IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jose A. Santana Salamanca, Petitioner	:	
v.	:	No. 1595 C.D. 2009
Unemployment Compensation Board of Review, Respondent	:	Submitted: January 22, 2010

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: March 2, 2010

Jose A. Santana Salamanca (Claimant), *pro se*, petitions for review of an order of the Unemployment Compensation Board of Review (Board) affirming the Referee's decision denying his claim for unemployment compensation benefits pursuant to Sections 401(d)(1) and 402(b) of the Unemployment Compensation Law (Law).[1] We affirm.

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §801(d)(1); §802(b). Section 401(d)(1) provides that in order to receive benefits, an employee must be "able to work and available for suitable work." Section 402(b) provides that an employee who voluntarily terminates his employment without cause of a necessitous and compelling nature is ineligible for benefits.

Claimant was last employed as a forklift operator by Americold Logistics (Employer) and his last day of work was January 22, 2009. Claimant filed a claim for unemployment compensation benefits with the Allentown UC Service Center (Service Center). By notice mailed March 4, 2009, the Service Center determined that Claimant was ineligible for benefits pursuant to Section 402(b) of the Law. The Service Center found that Claimant voluntarily quit his employment because he relocated.

Claimant appealed the Service Center's determination and a telephone hearing was conducted by the Referee on April 17, 2009. Employer did not participate in the telephone hearing. Claimant testified on his own behalf with the assistance of a translator, when needed, who was fluent in Spanish. Claimant also presented the testimony of a fact witness, Betsy Borchado. Based on the evidence presented, the Referee made the following findings of fact.

Claimant voluntarily quit his employment, giving Employer about three months informal notice, in order to relocate to Puerto Rico. Claimant relocated to Puerto Rico in order to care for his eighty-four-year-old ailing mother, who is in the third stage of Alzheimer's disease. Claimant's mother was in a nursing home in Puerto Rico. Claimant removed his mother from the nursing home after he returned to the island. The care obligations Claimant has undertaken are around-the-clock, seven days of the week, and Claimant has been unable to search for any employment in Puerto Rico due to such care. Claimant has removed himself from a realistic attachment to the labor market.

The Referee concluded that Claimant had not exhausted all reasonable alternatives to relocating to Puerto Rico to care for his elderly mother. The Referee pointed out that Claimant admitted that his mother was receiving decent care in the nursing home and he apparently removed her from there as a personal

choice. The Referee concluded further that Claimant admitted that he had removed himself from a realistic attachment to the labor market due to the 24/7 care he must provide for his mother and that other sources are either not presently available or desired. Accordingly, the Referee affirmed the Service Center's determination and denied Claimant benefits pursuant to Sections 401(d)(1) and 402(b) of the Law.

Claimant appealed the Referee's decision to the Board and attached several documents to the appeal form. Upon review of the record and the testimony submitted at the telephone hearing by the Referee, the Board affirmed the Referee's decision without making any independent findings of fact or conclusions of law. The Board noted that it did not consider documents that were not introduced at the Referee's hearing. The Board stated further that even if Claimant had good cause to return to Puerto Rico, he was not able and available for work during the weeks at issue in this claim. This *pro se* appeal followed.[2]

Herein, Claimant argues that the Board's finding that his mother was in a nursing home in Puerto Rico from which Claimant removed her after he returned to the island, is erroneous. Claimant argues that the finding that Claimant's mother was living in a nursing home is based on an error in translation. Claimant contends that the medical certificate from the doctor certifying his mother's medical condition and the necessity of him taking care of her was provided to both the Employer and the Board. Claimant argues that he had no other alternative than to leave his job and relocate. Therefore, Claimant contends, that the Board's reasoning and decision are based on an erroneous finding of fact,

[2] By notice filed with this Court on September 16, 2009, Employer intervened in this matter and has filed a brief in opposition to Claimant's appeal.

that he met his burden of proving a necessitous and compelling reason for quitting his employment, and that the Board's decision should be reversed.

Initially, we note that this Court's review of the Board's decision is set forth in Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704, which provides that the Court shall affirm unless it determines that the adjudication is in violation of the claimant's constitutional rights, that it is not in accordance with law, that provisions relating to practice and procedure of the Board have been violated, or that any necessary findings of fact are not supported by substantial evidence. See Porco v. Unemployment Compensation Board of Review, 828 A.2d 426 (Pa. Cmwlth. 2003). Findings of fact are conclusive upon review provided that the record, taken as a whole, contains substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977). Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. Hercules v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992). 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 Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985).

In this appeal, Claimant makes no argument with respect to the Board's denial of benefits pursuant to Section 401(d)(1) of the Act. As noted herein, Section 401(d)(1) provides that in order to receive benefits, an employee must be "able to work and available for suitable work." 43 P.S. §801(d)(1). To establish availability for work, a claimant must be ready and able to accept employment, and be actually and currently attached to the labor force. Ruiz v. Unemployment Compensation Board of Review, 911 A.2d 600 (Pa. Cmwlth.

2006); Pifer v. Unemployment Comp. Bd. of Review, 639 A.2d 1293 (Pa. Cmwlth. 1994).

The burden of proving availability for suitable work is on the claimant. Hamot Medical Center v. Unemployment Compensation Board of Review, 645 A.2d 466, 468 (Pa. Cmwlth. 1994). "The question of availability, however, is ultimately a question of fact for the Board, which this Court must affirm if supported by substantial evidence." Pennsylvania Electric Co. v. Unemployment Compensation Board of Review, 458 A.2d 626, 628 (Pa. Cmwlth. 1983).

Claimant testified before the Referee that he does not currently have a job, that he just takes care of his mother, that he is unable to look for work because he taking of his mother, and that he is caring for his mother around-the-clock. See Certified Record, Transcript of April 17, 2009, Telephone Hearing at 6; Supplemental Appendix to Brief of Intervenor at 45a. As such, Claimant's own testimony supports the Board's finding that Claimant has removed himself from a realistic attachment to the labor market. In short, Claimant simply was not able and available for work as required by Section 401(d)(1) of the Law for the weeks in which he is seeking unemployment compensation benefits.

Moreover, the record supports the Board's determination that Claimant failed to establish that he had a necessitous and compelling reason to quit his employment.[3] While Claimant contends that the Board's finding that he

[3] The question of whether particular facts constitute a voluntary quit is a question of law fully reviewable by this Court. Chamoun v. Unemployment Compensation Board of Review, 542 A.2d 207 (Pa. Cmwlth. 1988). The claimant bears the burden of proving a necessitous and compelling reason for voluntarily terminating the employment relationship. Mutual Pharmaceutical Company, Inc. v. Unemployment Compensation Board of Review, 654 A.2d 37 (Pa. Cmwlth. 1994). In establishing that a voluntary quit was reasonable, a claimant "must

(Continued....)

removed his mother from a nursing home is erroneous due to an error in translation, we note that a professional translator was provided during the telephone hearing before the Referee and that Claimant utilized the services of the translator when he did not understand a question. In addition, the medical certificate from Claimant's mother's doctor was not submitted into evidence during the telephone hearing; therefore, the Board properly did not consider any documents submitted by Claimant that were not introduced at that hearing. Likewise, this Court may not consider any of the documents attached to Claimant's *pro se* brief filed with this Court that were not introduced into evidence during the telephone hearing.[4] As such, we conclude that the Board properly found that Claimant failed to demonstrate that he exhausted all reasonable alternatives to relocating to Puerto Rico to provide care for his mother.

Accordingly, the Board's order is affirmed.

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JAMES R. KELLEY, Senior Judge

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establish that he acted with ordinary common sense in quitting his job, that he made a reasonable effort to preserve his employment, and that he had no other real choice than to leave his employment." PECO Energy Company v. Unemployment Compensation Board of Review, 682 A.2d 58, 61 (Pa. Cmwlth. 1996) (quoting Stroh-Tillman v. Unemployment Compensation Board of Review, 647 A.2d 660, 662 (Pa. Cmwlth. 1994)). If a claimant does not take all "necessary and reasonable steps to preserve the employment relationship, he or she has failed to meet the burden of demonstrating necessitous and compelling cause." PECO, 682 A.2d at 61.

[4] It is well settled that an appellate court cannot consider anything which is not part of the certified record in a case. Smith v. Smith, 637 A.2dd 622, 623-24 (Pa. Super. 1993), petition for allowance of appeal denied, 539 Pa. 680, 652 A.2d 1325 (1994). See also Fotta v. Workmen's Compensation Appeal Board (U.S. Steel/USX Corporation Maple Creek Mine), 534 Pa. 191, 196 n.2, 626 A.2d 1144, 1147 n.2 (1993) ("[T]he report is not part of the record and our review is limited to the evidence contained in the record. *Humphrey v. W.C.A.B. (Super Market Service)*, [514 A.2d 246, 251 (Pa. Cmwlth. 1986].")

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O R D E R

AND NOW, this 2nd day of March, 2010, the order of the Unemployment Compensation Board of Review entered in the above-captioned matter is affirmed.

JAMES R. KELLEY, Senior Judge