

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Temple University Hospital, :
Petitioner :
 :
v. :
 :
Unemployment Compensation :
Board of Review, : No. 2748 C.D. 2010
Respondent : Submitted: May 13, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: July 28, 2011

Temple University Hospital (Employer) challenges the order of the Unemployment Compensation Board of Review (Board) which affirmed the referee's grant of benefits to Tanika K. Jefferson (Claimant) under Sections 402(b) and 401(d)(1) of the Unemployment Compensation Law (Law).¹

The facts, as found by the Board, are as follows:

1. For purposes of this appeal, the claimant was last employed as a part-time escort attendant by Temple University Hospital from October 27, 2007, at a final rate of \$17.69 per hour. She worked 24 to 32 hours per week and her last day of work was July 6, 2010.
2. The claimant became pregnant and as of July 2010, her doctor placed her on restrictions of no lifting more than ten pounds, no working more than 40 hours per

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §§802(b) and 801(d)(1).

week, and standing up to one or two hours with periods of rest as needed.

3. The claimant provided her supervisor with a doctor's note with her work restrictions.

4. No work within those restrictions was available to the claimant.

5. The claimant applied for leave under the Family and Medical Leave Act (FMLA), which was granted by the employer.

6. The claimant is able to work within her light duty restrictions.

Board Opinion (Opinion), December 3, 2010, Findings of Fact Nos. 1-6 at 1-2; Reproduced Record (R.R.) at RR61-RR62.

The Board determined:

Here, due to her pregnancy, the claimant was placed on light duty work restrictions. The claimant informed the employer of the work restrictions, and was informed that no work was available within those restrictions. The employer's testimony to the contrary is rejected. Consequently, the claimant applied for FMLA leave, which was granted. The Board finds that the claimant has established that an adequate health reason existed at the time of her separation to justify the separation, that she informed the employer of her condition and limitations, and that she was available for work not inimical to her health. Because no work within her restrictions was available, the claimant had a necessitous and compelling reason to take the leave of absence. Benefits cannot be denied pursuant to Section 402(b) of the Law.

....

The claimant credibly testified that she is able to work within her light duty work restrictions. The employer's testimony and evidence to the contrary is rejected as not

credible. As the claimant is able and available for work, benefits cannot be denied pursuant to Section 401(d)(1) of the Law.

Opinion at 2-3; R.R. at RR62-RR63.

Employer contends that the Board erred when it granted Claimant benefits because she was not able and available for work.²

Section 401(d)(1) of the Law, 43 P.S. §801(d)(1), provides:

Compensation shall be payable to any employe who is or becomes unemployed and who

.....

(d)(1) Is able to work and available for suitable work: Provided, That no otherwise eligible claimant shall be denied benefits for any week because he is in training with the approval of the secretary nor shall any such individual be denied benefits with respect to any week in which he is in training with the approval of the secretary by reason of the application of the provisions of this subsection relating to availability for work or the provisions of section 402(a) of this act relating to failure to apply for or a refusal to accept suitable work. (Emphasis added).

Whether a claimant is able and available for suitable work is a question of fact unless the restriction on job availability is so untenable and illustrative of a lack of good faith so as to disqualify a claimant as a matter of law. Proof that a claimant has registered with the unemployment compensation authorities creates a presumption of availability for work. The presumption may

² This Court's review in an unemployment compensation case is limited to a determination of whether constitutional rights were violated, errors of law were committed, or findings of fact were not supported by substantial evidence. Lee Hospital v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994).

be rebutted by evidence that a claimant's physical condition limits the type of work a claimant is able to accept or by evidence that he has voluntarily placed other restrictions on the type of job he is willing to accept. If a claimant is able to do some type of work even though he is disabled and there is a reasonable opportunity to secure such a position, then the claimant is attached to the labor force. Hower and Son v. Unemployment Compensation Board of Review, 509 A.2d 1383 (Pa. Cmwlth. 1986).

Generally, the determination of whether a claimant is available for work is a question of fact for the Board, which this Court is bound to affirm if the Board's determination of the factual issue is supported by substantial evidence. Pennsylvania Electric Company v. Unemployment Compensation Board of Review, 450 A.2d 779 (Pa. Cmwlth. 1982). Further, a woman may not be presumed to be unavailable for work because she was placed on a pregnancy leave of absence. Wincek v. Unemployment Compensation Board of Review, 412 A.2d 699 (Pa. Cmwlth. 1980).

Employer contends that the Board's findings that Claimant was placed under medical restrictions and was able and available for work are not supported by substantial evidence. Substantial evidence is defined as "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985). Employer argues that the only evidence in support of Claimant's work availability was Claimant's own testimony wherein she "reiterated and parroted the alleged medical restrictions given to her by her physician." Employer's Brief at 8.

Claimant testified that she was due to give birth on December 2nd, 2010. Notes of Testimony, September 29, 2010, (N.T.) at 4; R.R. at RR-33.

Claimant testified regarding her medical restrictions:

R: And, what were your medical restrictions?

C: My medical restriction was not to lift no [sic] more than – no more than 10 pounds. I can work for eight hours a day. No more than 40 hours per week. And I could stand up to one or two hours and just . . . short periods of rest as needed.

R: Now did you present these medical restrictions to your Employer?

C: Yes. I did.

R: And then they told you that they were not able to accommodate them?

C: Yes. He said wasn't nothing [sic] for me to do. No light duty was available.

N.T. at 4; R.R. at RR-33.

Claimant received the limitations from her physician in the first week of July. N.T. at 4; R.R. at RR-33. Claimant testified that she could perform work within her restrictions. N.T. at 5; R.R. at RR-34. Claimant testified that she was able and available for work and “if there was work to be done at light duty, I would be there doing it. You know, up to the time for me to go in. As long as I could.”

N.T. at 5; R.R. at RR-34.

On cross-examination, Claimant testified that she did not have a copy of the medical restrictions but had given it to “Mr. Hanna”³ of Employer who told her he would “fax it over to you guys.” N.T. at 5; R.R. at RR-34.

³ Gregory Hanna was Claimant's supervisor.

Employer argues that this testimony by Claimant constituted inadmissible hearsay.⁴

Although Claimant's testimony that "parroted" what her doctor told her was hearsay, Employer did not object to the statement. Unobjected to hearsay testimony which is corroborated by other evidence may support a finding of fact. Walker v. Unemployment Compensation Board of Review, 367 A.2d 366 (Pa. Cmwlth. 1976).

A review of the record reveals that no other evidence corroborated the hearsay testimony. The only evidence that Claimant had any work restrictions under which she was able to work was Claimant's own testimony. Richard West (West), manager of benefits for Employer, testified that he was unaware of any medical certification provided by Claimant's physician other than the Healthcare Provider Certification which accompanied Claimant's leave of absence application under the Family Medical Leave Act (FMLA), 29 U.S.C. §§2601-2654. N.T. at 8; R.R. at RR-37. In fact West explained that Question Number Five on page three of the Healthcare Provider Certification completed by Claimant's physician asked "will the employee be incapacitated for a single continuous period of time due to his or her medical condition? And the answer is yes. And the estimate of the beginning and ending dates would be July 6th, 2010 through six to eight weeks after delivery." (Emphasis added). N.T. at 7; R.R. at RR-36.

⁴ Hearsay is defined as a "statement, other than one made by the declarant . . . offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801(c).

This document clearly does not corroborate the hearsay testimony of Claimant and, in fact, refutes it. Although the Board did not find this document credible⁵, it is undisputed by the parties that Claimant applied for and received a leave of absence under the FMLA. Part of the application was the Healthcare Provider Certification which stated that Claimant would be incapacitated from July 6, 2010, until six to eight weeks after her delivery. Claimant's last day of work for Employer was July 6, 2010. This Court agrees with Employer that the Board's finding regarding Claimant's availability to work is unsupported by substantial evidence.

Accordingly, this Court reverses.

BERNARD L. McGINLEY, Judge

⁵ In unemployment compensation proceedings, the Board is the ultimate fact-finding body empowered to resolve conflicts in evidence, to determine the credibility of witnesses, and to determine the weight to be accorded evidence. Unemployment Compensation Board of Review v. Wright, 347 A.2d 328 (Pa. Cmwlth. 1975).

