

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Allstar Therapies, Inc., :
Petitioner :
v. : No. 1608 C.D. 2007
Unemployment Compensation : Submitted: January 25, 2008
Board of Review, :
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: February 28, 2008

Allstar Therapies, Inc. (Employer) petitions for review of an order of the Unemployment Compensation Board of Review (Board) affirming the Referee's decision granting unemployment compensation benefits to Jodie L. George (Claimant) pursuant to Section 402(b) of the Unemployment Compensation Law (Law).¹

Claimant was employed as a full time director of rehabilitation by Employer. On March 30, 2007, Claimant was informed by Employer that she was being removed from her position because the administrator did not like her.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(b). Section 402(b) provides that an employee who voluntarily terminates her employment without cause of a necessitous and compelling nature is ineligible for benefits.

Employer alluded to a personality conflict between Claimant and the administrator. Employer informed Claimant that the administrator did not feel that Claimant was “management material.” In lieu of firing, Employer offered Claimant a non-management staff position at another facility for \$2.25 per hour less than her current management position. The new position was located fourteen miles from Claimant’s residence as opposed to seven miles from the current facility where Claimant was employed.

Claimant refused the non-management position because she considered the offer an unfair demotion. Claimant voluntarily left her job rather than accept a demotion.

After Claimant submitted her resignation on April 2, 2007, Employer offered Claimant an assistant management position for the same salary and benefits as her prior management position. The assistant management position was located at Westmoreland Manor which was approximately fourteen miles from Claimant’s home. Claimant refused the assistant manager position for two reasons. First, Claimant wanted to be closer to work from her home and second, she felt that accepting the assistant management position with the same employer would be adverse to her career. Employer notified the Department of Labor and Industry of Claimant’s refusal on April 10, 2007.

Claimant applied for unemployment compensation benefits and the Service Center issued two separate notices of determination.² By notice mailed April 23, 2007, the Altoona UC Service Center (Service Center) determined that Claimant was eligible for benefits pursuant to Section 402(b) of the Law. The Service Center

² It is unclear from the record why the Service Center issued two separate notices of determination. The certified record shows that Claimant only submitted one application for

(Continued....)

determined that Claimant had shown a necessitous and compelling reason for quitting because she was demoted and there were no possible alternatives for Claimant to resolve the situation.

By a second notice of determination also mailed April 23, 2007, the Service Center determined that Claimant was eligible for benefits pursuant to Section 402(a) of the Law³ because Employer did not notify the Department of the job offer for the assistant management position in writing within seven working days of the offer.

Employer appealed both notices of determination. A hearing ensued regarding both appeals before the Referee at which both Claimant and Employer appeared and presented evidence. The Referee issued two separate decisions regarding Employer's appeals. With regard to Claimant's claim for benefits pursuant

benefits.

³ 43 P.S. §802(a). Section 402(a) provides as follows:

An employe shall be ineligible for compensation for any week-

(a) In which his unemployment is due to failure, without good cause, either to apply for suitable work at such time and in such manner as the department may prescribe, or to accept suitable work when offered to him by the employment officer or by any employer, irrespective of whether or not such work is in "employment" as defined in this act: Provided, That such employer notifies the employment office of such offer within seven (7) days after the making thereof; however this subsection shall not cause a disqualification of a waiting week or benefits under the following circumstances: when work is offered by his employer and he is not required to accept the offer pursuant to the terms of the labor-management contract or agreement, or pursuant to an established employer plan, program or policy: Provided further, That a claimant shall not be disqualified for refusing suitable work when he is in training approved under section 236(a)(1) of the Trade Act of 1974.

to Section 402(b) of the Law, the Referee concluded that Claimant had established that she was unjustifiably demoted; therefore, she had a necessitous and compelling reason for leaving her job. Accordingly, the Referee affirmed the Service Center's determination and approved benefits pursuant to Section 402(b) of the Law beginning with the waiting week ending April 7, 2007.

With regard to Claimant's claim for benefits pursuant to Section 402(a) of the Law, the Referee found that Claimant had good cause for refusing Employer's offer of suitable work. The Referee stated that "[c]onsidering that Claimant was told that on her last day of work that she was disliked by the administrator and was not 'management material', one would not expect a reasonable person to turn around and accept a management position under the same administrator." Accordingly, the Referee affirmed the Service Center's determination and approved benefits pursuant to Section 402(a) of the Law beginning with the waiting week ending April 7, 2007 and the compensable week ending April 14, 2007.

Employer appealed both of the Referee's decisions to the Board. With respect to the Referee's decision granting benefits to Claimant pursuant to Section 402(b) of the Law, upon review of the record and the testimony submitted at the hearing before the Referee, the Board affirmed the Referee's decision without making any independent findings of fact or conclusions of Law. With respect to the Referee's decision granting benefits to Claimant pursuant to Section 402(a) of the Law, the Board reversed. The Board concluded that Claimant had failed to establish that she had good cause to refuse suitable work from Employer as her reasons for doing so were not reasonable or substantial.

Employer now appeals solely from the Board's decision affirming the Referee's decision granting Claimant benefits pursuant to Section 402(b) of the Law.⁴

Employer raises the following two issues: (1) whether the Board's decision denying Claimant benefits pursuant to Section 402(a) of the Law is *res judicata* or is the law of the case which would consequently necessitate a reversal of the Board's decision granting Claimant benefits pursuant to Section 402(b) of the Law; and (2) whether the Board erred in affirming the Referee's conclusion that Claimant had a necessitous and compelling reason for quitting her job.

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

⁴ It is somewhat puzzling to this Court as to why Employer is appealing the Board's decision granting Claimant benefits pursuant to Section 402(b) when the Board in a separate decision and order denied this same Claimant benefits under Section 402(a) for the same time period and Claimant has not appealed that decision and order.

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).

Employer first argues that the Board's decision denying Claimant benefits pursuant to Section 402(a) of the Law is *res judicata* or is the law of the case; therefore, the Board's decision granting Claimant benefits pursuant to Section 402(b) of the Law must be reversed. We disagree.

First, the doctrine of *res judicata* is not applicable to this proceeding. *Res judicata* requires the coalescence of four factors: (1) identity of thing sued upon or for; (2) identity of the causes of action; (3) identity of the persons or parties to the action; and (4) identity of the quality or capacity of the parties suing or being sued. Stonybrook Condominium Association v. Jocelyn Properties, Inc., 862 A.2d 721 (Pa. Cmwlth. 2004).

Although there was a single hearing before the Referee, there were two separate legal issues considered based on different facts. The first was whether Claimant had a necessitous and compelling reason to quit her job because she was unjustifiably demoted and was therefore eligible for benefits pursuant to Section 402(b) of the Law. The second was whether Claimant had good cause to refuse suitable work when offered another management position after declining the demotion. Each issue required the review of the differing facts and the utilization of differing legal analysis, based on those facts, pursuant to two separate subsections of the Law.

Second, the doctrine of the law of the case is also inapplicable. As pointed out by Employer in its brief, the law of the case is applicable to appellate courts. See Commonwealth v. Wallace, 582 Pa. 234, 239 n.2, 870 A.2d 838, 841

n.2 (2005) (explaining that "the law of the case doctrine dictates that 'upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same appellate court'"). As such, the Board was not bound by such doctrine.

Accordingly, Employer's arguments, based on the doctrines of *res judicata* and the "law of the case", are without merit.

Next, Employer argues that the Board erred in affirming the Referee's decision that Claimant established a necessitous and compelling reason for quitting her job. Again, we disagree.

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).

A determination that a claimant voluntarily quit is not an absolute bar to the recovery of unemployment compensation benefits. Monaco v. Unemployment Compensation Board of Review, 523 Pa. 41, 565 A.2d 127 (1989). A claimant may prove necessary and compelling reasons that could excuse the voluntary action of the claimant. Id. A cause of necessitous and compelling nature is one that results from circumstances which produce pressure to terminate employment which is both real and substantial and which would compel a reasonable person under the circumstances to act in the same manner. Id.

"The logical focus for determining whether necessitous and compelling reasons exist for a claimant to voluntarily terminate his employment

after receiving a demotion is the justification for the demotion.” Allegheny Valley School v. Unemployment Compensation Board of Review, 548 Pa. 355, 365,697 A.2d 243, 248 (1997); See also Diversified Care Mgmt. LLC v. Unemployment Compensation Board of Review, 885 A.2d 130 (Pa. Cmwlth. 2005); Korpics v. Unemployment Compensation Board of Review, 833 A.2d 1217 (Pa. Cmwlth. 2003).

Herein, the Board found that Claimant was unjustifiably demoted to a non-management position with a lower salary. The Board determined that the demotion was not justified because it was based on a personality conflict and Employer’s belief that Claimant was not management material. The Board found that Claimant was informed that she was being removed from her management position because the administrator did not like her. The Board did not find any fault on the part of Claimant that would have justified the demotion.

Our review of the record and the facts as adopted by the Board reveal that the Board’s findings are supported by substantial evidence. Accordingly, the Board did not err in granting Claimant benefits pursuant to Section 402(b) of the Law.⁵

The Board’s order is affirmed.

JAMES R. KELLEY, Senior Judge

⁵ We note that Employer’s argument that the Board erred in granting Claimant benefits pursuant to Section 402(b) of the Law is based partly on the Board’s findings in its decision denying Claimant benefits pursuant to Section 402(a) of the Law. However, review of that decision is not before this Court.

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Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 28th day of February, 2008, the order of the Unemployment Compensation Board of Review, at Appeal Number B-07-09-D-2258, in the above-captioned matter is affirmed.

JAMES R. KELLEY, Senior Judge