at 8.

There is no doubt Claimant here offered evidence which, if believed by the fact-finder, would have satisfied her burden to explain her motivation to leave her employment. Judd. Thus, the Board erred in determining Claimant was required to present expert medical evidence to prove why she left her employment.

Where, as here, factual findings are inadequate to allow this Court to pass on a question of law, the case must be remanded for additional necessary findings. Miller v. Unemployment Comp. Bd. of Review, 415 A.2d 454 (Pa. Cmwlth. 1980). Accordingly, a remand is necessary to determine if Claimant's testimony and documentary evidence are credible.

In accordance with the foregoing, we vacate and remand for additional findings of fact.

ROBERT SIMPSON, Judge

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Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 22nd day of March, 2010, the order of the Unemployment Compensation Board is **VACATED** and this matter is **REMANDED** for proceedings consistent with this opinion.

Jurisdiction is relinquished.

ROBERT SIMPSON, Judge