IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Crystal R. Nelson, Petitioner	:	
v.	:	No. 365 C.D. 2011
	:	Submitted: August 19, 2011
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** October 11, 2011

Petitioner Crystal R. Nelson (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board), which affirmed an order of an Unemployment Compensation Referee (Referee), denying Claimant unemployment compensation benefits. The Board, adopting the Referee's findings of fact and conclusions of law, concluded that Claimant was ineligible for unemployment compensation benefits under Section 402(b) of the Unemployment Compensation Law (Law).[1] We affirm the Board's order.

Claimant applied for unemployment compensation benefits after she voluntarily resigned from her position as a Word Processing Specialist 2 for the City of Philadelphia (Employer). The Philadelphia UC Service Center (Service

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

Center) denied Claimant's application for benefits, determining that Claimant had not demonstrated that she had cause of a necessitous and compelling nature to quit her employment and that she had failed to prove that she was not able and available for suitable work. Claimant appealed that decision, and a Referee conducted a hearing, during which Claimant and Employer presented testimony regarding the circumstances of Claimant's employment and resignation.

Claimant testified that she quit her employment because she believed that working for Employer was damaging to her health. (Certified Record (C.R.), Item No. 12, at 6.) Claimant stated that she had high blood pressure, back pain, and anxiety attacks because of work-related stress. (*Id.*) She testified that she informed Employer about her medical problems and provided Employer with a note or notes from her doctor. (*Id.* at 7.) She also testified that her doctor gave her medications for her condition(s). (*Id.* at 8.) Claimant testified that she is able and available to work, but cannot lift the forty-to-fifty pound boxes that Employer asks her to move occasionally. (*Id.*) Claimant testified that she provided Employer with a doctor's note regarding lifting restrictions but that Employer ignored the restrictions. (*Id*.) Claimant testified that she had taken a leave of absence under the Family Medical Leave Act (FMLA), 29 U.S.C. §§ 2601–2654, and that she believed she was not entitled to any additional leaves of absence under the FMLA.[2] (*Id.* at 9-10.) Claimant also testified that she informed a union representative that Employer was requiring her to lift boxes that she was not able to lift. (*Id*. at 11.) Claimant's testimony suggests that she obtained a doctor's note based upon the advice of her union. (*Id.*) Claimant testified, however, that she could not produce any of the doctor's notes or medical documents relating to her conditions. (*Id.*)

[2] Claimant's and Employer's testimony indicate that Claimant was on leave under the FMLA for the period from February 2009 through July 2009. (C.R., Item No. 12, at 9-10, 18.)

On cross-examination, Claimant testified that when she resigned her employment she did not provide Employer with a reason for her decision. (*Id.*) Claimant admitted that she could and did take medication to treat the health problems she identified as being the cause of her resignation. (*Id.* at 12.) Claimant indicated that she was under a doctor's care from September 2009 through September 2010. (*Id.*) Claimant stated that she did not ask Employer about a medical leave of absence before she quit (*id.*), because Employer had told her she was not eligible (*id.* at 13-14). Claimant's later testimony indicates some confusion on her part about the various types of leave that employees may be able to use and suggests that she had not asked for medical leave, but rather sought additional leave under the FMLA. (*Id.* at 15.) In response to Employer's question whether Claimant attempted to provide Employer with any medical documentation following her actual resignation on August 27, 2010, and the effective date of her resignation, September 3, 2010, Claimant stated that she "was going to give them a note from my doctor, and they said well there's no need for you to give it to us because you're resigning, so you don't need to give us this documentation. That's what they told me. And I said okay." (*Id.* at 16.) Claimant stated that she had continuously provided Employer with medical documentation from September 2009 until the time of her resignation. (*Id.*)

Employer's witness, Steven Liller, who is Employer's human resource professional, testified that continuing work was available to Claimant at the time she resigned. (*Id.* at 1, 17-18.) Mr. Liller testified that Claimant was aware when she was hired that she would have some contact with prisoners and that Claimant's personnel file contained no record of her informing Employer that working with prisoners caused her stress. (*Id.* at 18.) Mr. Liller also testified that, to the best of

his knowledge, Claimant had not informed Employer about her inability to lift boxes. (*Id.*) Mr. Liller stated that the only medical documentation in Claimant's file related to her 2009 leave of absence under the FMLA and that the medical note in the file referenced "injuries sustained in MVA of February of '09." (*Id.*) Mr. Liller roughly estimated that Claimant would likely have been eligible again for leave under the FMLA in May 2010. (*Id.* at 19, 22.) Mr. Liller also indicated that Claimant could have sought approval for medical or personal leaves of absences, which Employer may re-approve in three month increments. (*Id.* at 19.)

Based upon the testimony in the record, the Referee made the following findings of fact:

1. The claimant was last employed as a full-time Word Processing Specialist 2, with the employer from August 11, 1997 until September 3, 2010, at a final salary of $34,067 annually.

2. The claimant was aware that she would be working around inmates as this was specified in her Job Description.

3. The employer permits an employee to take a medical leave of absence or personal leave of absence, which has to be re-approved every three months.

4. The medical leave of absence or personal leave of absence is available to employees who have exhausted leave under the Family and Medical Leave Act.

5. The claimant had high blood pressure, experienced back pain, had anxiety attacks and was unable to sleep.

6. The claimant attributed her health problems due to working around inmates.

7. The claimant's medical problems were under control by taking medication.

8. The claimant had been told not to lift heavy boxes by her doctor.

9. The claimant did not inform the employer about her inability to lift heavy boxes.

10. The claimant did not make the employer aware of her medical issues and did not submit any medical documents.

11. The claimant did not request any type of leave of absence.

12. Continuing work was available to the claimant.

13. The claimant resigned her position as of September 3, 2010 for personal reasons.

14. The claimant is able and available for suitable work.

(C.R., Item No. 13.)

The Referee, finding Claimant's testimony not credible, concluded that Claimant was ineligible for benefits under Section 402(b) of the Law, because she failed to demonstrate that she had cause of a necessitous and compelling nature that would justify her voluntary resignation.[3] The Referee explained that Claimant failed to attempt to preserve her employment.

[3] The Referee also concluded that Claimant is not ineligible under Section 401(d)(1) of the Law, Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 801(d)(1).

Claimant appealed to the Board, which adopted the Referee's factual findings and legal conclusions. (C.R., Item No. 18.) The Board reasoned that "claimant failed to make a reasonable effort to maintain her employment," and "failed to credibly establish that informing the employer of her concerns would have been futile." (*Id.*)

On appeal to this Court,[4] Claimant argues that the Board's factual findings are not supported by substantial evidence and that the Board committed an error of law. Claimant asserts that her medical conditions justified her decision to quit. We disagree.

First, we will address Claimant's argument that the Board's factual findings are not supported by substantial evidence. Claimant appears to challenge the Board's findings that Claimant failed to inform Employer about her inability to lift heavy boxes, did not make Employer aware of her medical issues or provide medical documents, and did not request any type of leave of absence.

Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. *Hercules, Inc. v. Unemployment Comp. Bd. of Review*, 604 A.2d 1159, 1161 (Pa. Cmwlth. 1992). In determining whether there is substantial evidence to support the Board's findings, this Court must examine the testimony in the light most favorable to the prevailing party, giving that party the benefit of any inferences that can logically and reasonably be drawn from the evidence. *Id*. A determination as to whether substantial evidence exists to support a finding of fact can only be made upon examination of the record

[4] This Court's standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704.

as a whole. *Taylor v. Unemployment Comp. Bd. of Review*, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). The Board's findings of fact are conclusive on appeal only so long as the record taken as a whole contains substantial evidence to support them. *Penflex, Inc. v. Bryson*, 506 Pa. 274, 286, 485 A.2d 359, 365 (1984). "The fact that [the employee] may have produced witnesses who gave a different version of the events, or that [the employee] might view the testimony differently than the Board is not grounds for reversal if substantial evidence supports the Board's findings." *Tapco, Inc. v. Unemployment Comp. Bd. of Review*, 650 A.2d 1106, 1107 (Pa. Cmwlth. 1994). Similarly, even if evidence exists in the record that could support a contrary conclusion, it does not follow that the findings of fact are not supported by substantial evidence. *Johnson v. Unemployment Comp. Bd. of Review*, 504 A.2d 989, 990 (Pa. Cmwlth. 1986).

Moreover, in an unemployment case, 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 Comp. Bd. of Review*, 509 Pa. 267, 272, 501 A.2d 1383, 1386 (1985). The Board is also empowered to resolve conflicts in the evidence. *DeRiggi v. Unemployment Comp. Bd. of Review*, 856 A.2d 253, 255 (Pa. Cmwlth. 2004).

A review of the record reveals that Mr. Liller testified that Claimant did not inform Employer about her inability to lift boxes or any medical issues or provide documentation thereof, with the exception of medical documentation in her file related to her 2009 leave of absence under the FMLA for injuries sustained in a motor vehicle accident. (C.R., Item No. 12, at 17-18.) Mr. Liller also testified that, if Claimant had requested leave under the FMLA, she would have been eligible in May 2010. (*Id.* at 19-22.) Further, he testified that Claimant could have

requested other types of leave, including medical and personal, but she did not do so.[5] (*Id.*) Mr. Liller's testimony, which the Board found to be credible, constitutes substantial evidence to support the Board's findings that Claimant failed to inform Employer about her inability to lift heavy boxes, did not make Employer aware of her medical issues or provide medical documents, and did not request any type of leave of absence. That Claimant's testimony could have supported different findings, more favorable to Claimant, is irrelevant. *See Johnson*, 504 A.2d at 990. The Board simply did not find Claimant's testimony credible, and the Board is the ultimate fact finder entitled to make its own credibility determinations. *Peak*, 509 Pa. at 272, 501 A.2d at 1386.

Claimant also argues that the Referee erred during the hearing by asking Employer to verify the accuracy of certain information. Claimant argues that the Referee's use of this method of record-making constitutes an abuse of discretion and supports Claimant's argument that substantial evidence does not support the Board's necessary factual findings. First, we agree with the Board that Claimant did not specifically raise this issue in her appeal to the Board and,

[5] Claimant asserts that the testimony of Employer's witness, Mr. Liller, indicates that Mr. Liller did not testify definitively that Claimant did not inform Employer regarding her back condition and accommodations. In fact, the testimony does not support Claimant's argument. Mr. Liller responded to the question "[i]f [Claimant] had informed [Employer about her inability to lift heavy boxes], would accommodations have been made so she did not have to do the heavy lifting?" Mr. Liller responded that "[s]he may or may not have—we may or may not have been able to accommodate her if she . . . ." (C.R., Item No. 12, at 18.) Employer then interrupted by asking "[b]ut she never informed you about her . . . ." (*Id.*) Mr. Liller responded by saying "[t]here's nothing on file." (*Id.*) Mr. Liller's testimony can at best be characterized as a response to a hypothetical question regarding whether Employer would have offered Claimant accommodations *if* Claimant had advised Employer of her impairment.

therefore, Claimant has waived this issue.[6] Second, even if Claimant had properly raised the issue, Claimant did not point out the specific factual issues that are purportedly based upon the Referee's request for verification from Employer. Thus, we also view Claimant as waiving this issue by failing to brief the issue adequately.[7] Finally, even if Claimant had properly raised and preserved the issue, our review of the record indicates that the only apparent instances for which the Referee sought verification from Employer concerned matters such as the effective date of Claimant's resignation and the amount of her wages. These matters are not pivotal to the resolution of the primary legal question of whether Claimant had necessitous and compelling cause to voluntarily terminate her employment.

Next, we will address Claimant's argument that the Board erred in concluding that she failed to prove that she had cause of a necessitous and compelling nature to voluntarily resign from her employment. Section 402(b) of the Law provides, in part, that a claimant shall be ineligible for compensation for any week in which the claimant's unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature. Whether a claimant had cause of a necessitous and compelling nature for leaving work is a question of law subject to this Court's review. *Wasko v. Unemployment Comp. Bd. or Review*, 488 A.2d 388, 389 (Pa. Cmwlth. 1985). A claimant who voluntarily quits her employment bears the burden of proving that necessitous and compelling reasons motivated that decision. *Fitzgerald v. Unemployment Comp. Bd. of Review*, 714 A.2d 1126 (Pa. Cmwlth. 1998), *appeal denied*, 568 Pa. 650, 794 A.2d 364 (1999).

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[6] Claimant does not mention this issue in her letter seeking to appeal the Referee's determination, and Claimant's brief to the Board does not address this issue. *Leone v. Unemployment Comp. Bd. of Review*, 885 A.2d 76 (Pa. Cmwlth. 2005).

[7] Pennsylvania Rule of Appellate Procedure 2119(c) directs parties to identify for the appellate court the place or places in the record where the particular error or errors occurred.

A necessitous and compelling cause for voluntarily leaving employment is one that results from circumstances which produced 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. *Mercy Hosp. of Pittsburgh v. Unemployment Comp. Bd. of Review*, 654 A2d 264 (Pa. Cmwlth. 1995). In order to establish cause of a necessitous and compelling nature, a claimant must establish that: (1) circumstances existed that produced real and substantial pressure to terminate employment; (2) like circumstances would compel a reasonable person to act in the same manner; (3) the claimant acted with ordinary common sense; and (4) the claimant made a reasonable effort to preserve her employment. *Procito v. Unemployment Comp. Bd. of Review*, 945 A.2d 261, 264 (Pa. Cmwlth. 2008).

An employee's medical condition may create cause of a necessitous and compelling nature to terminate employment voluntarily. *Deiss v. Unemployment Comp. Bd. of Review*, 475 Pa. 547, 381 A.2d 132 (1977). An employee seeking to obtain benefits on health-related grounds bears the burden to demonstrate through competent and credible evidence that (1) health reasons of sufficient dimension compelled the employee to quit; (2) the employee informed the employer of the health problems; and (3) the employee is able and available for work if her employer can make a reasonable accommodation. *Genetin v. Unemployment Comp. Bd. of Review*, 499 Pa. 125, 131, 451 A.2d 1353, 1356 (1982). Further, in such cases, once an employee makes an employer aware of such health problems, the employer bears a burden to establish that it made a reasonable attempt to identify and propose possible accommodations for the employee's health problems. *Lee Hospital v. Unemployment Comp. Bd. of Review*, 637 A.2d 695, 699 (Pa. Cmwlth. 1994).

As discussed above, the Board, adopting the Referee's findings and conclusions, did not credit Claimant's testimony that she informed Employer about her medical conditions or requested a leave of absence. Having failed to prove that she informed Employer of her health problems, the Board properly concluded that she failed to prove that her medical condition created cause of a necessitous and compelling nature to voluntarily terminate her employment, s*ee Genetin*, 499 Pa. at 131, 451 A.3d at 1356, and failed to prove that she made a reasonable effort to preserve her employment, see *Procito*, 945 A.2d at 264.

Accordingly, we affirm the Board's order.

P. KEVIN BROBSON, Judge

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Unemployment Compensation Board of Review, Respondent	:	

O R D E R

NOW, this 11th day of October, 2011, the order of the Unemployment Compensation Board of Review is AFFIRMED.

P. KEVIN BROBSON, Judge