IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Cynthia Brown, Petitioner	:	
	:	No. 1885 C.D. 2010
v.	:	
	:	Submitted: April 8, 2011
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: October 31, 2011

Cynthia Brown (Claimant) petitions pro se for review of the August 17, 2010, order of the Unemployment Compensation Board of Review (Board), which held that she was ineligible for benefits pursuant to sections 401(d)(1) and 402(b) of the Unemployment Compensation Law (Law).[1] We affirm.

Claimant worked for Impact Systems (Employer) as a caregiver to mentally disabled individuals; her final rate of pay was $10.97 per hour. On or about December 23, 2009, Claimant requested an unpaid family medical leave. Claimant

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §§802(b) and 801(d)(1). Section 401(d)(1) sets forth the requirement that a claimant be able to work and available for suitable work. Section 402(b) provides that a claimant will be ineligible for compensation for any week in which her unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature.

supplied Employer with documentation from her medical provider indicating that she was unable to perform her job duties. (Certified Record, Ex. E-2, U.S. Department of Labor Form WH-380-E, Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act).) The form states that Claimant was not able to perform her job duties at maximum capacity due to depression. It also indicates that Claimant's need for restricted work would depend on her condition and that she would experience flare-ups of her condition during which it would be medically necessary for her to be absent from work. Specifically, the form indicates that Claimant might experience flare-ups, lasting two to three hours per episode, five to seven times per week for a period of two to three months. Additionally, where the form asks the health care provider to "[e]stimate the part time or reduced work schedule the employee needs, if any," there is a written notation: "depends on patient's condition[,] patient decision temporary leave."

Employer granted Claimant's request for unpaid family medical leave effective from December 31, 2009, to March 30, 2010. Claimant then filed an application for unemployment benefits.[2] The local job center determined that Claimant was eligible for benefits under section 402(b) of the Law but ineligible

[2] Section 401 of the Law, 43 P.S. §801, sets forth the initial prerequisite for eligibility which is that a claimant be unemployed. Section 4(u) defines the term "unemployed" and states that an individual "shall be deemed unemployed (I) with respect to any week (i) during which he performs no services for which remuneration is paid or payable to him and (ii) with respect to which no remuneration is paid or payable to him…." 43 P.S. §753(u). Thus, although Claimant was on a medical leave of absence and maintained an employment relationship with Employer, she nevertheless may satisfy the requirement of section 401 of the Law. Cervenak v. Unemployment Compensation Board of Review, 400 A.2d 1356 (Pa. Cmwlth. 1979).

A person who is unemployed for purposes of section 401 of the Law must satisfy additional eligibility requirements set forth by the statute. Here, because Claimant voluntarily left her employment, Claimant's eligibility is analyzed under sections 401(d)(1) and 402(b) of the Law.

under section 401(d)(1). Claimant appealed, and, on March 2, 2010, a referee held a hearing at which both parties participated without benefit of counsel.[3]

Claimant testified that, on December 14, 2009, prior to requesting unpaid medical leave, she notified Employer that she was able to do other types of work and sought another position with Employer. (N.T. at 6.) In response to the referee's questions, Claimant also testified that she had not contacted Employer about returning to work since beginning her leave. Claimant explained that she requested a leave of absence because she was abused by Employer's clients. Claimant also stated that her doctor strongly advised her not to return to work with Employer. Claimant noted that her doctor had not restricted her from performing other kinds of work; however, she also stated that her doctor had not released her to return to work. Claimant said she was able and willing to do other kinds of work and that she had been actively seeking employment elsewhere. Claimant stated that she had experience in data processing, phlebotomy, and restaurant management and had applied for positions as a phlebotomist, receptionist and childcare worker. Claimant repeated that her doctor did not want her to return to work with Employer. (N.T. at 1-15.)

In support of her testimony, Claimant submitted a February 26, 2010 letter from Barry Jacobs, Psy.D., stating that Claimant has been suffering from acute, marked depression in response to work stressors and that Claimant's mood appeared to improve after she went on medical leave from her job. In the letter, addressed "To Whom It May Concern," Dr. Jacobs expressed his belief that Claimant is not too depressed to work; rather, she is likely to be less depressed and work more effectively in a different work setting. (O.R., Ex. C-1.)

[3] Claimant was still on unpaid family medical leave at the time of the hearing.

Adam Brandt, Employer's staff development specialist, testified that Claimant had not contacted Employer concerning her limitations since she went on leave. Brandt stated that work was available for Claimant should she choose to return, i.e., her original position, as well as other positions similarly involving working with mentally disabled adults. Susan Fuller, Employer's program director, testified that she had talked to Claimant about possible accommodations to Claimant's schedule before Claimant went on leave but had not spoken to Claimant during her leave of absence. Fuller testified that the only types of work available for Claimant would be the same job title but at different facilities; Fuller stated that some programs are different from others and that she had discussed the possibility of working at other locations with Claimant before she went on leave. At the conclusion of Fuller's testimony, Brandt added that individuals at some locations do not have the same behavioral issues, and he disputed the suggestion that all work available with Employer was the same. (N.T. at 16-21.)

Following the hearing, by decision and order dated on March 8, 2010, the referee affirmed the job center's determination. The referee concluded that Claimant's medical leave of absence established her eligibility under section 402(b). However, the referee further concluded that, because Claimant failed to inform Employer while she was on leave of her restrictions or her ability to return to work at another position, she did not demonstrate that she was able and available to return to work and thus was ineligible for benefits under section 401(d)(1).

Claimant appealed to the Board, arguing that the record established that she followed her doctor's advice not to return to work with Employer and that she

had been looking for positions elsewhere.[4] By decision dated June 9, 2010, the Board affirmed in part and reversed in part, holding that Claimant was ineligible for benefits under both sections 401(d)(1) and 402(b).

Claimant then filed a request with the Board for reconsideration, seeking a remand of the record or consideration by the Board of alleged after-discovered evidence regarding her availability for suitable work. The Board granted Claimant's request for reconsideration. However, by decision dated August 17, 2010, the Board denied Claimant's request to supplement the record and again held that Claimant was ineligible for benefits under sections 401(d) and 402(b) of the Law. The Board reasoned that Claimant submitted documentation to Employer for a leave of absence which informed Employer that Claimant was unable to perform all of her job duties but Claimant failed to credibly establish that she provided Employer with an opportunity to accommodate her medical condition. Further, the Board found that Claimant failed to offer credible testimony or evidence that she is, in fact, able and available for work.

On appeal to our Court,[5] Claimant first argues that the Board erred and violated her constitutional rights by refusing to consider evidence that only came into existence after the referee's hearing. However, as the Board explained, the evidence Claimant sought to introduce did not relate to her voluntary unpaid medical leave

[4] Thereafter, on March 30, 2010, Claimant sent the Board copies of a March 25, 2010, letter from Claimant to Employer that asked about available positions and was accompanied by a March 25, 2010 note from Dr. Jacobs detailing Claimant's limitations and abilities. (Claimant's brief, Exhibits A-4, A-5.)

[5] Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

beginning in December 23, 2009, which was the period of time for which she applied for benefits and the voluntary separation at issue before the Board. Thus, although these documents do indicate specific restrictions or limitations to Claimant's work capacity, they fail to help Claimant sustain her burden of proving that she made such restrictions or limitations known to Employer upon taking her medical leave. Therefore, the Board neither erred nor violated Claimant's constitutional rights by denying her request to admit and/or consider this evidence.[6]

Pursuant to section 402(b) of the Law, an employee is ineligible for benefits if she voluntarily leaves her employment without cause of a necessitous and compelling nature.[7] 43 P.S. §802(b). Thus, a claimant seeking benefits after voluntarily leaving her employment has the burden to demonstrate real and substantial pressure to terminate employment that would compel a reasonable person under similar circumstances to act in the same manner. Dopson v. Unemployment Compensation Board of Review, 983 A.2d 1282 (Pa. Cmwlth. 2009). The claimant must further demonstrate that she acted with ordinary common sense and made a reasonable effort to preserve her employment. First Federal Savings Bank v. Unemployment Compensation Board of Review, 957 A.2d 811 (Pa. Cmwlth. 2008).

To establish health problems as a compelling reason to quit, a claimant must: (1) show that adequate health reasons existed to justify the voluntary

[6] In its decision, the Board noted that, in April 2010, Claimant's medical leave resulted in a permanent separation from employment. The Board suggested that "the Department may wish to investigate the claimant's subsequent separation to determine whether it has any effect on her eligibility for benefits." (Board's August 17, 2010 decision at 3.)

[7] Whether or not a claimant has a compelling and necessitous cause for voluntarily terminating employment is a question of law subject to this Court's review. Willet v. Unemployment Compensation Board of Review, 429 A.2d 1282 (Pa. Cmwlth. 1981).

termination, (2) communicate her medical problem to her employer, and (3) be available for suitable work, consistent with her medical condition. Genetin v. Unemployment Compensation board of Review, 499 Pa. 125, 451 A.2d 1353 (1982). A claimant is required to notify her employer of her health limitations prior to her separation from employment so that her employer is afforded the opportunity to accommodate the claimant by offering suitable work.[8] Fox v. Unemployment Compensation Board of Review, 522 A.2d 713 (Pa. Cmwlth. 1987).

In Fox, the claimant voluntarily terminated her employment as an ice cream counter clerk due to health limitations resulting from her pregnancy. The claimant argued that notifying her employer of her health limitations prior to leaving her employment would have been futile because she knew that suitable employment was not available. However, we explained that a claimant may not be aware that her employer has suitable work available; accordingly, we held that, in order to be eligible for benefits after terminating employment for health reasons, a claimant must afford the employer an opportunity to accommodate her limitations by notifying the employer of her specific health issues prior to terminating employment.

Here, Claimant credibly testified that she suffered from health problems that limited her ability to perform her job duties. Claimant also submitted

[8] However, a claimant is not required to notify her employer of health limitations as a reason for terminating employment if the evidence of record reveals that doing so would be futile. Hoffman v. Unemployment Compensation Board of Review, 528 A.2d 1050 (Pa. Cmwlth. 1987). In Hoffman, the claimant voluntarily terminated her employment as a custodial worker due to health limitations resulting from hypertension and a liver problem. Although the claimant did not notify her employer of those health limitations prior to voluntarily terminating her employment, we held that she was nevertheless entitled to benefits where the employer's representative and claimant's supervisor testified that they would not have been able to accommodate the claimant's health limitations with suitable employment.

documentation to Employer supporting her request for a medical leave of absence. However, Claimant failed to establish that she informed Employer that she was available for other types of work, either for full duty assignments or for work within specific limitations or restrictions as ordered by her doctor. Therefore, Employer was not given an opportunity to offer Claimant reasonable accommodations. Employer credibly testified that it operates programs at other jobsites that may have been able to accommodate Claimant's medical needs. Because Claimant did not give Employer an opportunity to provide her with an alternative work environment, Claimant failed to meet her burden under section 402(b) of the Law to establish a necessitous and compelling reason to voluntarily terminate her employment.

Furthermore, under section 401(d)(1) of the Law, a claimant must be available for suitable work. Nytiaha v. Pennsylvania, 425 A.2d 485 (Pa. Cmwlth. 1981). The test of availability requires that the claimant be currently attached to the labor force. Id. A claimant may pursue work outside of her current employer and is not limited to jobs available within the employer's place of business. St. John v. Unemployment Compensation Board of Review, 529 A.2d 1218, 1220 (Pa. Cmwlth. 1987). The claimant bears the burden to prove availability for suitable work because "one who accepts a medical leave of absence has indicated a present intention to accept only temporary, as opposed to permanent, employment and that those limiting medical problems rebut the presumption of availability." Id.

Here, the Board found Claimant's testimony concerning her efforts to find other employment not credible. In unemployment compensation cases, the Board is the ultimate fact-finder, empowered to determine the credibility of witnesses and resolve conflicts in evidence. Curran v. Unemployment Compensation Board of Review, 752 A.2d 938 (Pa. Cmwlth. 2000). The Board's findings are conclusive on

appeal where, as here, they are supported by substantial evidence. Id. Because the Board rejected Claimant's testimony on this issue, Claimant failed to meet her burden of proof under section 401(d)(1).

We appreciate that Claimant views the evidence differently; however, a different version of events or view of the evidence is not grounds for reversal where, as here, substantial evidence supports the Board's findings. Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994). Although we might have decided the case differently, we may not reverse if there is competent evidence supporting the fact-finder's decision. Id. Indeed, our scope of review in an appeal of a Board adjudication "is that we must affirm unless the adjudication violates the constitutional rights of the appellant, or is contrary to law, or … agency procedure was violated, or a finding of fact necessary to back the decision is not supported by substantial evidence." Miceli v. Unemployment Compensation Board of Review, 519 Pa. 515, 519, 549 A.2d 113, 115 (1988).

Accordingly, we affirm.

PATRICIA A. McCULLOUGH, Judge

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v.	:	
	:	
Unemployment Compensation Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 31st day of October, 2011, the order of the Unemployment Compensation Board of Review, dated August 17, 2010, is hereby affirmed.

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PATRICIA A. McCULLOUGH, Judge