

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ronald Gombita,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2789 C.D. 2010
	:	Submitted: August 26, 2011
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: October 12, 2011

Ronald Gombita (Claimant), representing himself, petitions for review of an order of the Unemployment Compensation Board of Review (Board) that denied his claim for benefits under Section 402(b) of the Unemployment Compensation Law (Law) (voluntary quit).¹ Claimant contends the Board's findings are not supported by substantial evidence. For the reasons that follow, we affirm.

I. Background

Claimant worked for Waste Management (Employer) as a full-time residential waste driver for approximately one month during March and April

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

2010. During that time, Claimant injured his left arm leaving him unable to work. Claimant subsequently filed a claim for workers' compensation benefits, which was granted. Claimant received workers' compensation benefits throughout the time covered in this opinion. Notes of Testimony, 8/23/10 (N.T.), at 6.

A month after the injury, Claimant's treating physician informed Employer and Claimant that Claimant could perform certain work. Specifically, the physician allowed Claimant to perform light duty work, which included limited walking, standing, and lifting, and sedentary work.

Shortly thereafter, Employer notified Claimant by letter (June Letter), that a light duty position was available for him. The light duty consisted of filing paperwork, and picking up trash at the landfill hauling site with the aid of a shoulder bag. The letter directed Claimant to report to work the following Wednesday.

On that subsequent Wednesday, Claimant did not report to work or contact Employer to explain his failure to report. As a result, Employer considered Claimant voluntarily terminated. At that time, Claimant applied for unemployment benefits, which were initially granted. Employer appealed.

After a hearing, Ryan Sallee (Employer's Witness), one of Employer's operations managers, and Claimant testified. The referee determined that Claimant was ineligible for benefits. Claimant appealed.

On Claimant's appeal, the Board entered its own decision. Specifically, the Board found:

1. ...[C]laimant's last day of work was April 16, 2010.

....

3. The treating physician gave [C]laimant and [E]mployer information regarding [C]laimant's ability to work indicating [C]laimant would work light duty, lifting no more than 10 pounds with limited walking and standing

7. [C]laimant alleges that he contacted an individual he referred to as a Worker's Compensation case worker² and was told that his job would only entail picking up garbage for the entire eight hours that he worked.

8. [C]laimant also alleges [the case worker told him] he was prohibited from contacting [E]mployer directly to discuss the light duty position.

9. [C]laimant never contacted [E]mployer with any questions about the new position.

10.[C]laimant did not report for work or contact [E]mployer alleging safety concerns, as he did not think his duties were going to comply with his medical restrictions.

Bd. Op., 11/5/10, Findings of Fact (F.F.) Nos. 1, 3, 7-10.

² According to Claimant, because he filed a human resources complaint against a supervisor related to his workers' compensation claim, Employer instructed him to direct his contacts with Employer through Ms. Leslie Watts, a workers' compensation case worker. Notes of Testimony, 8/23/10, at 5, 9-10.

Based on these findings, the Board determined that despite his injury Claimant was able and available for suitable work; however, he became ineligible for continued unemployment compensation, under Section 402(b), when he refused an offer of suitable work without good cause. Claimant petitions for review.³

II. Issues

In Claimant's petition for review, he challenges whether substantial evidence supports the Board's factual findings. Specifically, he argues the Board Findings of Fact Nos. 1, 3, 7, 8, 9, and 10 lack record support.

III. Discussion

A. Substantial Evidence

In an unemployment compensation case, the Board's factual findings are conclusive on appeal so long as the record taken as a whole contains substantial evidence to support those findings. Grieb v. Unemployment Comp. Bd. of Review, 573 Pa. 594, 827 A.2d 422 (2003). In determining whether substantial evidence exists, we must view the record in the light most favorable to the party that prevailed before the Board, and give that party the benefit of all reasonable and logical inferences that can be drawn from the evidence. Tapco, Inc. v. Unemployment Comp. Bd. of Review, 650 A.2d 1106 (Pa. Cmwlth. 2004).

³ Our review is limited to determining whether the necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Oliver v. Unemployment Comp. Bd. of Review, 5 A.3d 432 (Pa. Cmwlth. 2010) (en banc).

Moreover, the Board is the exclusive arbiter of all credibility and evidentiary-weight determinations. Id.

In his petition for review, Claimant argues that his last day of work was not April 16, 2010, as the Board found, but rather, October, 13, 2010. However, at the referee hearing, Claimant testified the last day he worked for Employer was April 16, 2010. N.T. at 4. As such, this finding is supported.

Next, Claimant asserts Board Finding of Fact No. 3, which relates to what type of work the treating physician restricted Claimant to performing, is not supported by the record. Contrary to Claimant's assertion, Claimant admitted that the doctor "put me on light duty." N.T. at 4. Similarly, Employer's witness stated that he became aware the Claimant was released for light duty work, that they received the information the end of May, and that Employer offered light duty work with "the same restrictions, the 10 pounds lift with the left arm and walk and stand on occasion." N.T. at 7. The offered light duty job included filing paperwork in the office, and picking up trash with aid of a shoulder bag. N.T. at 7-8. Employer tailored the position to conform to Claimant's medical restrictions. N.T. at 8; see also N.T. at 6-7. Additionally, Employer's Witness testified Employer routinely provided light duty work to medically restricted employees. N.T. at 10.

Moreover, Claimant's argument that Ms. Leslie Watts (Case Manager), a workers' compensation case worker, told him the offered position would be different than as stated in the June Letter was rejected as not credible. F.F. No. 7; N.T. at 8. In this regard, the Board stated, "The Board finds

insufficient credible evidence in support of the claimant's assertions regarding the alleged statements attributable to this person [a Workers' Compensation case manager]. The written offer of work provided by the employer dated June 3, 2010, complied with the claimant's medical restrictions. Therefore, the offer was suitable and the claimant did not have good cause for refusing it." Bd. Op., 11/5/10 at 3-4.

Lastly, Claimant challenges the basis for Board Findings of Fact Nos. 7, 8, 9, and 10, which were all made after weighing the credibility of conflicting testimony about contacts between Claimant and Employer. As determined by the Board, Employer's Witness testified credibly that Claimant never called the local site or made contact with Employer. N.T. at 8. As discussed above, Claimant's testimony to the contrary was deemed not credible. Additionally, it was undisputed that Claimant did not report to work to attempt the offered light duty position. N.T. at 6, 8.

In sum, viewing the evidence in the light most favorable to Employer, the prevailing party, the record supports the Board's findings that: 1) Claimant's last day of work was April 16, 2010; 2) the treating physician informed Claimant and Employer regarding Claimant's restricted work ability; 3) Employer offered Claimant a light duty position consistent with Claimant's medical restrictions; 4) Claimant alleged that he called his Case Manager to discuss the offered position, but the Board rejected this testimony; 5) Claimant alleged that the Case Manager told him not to call Employer, but the Board rejected this testimony; and, 6)

Claimant did not report to work or contact Employer regarding the proposed light duty position.⁴

Therefore, substantial evidence supports the challenged findings. Accordingly, Claimant's argument that substantial evidence does not support the Board's findings fails.⁵

B. Section 402(b), Voluntary Leave and Suitable Work

Claimant's petition for review solely challenged the sufficiency of the evidence upon which the Board made its determination; therefore, the issue of whether the Board erred as a matter of law is waived. See Maher v. Unemployment Comp. Bd. of Review, 983 A.2d 1264 (Pa. Cmwlth. 2009). Moreover, we discern no error in the Board's conclusion that Claimant did not establish necessitous and compelling cause for his voluntary termination of employment.

⁴ Additionally, Claimant presented no evidence to support his argument that a Dr. Butterbaugh contacted Employer on Claimant's behalf in response to the June Letter. See Claimant's Br. at 5, 13. Further, this Court must disregard Claimant's attempts to present evidence that was not properly before the Board. See Grever v. Unemployment Comp. Bd. of Review, 989 A.2d 400 (Pa. Cmwlth. 2010).

⁵ Separately, in his brief Claimant refers to two documents: a letter from Claimant's Case Manager, and a report signed by Dr. Butterbaugh. He claims they were "used" at the referee hearing but were not included in the record for the Board's consideration.

Our review of the record reveals that neither document was presented or admitted into evidence at the referee hearing. Instead, Claimant submitted the Case Manager letter as an exhibit with his brief before the Board, and he attached Dr. Butterbaugh's report to his request for reconsideration by the Board. Certified Record at Item Nos. 27, 30. We discern no abuse of discretion in the Board's failure to base any of its findings on these extra-record documents. See Ferris v. Unemployment Comp. Bd. of Review, 405 A.2d 1047 (Pa. Cmwlth. 1979). Therefore, Claimant's argument lacks merit.

Under Section 402(b) of the Law, an employee is ineligible for unemployment compensation for any week in which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature. Genetin v. Unemployment Comp. Bd. of Review, 499 Pa. 125, 451 A.2d 1353 (1982). For a claimant to establish a physical condition or health problem as a cause of a necessitous and compelling nature, the claimant must establish: 1) an adequate health reason existed; 2) the claimant informed the employer of the health concerns; and, 3) the claimant is available to work if suitable work can be offered. Id. However, a claimant who does not attempt proposed work without good cause is deemed unavailable. See Leonarczyk v. Unemployment Comp. Bd. of Review, 397 A.2d 49 (Pa. Cmwlth. 1979).

Suitable work includes all work that the employee is capable of performing. See Laws v. Unemployment Comp. Bd. of Review, 412 A.2d 1381 (Pa. Cmwlth. 1980). In determining whether particular work is suitable for an individual, this Court considers: the degree of risk to the individual's health and morals, his physical fitness, his prior training and experience, and the distance of the work from his residence. Section 4(t) of the Law, 43 P.S. § 753(t); Laws.

In his brief, Claimant cites Shay v. Unemployment Compensation Board of Review, 424 Pa. 287, 227 A.2d 174 (1967) and Ellswood City Hospital v. Unemployment Compensation Board of Review, 457 A.2d 231 (Pa. Cmwlth. 1983) as proper guidance for applying Section 4(t) of the Law. In those cases, the employers offered alternative work to claimants to retain them during work

shortages, and to avoid possible lay-offs. Thus, in determining whether the offered positions were suitable work in those scenarios, this Court primarily considered similarity of the duties and salaries of the offered positions to those of the original positions. See Shay; Ellswood City Hosp.

However, Shay and Ellswood City Hospital are inapplicable here. Neither case dealt with medical restrictions. In contrast, in Laws, this Court distinguished suitable work designed to accommodate medical restrictions from the suitable work for the claimants in Shay and Ellswood City Hospital. This Court held that suitable work for an employee with a medical restriction includes positions the employee is physically capable of performing, with less weight given to whether the offered work is dissimilar to the claimant's prior position and training, or could result in a significant reduction in pay. Laws. Such an analysis is more appropriate in this case. Moreover, this approach is especially just where, as here, a claimant is also receiving workers' compensation to address a loss of earning power occasioned by his physical limitations. N.T. at 6; see generally United Cerebral Palsy v. Workmen's Compensation Appeal Bd., 543 Pa. 544, 673 A.2d 882 (1996).

Here, Employer offered Claimant a light duty position in order to accommodate his current physical condition. Based on the Board's findings, the offered light duty position was consistent with Claimant's medical restrictions. F.F. Nos. 2, 5. Additionally, the position's appropriateness was not outweighed by any potential reduction in salary, or lack of prior training. See F.F. Nos. 1; N.T. at

10, Employer Ex. 1. Therefore, the offered position constituted suitable work. See Laws.

Once Employer offered Claimant suitable work, Claimant had to either accept the work, or establish a necessitous and compelling reason to voluntarily terminate employment. See Leonarczyk. Here, Claimant did not contact Employer about the offered work, or attempt to perform the position. Therefore, Claimant did not establish necessitous and compelling cause for his separation from employment.

For these reasons, we discern no error in the Board's decision. Accordingly, we affirm.

ROBERT SIMPSON, Judge

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Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 12th day of October, 2011, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge