IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nicholas A. DiPietro, Petitioner	:	
v.	:	No. 2207 C.D. 2010
Unemployment Compensation Board of Review, Respondent	:	Submitted: February 11, 2011

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: June 15, 2011

Nicholas A. DiPietro (Claimant) petitions *pro se* from an order of the Unemployment Compensation Board of Review (Board) affirming an order of a Referee denying Claimant benefits pursuant to Section 402(b) of the Unemployment Compensation Law (Law).[1] We affirm.

Claimant worked for QVC, Inc. (Employer) as a full time security coordinator, until his voluntary termination on May 3, 2010. Claimant sold his home in Pennsylvania, and moved to Florida, on the belief that the climate and life

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(b). Section 402(b) of the Law provides that an employee who voluntarily terminates his employment without cause of a necessitous and compelling nature is ineligible for benefits.

style in Florida was better for his medical condition. Prior to resigning, Claimant did not inform Employer of his medical condition, and Employer therefore did not have an opportunity to accommodate Claimant's medical condition. Additionally, prior to his resignation Claimant did not request leave, medical or otherwise, due to his medical condition.

On May 9, 2010, Claimant filed for benefits under the Law with the Altoona Unemployment Compensation Service Center (Service Center). By determination issued June 4, 2010, the Service Center ruled Claimant ineligible for benefits pursuant to Section 402(b) of the Law, 43 P.S. §802(b).

Claimant timely appealed, and a hearing ensued before the Referee at which Claimant appeared *pro se*, and Employer appeared with representation. Following the receipt of testimony and evidence, the Referee reasoned:

> In the present case, the [C]laimant voluntarily terminated his employment because of a medical condition. The [C]laimant, however, did not inform the [E]mployer of the condition prior to resigning in order to allow the [E]mployer an opportunity to accommodate the medical condition. In addition, the [C]laimant did not seek to preserve his employment by accepting any accommodation the [E]mployer might have offered him as a result of his medical condition. The [C]laimant … is, therefore, ineligible to receive benefits under Section 402(b) of the Law.

Referee Decision and Order at 2.

Claimant timely appealed to the Board, which adopted the Referee's Findings and Conclusions and affirmed by order dated September 13, 2010. Claimant timely requested that the Board reconsider its order and either reverse its

prior order, or remand to allow Claimant to present additional evidence on the issues of Employer's prior knowledge of, and prior accommodation for, Claimant's medical condition. The Board denied Claimant's reconsideration request by order dated October 19, 2010. Claimant now petitions this Court for review of the Board's September 13, 2010, order.

This Court's review of the Board's decision is set forth in Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704, which provides that the Court shall affirm unless it determines that the adjudication is in violation of the claimant's constitutional rights, that it is not in accordance with law, that provisions relating to practice and procedure of the Board have been violated, or that any necessary findings of fact are not supported by substantial evidence. See Porco v. Unemployment Compensation Board of Review, 828 A.2d 426 (Pa. Cmwlth. 2003).

The question of whether particular facts constitute a voluntary quit is a question of law fully reviewable by this Court. Chamoun v. Unemployment Compensation Board of Review, 542 A.2d 207 (Pa. Cmwlth. 1988). The claimant bears the burden of proving a necessitous and compelling reason for voluntarily terminating the employment relationship. Mutual Pharmaceutical Company, Inc. v. Unemployment Compensation Board of Review, 654 A.2d 37 (Pa. Cmwlth. 1994). To establish health problems as a compelling reason to quit, a claimant must: (1) offer competent testimony that adequate health reasons existed to justify the voluntary termination; (2) prove that the claimant informed the employer of the health problems to provide the employer with an opportunity to provide accommodations therefor, and; (3) be available to work if reasonable

accommodations can be made. Ann Kearney Astolfi DMD PC. v. Unemployment Compensation Board of Review, 995 A.2d 1286 (Pa. Cmwlth. 2010). Any failure by a claimant to meet any one of these conditions bars a claim for unemployment compensation. Id.

Claimant presents three issues for review, which we have reordered in the interests of clarity. First, we address Claimant's argument that two Findings of Fact are not supported by substantial evidence. In Finding No. 4, the Board found:

> 4. Prior to resigning, the [C]laimant did not inform the [E]mployer of his medical condition.

Referee Opinion at 1. Claimant's scantly developed argument on this issue amounts to his flat assertion that Employer did know of his medical condition prior to Claimant's resignation, and an accompanying citation to evidence not of record[2] that Claimant argues supports his assertion.

Findings of fact are conclusive upon review provided that the record, taken as a whole, contains substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977). Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. Hercules v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992). It is irrelevant whether the record contains evidence to support findings other than those made by the Board in its role as fact-finder; the critical inquiry is whether evidence

[2] In our appellate capacity, this Court, is bound by the facts certified in the record on appeal, and cannot consider facts advanced by the parties not contained therein. Grever v. *(Continued....)*

of record exists supporting the findings that were actually made. Ductmate Industries, Inc. v. Unemployment Compensation Board of Review, 949 A.2d 338 (Pa. Cmwlth. 2008). The Board is the ultimate fact finder and is, therefore, entitled to make its own determinations as to witness credibility and evidentiary weight. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985).

In the instant matter, Claimant testified that he had informed his immediate supervisor, Stan McCloskey, about his medical condition. Original Record (O.R.), Item 7 at 4-6. However, McCloskey testified:

> Q (Employer's attorney): Yes. And you heard the Claimant testify. He mentioned that you were giving him some type of special treatment because you knew of his pulmonary problems, is that correct?
>
> A (McCloskey): No and I actually allow the coordinators to do the nightly rotational schedule which is sent out to all the staff, let the guys do where they go. I do not send that schedule assignment.
>
> * * *
>
> Q: Did he ever tell you that he was having any problems performing his job?
>
> A: No.
>
> Q: Did he ever ask you whether there were any other jobs or any modifications that could be done for his job?
>
> A: No sir.

Unemployment Compensation Board of Review, 989 A.2d 400 (Pa. Cmwlth. 2010).

> Q: And did you have any other involvement with this, is there anything else that he testified to that you wanted to address?
>
> A: Not that I'm aware of, no.

Id. at 11. Further, in response to Claimant's cross-examination of McCloskey, McCloskey repeatedly testified that he did not recall having knowledge of Claimant's medical condition. Id. at 12-13. The above-cited evidence constitutes substantial evidence supporting Finding 4. Hercules. Claimant's citation to his own testimony contradicting that cited above is to no avail; this Court is constrained by the credibility determinations made by the Board in its function as the fact finder, and we cannot revisit those credibility determinations on appeal. Peak.

> In regards to Finding 5, the Board found:
>
> 5. Prior to the [C]laimant's resigning, the [E]mployer did not have an opportunity to accommodate the [C]laimant's medical condition.

Referee Opinion at 1. On this point, Claimant testified in relevant part:

> Q (Referee): Now when you -- before you resigned did you request medical leave of absence?
>
> A: No.
>
> Q: Okay. Why didn't you pursue that option?
>
> A: Well because of the preexisting issue.
>
> Q: I don't understand. It if got worse why didn't you exercise the option to possibly you know take 30 days, 60 days, 12 weeks, whatever it is?

A: I don't know. I just – I thought that the climate and the lifestyle would be better in Florida than it would be here.

* * *

Q (Employer's attorney): Okay. So did you ever ask anybody at the [E]mployer to say well I'm having trouble doing my regular duty job can you further accommodate my pulmonary problems?

A: I didn't because I explained it to Mr. McCloskey and Mr. McCloskey did accommodate me as much as he could.

* * *

Q: Did you ever go to human resources and tell them that you're having trouble performing your job and ask them whether they had another job for you?

A: No I didn't and one of the reasons why I didn't go is the same reason why I didn't go for that [requested life insurance examination program] and take that physical because I knew what my condition was. I tried to last as long as I could with that condition.

* * *

Q: So besides for this security-guarding job did you ever ask whether there are any other jobs where you didn't have to walk long distances?

A: No, I didn't…

O.R., Item 7 at 4-6, 8. Employer's HR partner testified:

Q (Employer's attorney): And did the Claimant ever come to you to ask – to tell you he was having any problems performing his job?

A: No.

> Q: If he had come to you to tell you that he wasn't able to walk the long distances would there have been other alternatives that you could have explored with him?
>
> A: We would have reviewed his situation to determine if we were able to accommodate his restrictions.

Id. at 9. Employer's HR partner further testified that her department had just recently accommodated another employee's request for accommodations for a sedentary position related to medical restrictions. Id. at 10. As noted previously, McCloskey also testified that he did not know of Claimant's medical condition, and had not made any accommodations therefor. Id. at 11.

The above-cited evidence constitutes substantial evidence supporting Finding 5. Hercules. Again, we emphasize that Claimant's citation to testimony contradicting that cited above is to no avail; this Court is constrained by the credibility determinations made by the Board in its function as the fact finder, and we cannot revisit those credibility determinations on appeal. Peak.

Claimant next argues that the Board erred in not granting his request that the Board reconsider its order affirming the Referee's order, and/or grant a remand of the matter to the Referee for a reopening of the record to allow Claimant to enter additional testimony and/or evidence to demonstrate that Employer was aware of Claimant's medical condition, and that Employer had made prior accommodations for that condition. Claimant argues that he learned for the first time at the hearing before the Referee that Employer denied having knowledge of his medical condition, and denied having ever made an accommodation for that condition. Because the Referee closed the record herein on the same day, Claimant

argues that he was unable to produce evidence to counter Employer's denials. Thus, Claimant reasons, his request for reconsideration for the purpose of reopening the record to allow him to enter additional evidence should have been granted.

The Board has within its discretion the power to remand a case for the taking of additional evidence, 34 Pa. Code § 101.104; DeFelice v. Unemployment Board of Review, 649 A.2d 485 (Pa. Cmwlth. 1994). Where the Board has committed an error of law, its decision must be reversed; however, ordinarily the Board's decision not to remand a case will be upheld by this Court. Id.

Our review of the record in its entirety to this matter reveals that Claimant did in fact contest, with his own testimony and in his cross-examination of Employer's witnesses, the factual matters that he now requests a reopening of the record for the acceptance of further evidence. The record also reveals that Claimant made no request to the Referee for a continuation of the proceedings to allow him to produce additional evidence, and that Claimant made no assertions herein that any witnesses or evidence that he intended to present were unavailable for any reason. Given the lack of any such request or objection on the record before the Referee, Claimant has waived this issue. Issues not raised before a Referee are waived. Schneider v. Unemployment Compensation Board of Review, 12 A.3d 754 (Pa. Cmwlth.), petition for allowance of appeal denied, ___Pa.___, 14 A.3d 830 (2010). We are cognizant of the frequent necessity, and incumbent difficulty, of *pro se* representation by unemployed claimants in matters such as this. However, it is axiomatic that a layperson who chooses to represent

himself in a legal proceeding must assume the risk that his lack of expertise and legal training may prove to be his undoing. Finfinger v. Unemployment Compensation Board of Review, 854 A.2d 636 (Pa. Cmwlth. 2004).

Finally, Claimant argues that the Board denied Claimant "due process and constitutional protections and rights" in not granting his reconsideration request. Claimant has waived this issue by failing to preserve it within his Petition for Review to this Court. See O.R., Petition for Review; Pa.R.A.P. 1513(d); Diehl v. Unemployment Compensation Board of Review, 4 A.3d 816 (Pa. Cmwlth. 2010) (an issue not raised in a petition for review to this Court results in a waiver of that issue). Additionally, and independently dispositive, Claimant has failed to develop or advance any constitutional argument within his brief to this Court. A party's failure to develop an argument on appeal results in a waiver of that argument. Diehl.

Accordingly, we affirm.

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JAMES R. KELLEY, Senior Judge

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O R D E R

AND NOW, this 15th day of June, 2011, the order of the Unemployment Compensation Board of Review dated September 13, 2011, at Decision No. B-506004, is affirmed.

JAMES R. KELLEY, Senior Judge