IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

EMERSON NICHOLS, JR.,	)	
	)	C.A. No. 03A-12-004 JTV
Appellant,	)	
	)	
v.	)	
	)	
KRAFT FOODS,	)	
	)	
Appellee.	)	

Submitted: June 15, 2004
Decided: October 29, 2004

Emerson Nichols, Jr., *Pro. Se.*

K. MacArthur, *Pro. Se.*

Upon Consideration of Appellant's Appeal From
Decision of Industrial Accident Board
AFFIRMED

VAUGHN, President Judge

Nichols v. Kraft Foods
C.A. No. 03A-12-004 JTV
October 29, 2004

OPINION

This is an appeal from a decision of the Unemployment Insurance Appeals Board ("Board"). The Board ruled in favor of the employer.

I. FACTS

Emerson Nichols, Jr. ("claimant") was employed at Kraft Foods Dover, where he had worked since May 27, 1998. He began as a general production worker and in December of 1998 was transferred to the warehouse as a general warehouse worker. He was advanced to lift truck operator in January of 2003. He experienced numerous layoffs from 1998 to 2001 due to his lack of seniority. The claimant has had isolated incidents of absenteeism and tardiness since being hired. Beginning in 2001, his attendance began to slide noticeably resulting in Stage I, II, and III reports.[1] The majority of these attendance violations were for tardiness in reporting to his shift and tardiness in reporting from his lunch break. In September of 2002, the claimant discussed growing bouts of anxiety and depression with his shift leader, Belinda Cicchini. She referred the claimant to their supervisor, Todd Johnson, who offered the claimant information regarding Kraft's Employee Assistance Program ("EAP").

The claimant contacted EAP and was referred to A Center for Human Development, specifically Dr. Patricia Guarrillo for counseling, and Dr. Joshi for medication. In February 2003, after reviewing the claimant's absences and learning

[1] The employer has an attendance policy which provides for three un-excused absence points in each stage whereby an un-excused absence equates to one point and un-excused tardiness equates to ½ point. Upon reaching three points in Stage III, an employee is required to be terminated.

that he was attending counseling sessions for which he may need to take time off from work, the Human Resources Manager provided the claimant with Family Medical and Leave Act (FMLA) paperwork. The paperwork was filled out by Dr. Joshi to permit the claimant to be absent from work for therapy and monthly medication adjustments. The claimant utilized FMLA on March 14, May 19, and May 22, 2003, and these were not counted toward his attendance violations.

The claimant requested that his tardiness from work resulting from episodes of anxiety be excused under FMLA. Dr. Guarillo refused to excuse these instances on the grounds that it would be counter-productive to his recovery.[2] The only excused absences would be those necessary for therapy and medication management appointments that could not be scheduled during the claimant's time off.

The claimant was discharged from his employment as a warehouse employee on June 3, 2003 for violating the attendance policy. His request for unemployment benefits was heard before the Appeals Referee on September 24, 2003. The Referee found that the claimant was discharged without good cause and thus was eligible for benefits. Kraft appealed this decision, and the Board found that the claimant was disqualified from benefits under 19 *Del. C.* § 3315(8), which provides that an individual is disqualified for benefits if it is determined that "total or partial unemployment is due to the individual's inability to work."

II. STANDARD OF REVIEW

[2] On June 18, 2003, after the claimant had been discharged, Dr. Guarillo submitted a letter asking Kraft to excuse the claimant's tardiness and absenteeism but she was not certifying the absences under the FMLA guidelines or the Kraft attendance guidelines.

The scope of review for appeal of a board decision is limited to examining the record for errors of law and determining whether substantial evidence is present on the record to support the Board's findings of fact and conclusions of law.[3] "Substantial evidence" is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[4] On appeal, the court does not "weigh the evidence, determine questions of credibility, or make its own factual findings."[5] The court is simply reviewing the case to determine if the evidence is legally adequate to support the agency's factual findings.[6] When reviewing the Board's findings, the reviewing court should accept those findings, even if acting independently, the reviewing court would reach contrary conclusions.[7] Only where no satisfactory proof exists to support the factual finding of the Board may the Superior Court overturn it.[8]

III. DISCUSSION

As mentioned, under 19 *Del. C.* § 3315(8), an employee is disqualified from

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[3] *Robinson v. Metal Masters, Inc.*, 2000 Del. Super. LEXIS 264; *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

[4] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981); *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

[5] *Johnson*, 213 A.2d at 66.

[6] *ILC of Dover, Inc. v. Kelley*, 1999 Del. Super. LEXIS 573, at *3.

[7] *H&H Poultry v. Whaley*, 408 A.2d 289, 291 (Del. 1979).

[8] *Johnson*, 213 A.2d at 64.

benefits where unemployment is caused by "the individual's inability to work." This encompasses inability to work caused by medical conditions.[9] In *Petty v. University of Delaware*, the Supreme Court affirmed a decision of the Board where it found that the claimant was unable to work due to work restrictions arising from a pregnancy. The claimant's job as a custodian in that case required significant physical exertion in the form of bending, lifting, and standing. The court upheld the Board's determination that claimant was unable to work and, and, therefore, not eligible for benefits.

In this case, the record includes three statements from the claimant's psychologist. The first, a letter dated June 18, 2003, written shortly after the claimant's termination, states that the claimant's tardiness was caused by severe depression and panic disorder. The second is a "Doctor's Certificate" dated August 13, 2003 which states that the claimant is "totally disabled from performing his duties" due to severe depression. The third is a letter dated August 25, 2004 reciting the claimant's treatment and stating that "he has done well and is capable of returning to a full schedule." The Board relied upon the August 13 Certificate in determining that the claimant was not entitled to benefits because he was unable to work due to his medical condition.

The Certificate, which quite clearly states that the claimant was totally disabled as of the time the Certificate was executed, constitutes substantial evidence to support the Board's decision that the claimant's tardiness and resulting unemployment was

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[9] *Petty v. University of Delaware*, 450 A.2d 392 (Del. 1982).

due to the claimant's inability to work. Accordingly, the decision of the Board will be affirmed.

The statute also provides that a disqualification for benefits under § 3315(8) "terminates when the individual becomes able to work and available for work as determined by a doctor's certificate and meets all other requirements" for benefits. Whether the psychologist's letter dated August 25, 2003, coming only twelve days after the same psychologist found the claimant to be totally disabled due to severe depression, may constitute a "doctor's certificate" that the claimant became able to work and available for work as of that date is not raised by the parties or considered by the Appeals Referee or the Board. Accordingly, I do not consider that question here, and this affirmance of the Board's decision is without prejudice to the question whether at some point in time the claimant's disqualification from benefits may have terminated.

The decision of the Board is **affirmed**.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File