

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tracy McNelis,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2204 C.D. 2010
	:	
Unemployment Compensation	:	Submitted: February 4, 2011
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 COHN JUBELIRER**

FILED: June 22, 2011

Tracy McNelis (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board), which affirmed the decision of an Unemployment Compensation Referee (Referee) finding Claimant ineligible for benefits under Section 402(b) of the Unemployment Compensation Law (Law)¹ because Claimant voluntarily left her job without a necessitous and compelling reason. On appeal, we consider whether the Board capriciously disregarded evidence, namely, that Claimant quit her job to move in with her boyfriend 130 miles

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

away from her place of employment for health, financial and family reasons, making it impossible for Claimant to remain in her position. Concluding that the Board did not capriciously disregard this evidence, we affirm.

Claimant applied for unemployment compensation benefits after becoming separated from her employment with Christopher Kunes (Employer) for the claim week ending May 1, 2010. (R. Item 1, Claim Record at 1.) The Unemployment Compensation Service Center (Service Center) issued a determination finding Claimant eligible for benefits under Section 402(b) of the Law. Employer appealed the Service Center's determination and the Referee conducted an evidentiary hearing, at which Claimant and her boyfriend, Bronson Baubitz, testified via telephone, and Employer's owner, Mr. Kunes, appeared and testified. Following the hearing, the Referee reversed the Service Center's determination and found Claimant ineligible for benefits. Claimant appealed to the Board, which affirmed the Referee's determination, and made the following factual findings:

1. The claimant was last employed as an administrative assistant by Christopher Kunes from April 14, 2008, at a final rate of \$13 per hour, and her last day of work was March 19, 2010.
2. On or about March 20, 2010, the claimant had a hysterectomy, which could require a recovery period of 6-8 weeks as a worst case scenario.
3. The claimant offered to work from home after the surgery.
4. The employer did not accept the offer as the claimant's duties required that she be in the office.
5. The employer had continuing work for the claimant and would have permitted her to return to work after her recovery.

6. The claimant's boyfriend lived 130 miles away.
7. The claimant quit to move in with her boyfriend after her surgery.

(Board Decision, Findings of Fact (FOF) ¶¶ 1-7.) The Board determined that Claimant did not have a necessitous and compelling reason to quit her employment because Claimant “chose to quit and move in with her boyfriend instead of returning to work after she recovered from the surgery.” (Board Op. at 2.) Claimant now petitions this Court for review.²

On appeal, Claimant argues that the Board erred in concluding that she quit without cause of a necessitous and compelling nature. Claimant asserts that the Board's suggestion that she left her employment to be closer to her boyfriend is unsupported by the evidence and that the Board capriciously disregarded her testimony that the reason she had to move closer to her boyfriend was because of reasons related to her health, finances and family. Claimant further argues that, under this Court's precedent, Claimant's inability to physically and financially care for her family following her surgery unless she relocated constitutes a necessitous and compelling reason to quit. The Board responds that it did not capriciously disregard evidence; rather, Claimant's own testimony supports the finding that she quit because she wanted to live with her boyfriend, a personal choice, which is not a necessitous and compelling reason to quit a job under the Law.

² “Our scope of review is limited to determining whether the Claimant's constitutional rights were violated, whether an error of law was committed, or whether substantial evidence supports the findings of fact.” Williams v. Unemployment Compensation Board of Review, 926 A.2d 568, 571 n.4 (Pa. Cmwlth. 2007) (citation omitted). Whether a claimant had cause of a necessitous and compelling nature to leave his employment “is a legal conclusion subject to appellate review.” Brown v. Unemployment Compensation Board of Review, 780 A.2d 885, 888 (Pa. Cmwlth. 2001).

We first address Claimant’s argument that the Board capriciously disregarded her evidence in this case. “[T]he Board is the ultimate factfinding body empowered to resolve conflicts in evidence, to determine the credibility of witnesses, and to determine the weight to be accorded evidence.” Oliver v. Unemployment Compensation Board of Review, 5 A.3d 432, 438 (Pa. Cmwlth. 2010) (en banc). Capricious disregard occurs when the fact finder deliberately *ignores evidence* that a reasonable person would consider important. Leon E. Wintermyer, Inc. v. Workers’ Compensation Appeal Board (Marlowe), 571 Pa. 189, 203 n.12, 812 A.2d 478, 487 n.12 (2002) (quoting Kania v. Ebensburg State School and Hospital, 410 A.2d 939, 940 (Pa. Cmwlth. 1980)); see also Wintermyer, 571 Pa. at 210-11, 812 A.2d at 492 (Cappy, J., concurring) (capricious disregard occurs “where the agency completely ignores overwhelming evidence without comment.”). Our Supreme Court has cautioned that “where there is substantial evidence to support an agency's factual findings, and those findings in turn support the conclusions, it should remain a rare instance in which an appellate court would disturb an adjudication based upon capricious disregard.” Wintermyer, 571 Pa. at 203 n.14, 812 A.2d at 487 n.14.

Initially, we note that Claimant is seeking benefits for the period of time *after* she recovered from her surgery. (See R. Item 1, Claim Record at 1 (noting that the claim week ending was “100501” or May 1, 2010).) In support of her claim for benefits, Claimant testified that due to her planned and medically necessary hysterectomy, which her doctor advised could require a 6-8 week recovery, she could not financially take care of herself and her three children and was forced to move to Stewartstown with her boyfriend, who could, along with his family members, provide financial and child care support for her. (Hr’g Tr. at 11-14.) Claimant testified that

her boyfriend tried to find a job close to her so that he could move in with her and she would not have to relocate, but he was unsuccessful in obtaining employment. (Hr’g Tr. at 11.) Moreover, Claimant testified that her relocation was necessary because, although she offered to work from home during her time off for medical recovery, Employer did not agree to that arrangement. However, on cross-examination, Claimant seemingly admitted that the home she would be working from was her boyfriend’s home in Stewartstown and that she had planned to move to Stewartstown without regard to her surgery. (Hr’g Tr. at 15-18.)³

³ The following exchange took place between Claimant (C) and Employer’s lawyer (EL):

EL I guess my first question if we’re talking about working from home, was home in your mind Warriors Mark or was home Stewartstown.

C It was home. At first I would have been able to maybe work from home at Warriors Mark. However, I didn’t have all of the utilities I guess you could say, the fax machine and the internet service that I would need there, but I did have it in Stewartstown.

...

EL Okay. You have entered into the record a number of bank statements from Citizens Bank that has your name on them. I’m assuming those reflect your account?

C Correct.

EL Okay. I believe one of those is dated back as early – I believe those dated back as early as January of . . . 2010, am I right?

C Correct.

EL Okay. It has a Stewartstown address on it, correct?

C Yes.

...

EL One more question. Were you planning in January to move to Stewartstown in June after school let out?

C That was an option that was on the table, but [my boyfriend] was trying to move up there so I would not have to leave. I very much wanted to stay in the State College area and continue my employment with Mr. Kunes.

(Hr’g Tr. at 15-18.)

The Board implicitly discredited Claimant’s testimony regarding her financial, health and family reasons for relocating to Stewartstown, and instead found, based on the testimony of Claimant that she quit her employment and relocated to Stewartstown to live with her boyfriend. (FOF ¶ 7.) Although the Board did not specifically address in its findings Claimant’s assertion that she was forced to relocate to an area where she allegedly would have more financial and family support during her recovery from surgery, we cannot conclude that the Board disregarded this evidence. The Board, in its discussion, noted Claimant’s financial situation during the *recovery period* following her surgery as not having “disability insurance to cover her time off.” (Board Op. at 2.) The Board stated that Employer “had continuing work available to the claimant if she wanted to return after the surgery,” and implicitly discredited Claimant’s reasons for quitting by stating that “[C]laimant, however, *chose to quit and move in with her boyfriend instead of returning to work after she recovered from the surgery.*” (Board Op. at 2 (emphasis added).) This statement by the Board highlights why Claimant’s request for unemployment compensation benefits is problematic - Claimant failed to offer any credible evidence as to why she quit her employment *before* she had the surgery⁴ and why she could not

⁴ Claimant was last employed by Employer on March 19, 2010, one day before her surgery. (FOF ¶ 1.) This finding is supported by Employer’s testimony:

- R Okay. Then we move on to what happens at that point? Now, I’m either understanding that there’s a medical leave from Mr. Kunes during the period of time and at the end of that period of time there’s some type of a separation that occurs. Is that right, Mr. Kunes?
- E *She actually left employment at the time of her surgery.*
- R Okay. So, she says to you, I’m leaving now because medically I can’t continue this surgery?
- E That is correct.
- (Hr’g Tr. at 17 (emphasis added).)

return to her employment following her recovery, when she was able and available to work. In fact, Claimant testified that “Mr. Kunes [said] there would be a job available for me after my surgery,” (Hr’g Tr. at 18), and Employer agreed that it would have held her job until she was able to return to work. (Hr’g Tr. at 20.) The Board could have found that financial, health, and/or family-related reasons caused Claimant to leave her employment by permanently relocating 130 miles away with her boyfriend, but did not. Instead, the Board found that she quit her employment “to move in with her boyfriend after her surgery,” (FOF ¶ 7), which is supported by substantial evidence of record. Specifically, this factual finding is supported by Claimant’s own testimony that: she offered to work from her boyfriend’s home following her surgery; as early as January 2010, her personal bank account referenced her boyfriend’s address in Stewartstown; and she was considering moving to Stewartstown after school let out in June. (Hr’g Tr. at 15-18.) The Board weighed Claimant’s testimony differently than Claimant would have liked, which is not grounds for this Court to reverse the Board for capricious disregard of evidence. Moreover, Claimant has not proven that this is one of the rare instances in which this Court should disturb the Board’s adjudication based on capricious disregard. Accordingly, we conclude that the Board did not capriciously disregard evidence of record.

Next, we address whether the Board erred as a matter of law by concluding that Claimant did not show a necessitous and compelling reason to quit her employment under Section 402(b) of the Law. A “cause of a necessitous and compelling nature” is one that “results from circumstances which produce pressure to terminate employment that is both real and substantial, and which would compel a reasonable

person under the circumstances to act in the same manner.” Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 359, 378 A.2d 829, 832-33 (1977).

In this case, the credited evidence established that Employer had continuing work available for Claimant after she recovered from her surgery, but Claimant did not return. There is no credible evidence submitted by Claimant to explain why she could not return to work for Employer after she had recovered from her surgery and this Court cannot speculate as to those reasons. The Board found that Claimant quit her employment to move in with her boyfriend. (FOF ¶ 7.) This decision to quit and to move in with her boyfriend, and not to return to her available job, was based on a personal choice. It is well-settled that one’s personal preference or choice to quit employment to relocate with a significant other is not a necessitous and compelling reason under the Law. Lechner v. Unemployment Compensation Board of Review, 639 A.2d 1317, 1320 (Pa. Cmwlth. 1994). This Court is bound by the factual findings made by the Board because they are supported by substantial evidence. Therefore, we cannot conclude that the Board erred as a matter of law in finding Claimant ineligible for benefits under Section 402(b) of the Law.

Accordingly, the order of the Board is affirmed.

RENÉE COHN JUBELIRER, Judge

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Board of Review,	:	
	:	
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ORDER

NOW, June 22, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge