

Claimant worked as a communications director for the Keystone Research Center from February 2008 until he was laid off in October 2009. Shortly thereafter he began receiving unemployment compensation benefits. In November 2009, Claimant contacted his previous employer, the Mennonite Central Committee (Committee), and offered to assist the Committee with a major restructuring of its organization. The next month, Arli Klassen, the Committee's Executive Director, offered Claimant work as an "Aide to Teams" under a consulting contract that specified that Claimant would be an independent contractor, not an employee. Claimant signed the contract and began working for the Committee in January 2010.

On June 7, 2010, the UC Service Center issued a Notice of Determination informing Claimant that he was ineligible for benefits effective the week of January 23, 2010, because he was self-employed. The Service Center also found that Claimant had been overpaid regular and federal additional compensation benefits. Claimant appealed and a hearing was held by the Referee on July 22, 2010.

LaDonna Upton, in charge of human resources for the Committee, testified that, as required by his contract, Claimant attended biweekly progress meetings with Klassen and other meetings on request. According to Upton, Claimant primarily worked from home; was free to make his own schedule; was not closely supervised in his work; was free to work for others; did not receive any benefits or equipment from the Committee; and received an IRS Form 1099 from the Committee.

(continued . . .)

43 P.S. §802(h).

The consulting agreement expressly provided that Claimant was an independent contractor; was to be paid \$300 per eight-hour work day; and would work, on average, between ten and twelve days per month between January 1, 2010, and June 30, 2011. Claimant billed the Committee monthly via an invoice detailing the tasks he performed and the amount of time he spent doing each.

Claimant testified on his own behalf. He maintained that he was an employee of the Committee for purposes of the Law. Claimant testified that he was unaware that working as a consultant, instead of as an employee, affected an individual's eligibility for unemployment benefits. He also stressed that he was in frequent contact with Klassen and was expected to attend numerous meetings.

Claimant also offered an affidavit signed by the Committee's Executive Director, Arli Klassen, who was unable to attend the hearing. In the affidavit, Klassen stated that she offered Claimant work as an independent contractor, not an employee, because it would by-pass the Committee's hiring procedures and allow him to begin working sooner. The affidavit also stated that Claimant was free to perform his duties when he pleased, provided he met set deadlines. In addition to his biweekly meetings with Klassen, where she reviewed his work and assigned him new tasks, Claimant attended meetings concerning the Committee's reorganization.

The Referee held that Claimant was ineligible for unemployment compensation benefits under Section 402(h) of the Law because he was self-employed. In doing so, the Referee found that Claimant chose to work for the Committee as an independent contractor under a consulting contract instead of waiting for a staff position to become available; worked primarily from his home pursuant to his own schedule; was free to work for others; received an IRS Form

1099 from the Committee; submitted monthly invoices to receive compensation; and provided his own medical insurance. The Referee reasoned that Claimant's own evidence, especially Klassen's affidavit, showed that he was an independent contractor for the Committee.

Claimant appealed to the Board, which affirmed. The Board adopted the Referee's findings of fact and conclusions of law. The Board noted that the burden is on the employer to overcome the statutory presumption of employment. Here, strangely enough, Claimant's own evidence overcame the presumption. Claimant requested reconsideration, which the Board denied. Claimant now petitions this Court for review.²

On appeal, Claimant seeks a reversal or remand of the Board's order on two grounds: (1) the participation of Board Chairman Richard Bloomingdale in Claimant's case violated Claimant's due process rights; and (2) the Board erred in classifying him as self-employed.

In his first issue, Claimant asserts that Board Chairman Bloomingdale should have recused. Claimant points out that under Section 503(a) of the Law, "[n]o referee, member of the board, or employe of the department shall participate in the hearing of any case in which he himself is an interested party." 43 P.S. §823(a); *see also* 34 Pa. Code §101.62(a) (extending the prohibition of interested parties' involvement to "the hearing or determination of any case"). Claimant believes that Chairman Bloomingdale was an interested party in the appeal because

² This Court's scope of review of a decision by the Board is limited to determining whether constitutional rights were violated, findings of fact were supported by substantial evidence, or whether an error of law was committed. *Smithley v. Unemployment Compensation Board of Review*, 8 A.3d 1027, 1029 n.5 (Pa. Cmwlth. 2010).

he served on the board of the Keystone Research Center, which had a pecuniary interest in the proceeding because it was Claimant's base year employer.

The Board's regulations provide that a "referee or member of the Board may be challenged at any time by an interested party *prior to the disposition of an appeal* by the referee or the Board, whichever is the subject of the challenge." 34 Pa. Code §101.62(b) (emphasis added). A party must make a timely request for recusal, otherwise the issue of recusal is waived. *Stone Container Corp. v. Unemployment Compensation Board of Review*, 657 A.2d 1333, 1336 (Pa. Cmwlth. 1995). Claimant did not challenge Chairman Bloomingdale's participation until reconsideration, after his initial appeal to the Board had been decided. Simply, Claimant's after-the-fact request for recusal was presented too late.³

Next, we turn to Claimant's contention that the Board erred in determining that he was self-employed. Four separate arguments comprise this claim: (1) substantial evidence did not support the Board's finding of fact that Claimant chose to work for the Committee as an independent contractor instead of waiting for a staff position to become available; (2) Claimant's questionnaire responses were insufficient to overcome the Law's presumption of employment; (3) the Board's findings of fact were tainted by its capricious disregard of material and competent evidence; and (4) the Board's finding that he was self-employed is not supported by substantial evidence.

³ Even so, the recusal would not have affected the outcome of his appeal. Section 203(a) of the Law instructs that "[t]he board shall consist of three members Two members of the board shall be a quorum, and no action of the board shall be valid unless it shall have the concurrence of at least two members." 43 P.S. §763(a). As all three members voted to deny Claimant benefits, the Board's decision would stand even without Chairman Bloomingdale's vote.

First, Claimant maintains that substantial evidence did not support the Board's finding that he chose to work for the Committee as an independent contractor instead of waiting for a staff position to become available. We disagree.

It is well established that the Board's findings of fact are conclusive on appeal if they are supported by substantial evidence. *Guthrie v. Unemployment Compensation Board of Review*, 738 A.2d 518, 521 (Pa. Cmwlth. 1999). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and "requires more than a mere scintilla of evidence or suspicion of the existence of a fact to be established." *Murphy v. Department of Public Welfare*, 480 A.2d 382, 386 (Pa. Cmwlth. 1984) (internal citations omitted).

Claimant argues that the Board's finding that Claimant chose to be hired as an independent contractor, instead of a staff member, was unsubstantiated. Claimant argues that he had no choice, given his economic situation, to take the consulting agreement. The distinction Claimant attempts to draw here is irrelevant. Both Claimant's testimony and Klassen's affidavit show that he was offered work as an independent contractor because Klassen wanted to avoid the Committee's lengthy formal staff hiring process. Thus, the Board's finding that Claimant accepted employment as an independent contractor, in lieu of waiting for employment as a staff member, is supported by substantial evidence and is conclusive.

Second, Claimant argues that his responses to the claimant questionnaire did not overcome the Law's presumption of employment. Again, we disagree.

Section 402(h) of the Law, which excludes self-employed individuals from receiving benefits, does not define “self-employment.” Thus, “the courts have utilized Section 4(l)(2)(B) [of the Law] to fill the void because its obvious purpose is to exclude independent contractors from coverage.” *Thomas Edison State College v. Unemployment Compensation Board of Review*, 980 A.2d 736, 741 (Pa. Cmwlth. 2009) (quoting *Glatfelter Barber Shop v. Unemployment Compensation Board of Review*, 957 A.2d 786, 789 (Pa. Cmwlth. 2008)). Section 4(l)(2)(B) provides, in relevant part, as follows:

Services performed by an individual for wages shall be deemed to be employment subject to this act, unless and until it is shown to the satisfaction of the department that – (a) such individual has been and will continue to be free from control or direction over the performance of such services both under his contract of service and in fact; and (b) as to such services such individual is customarily engaged in an independently established trade, occupation, profession or business.

43 P.S. §753(l)(2)(B). Section 4(l)(2)(B) of the Law presumes that services performed by an individual for wages is employment, unless the individual is both free from control or direction in the performance of his work and engaged in a business or trade that is customarily independent. *Resource Staffing, Inc. v. Unemployment Compensation Board of Review*, 995 A.2d 887, 890-891 (Pa. Cmwlth. 2010). If this statutory presumption of employment is overcome, then the individual is an independent contractor. *Id.* at 892.

When analyzing whether an employee is free from control, this Court examines a variety of factors, including, but not limited to

whether there was a fixed rate of remuneration; whether taxes were withheld from the claimant’s pay; whether the employer supplied the tools necessary to carry out the services; whether the employer provided on-the-job training; whether the

employer set the time and location for work; whether the employer had the right to monitor the claimant's work and review performance; and whether the employer held regular meetings that the claimant was expected to attend.

Id. at 890 n.6. The Court looks to the totality of the circumstances when conducting this inquiry. *Id.*

When analyzing whether the employee is engaged in an independent trade or business, this Court has found the following factors to be relevant:

(1) whether the individual was capable of performing the activities in question to anyone who wished to avail themselves of the services; and (2) whether the nature of the business compelled the individual to look to only a single employer for the continuation of such services.

Id. at 892.

Here, Claimant's own responses on his claimant questionnaire were fatal to his claim that he was an employee. He responded, *inter alia*, that he: was a consultant who signed a contract identifying him as an independent contractor; set his own hours and worked primarily from home; could begin and end his work independently; was not supervised closely; received no benefits; could perform his consulting services for others independently; and was permitted under his consultant services contract to work for several entities at the same time. Certified Record, Item No. 3 (C.R. ____). These responses were credited by the Board.

Claimant maintains, however, that his questionnaire responses did not overcome the presumption, especially in light of his hearing testimony regarding Employer's control over his consulting work. Claimant argues from an incorrect premise. The Board did not rely solely on Claimant's questionnaire responses in concluding that he was an independent contractor. It adopted the Referee's findings of fact and conclusions of law, which were based on the hearing testimony

and other record evidence. Nevertheless, the Board, as fact finder, could have relied only on the questionnaire.

Next, Claimant argues that the Board's findings of fact regarding the Committee's control of his work disregarded material and competent record evidence in an arbitrary and capricious manner.

The Referee found that Claimant worked primarily from home pursuant to his own schedule, worked in an advisory role, and was free to work for others. However, Claimant maintains that the Board was required to make other relevant findings on the issue, especially concerning: how Claimant received his work; what parts of his work he could do alone and what parts required interaction with others; how his work was supervised; how his work fit into the Committee's operations; and the meetings he was required to attend. Claimant contends that by failing to make such findings, the Board "ignore[d] the overwhelming evidence in favor of a contrary result not supported by the evidence." *Borello v. Unemployment Compensation Board of Review*, 490 Pa. 607, 619, 417 A.2d 205, 211 (1980).

The Board's findings "must be sufficiently definite and specific to enable this Court to pass upon the legal issues involved." *Unemployment Compensation Board of Review v. Walton*, 343 A.2d 70, 72 (Pa. Cmwlth. 1975). However, "[a]n agency is not required to address each and every allegation of a party in its findings The findings need only be sufficient to enable the Court to determine the questions and ensure the conclusions follow from the facts." *Balshy v. Pennsylvania State Police*, 988 A.2d 813, 835 (Pa. Cmwlth. 2010).

The Board has not acted in an arbitrary or capricious manner by failing to make the specific findings of fact that Claimant desires. In addition to

adopting the Referee’s findings, the Board made several additional findings of fact regarding employer control of Claimant’s work. In its order, the Board, relying on Claimant’s questionnaire responses, found that

the claimant admitted that he could begin and end his work independently; he was not supervised closely or regularly; he was free from direction and control in the performance of his work; he purchased his own tools and supplies; and he was able to perform identical services for other entities.

C.R. Item No. 19, at 1. In determining if an individual was free from control in the performance of his work, “[n]o one factor is dispositive; instead, this Court looks to the totality of the circumstances.” *Resource Staffing, Inc.*, 995 A.2d at 890 n.6. By adopting the Referee’s findings of fact and making findings of its own, the Board did not ignore what Claimant perceives to be overwhelming evidence in his favor—it merely acted within its discretion as the fact finder. The Board is not required to address each point raised by Claimant, *Balshy*, 988 A.2d at 835, and its findings on the issue of employer control or direction are “sufficiently definite and specific” for our purposes. *Walton*, 343 A.2d at 72.

Finally, Claimant argues that the Board’s determination that he was self-employed was not supported by substantial evidence. However, based on the record evidence discussed above, the Board’s findings that Claimant was free from direction and control in his work and that he was engaged in an independent business are supported by substantial evidence. Those findings are conclusive upon review.

Accordingly, we affirm the Board’s determination that Claimant is self-employed and, therefore, ineligible for unemployment compensation benefits.

MARY HANNAH LEAVITT, Judge

