

issue of a voluntary resignation was properly before the Referee and whether the Board failed to consider the totality of the circumstances surrounding Claimant's departure from employment.

Claimant was employed by Wells Fargo Home Mortgage (Employer) as a reverse mortgage consultant for almost one year. Claimant's last day of work with Employer was February 16, 2007. Claimant applied for unemployment compensation benefits, stating that Employer had discharged him for insubordination. There was no response from Employer. On March 15, 2007, the Philadelphia UC Service Center approved Claimant's benefits under Section 402(e) of the Law² because Claimant denied being insubordinate and Employer failed to prove that Claimant was, in fact, insubordinate. Employer appealed, asserting that Claimant was not discharged but, rather, had resigned his employment, and a hearing was held before the Referee.

Employer presented testimony from Patrick Keenan, Branch Manager of the Rosemont Wells Fargo Home Office, where Claimant worked. Keenan explained that Claimant worked full-time as a reverse mortgage consultant and was paid on commission. Claimant reported to Dick Hovack as his direct supervisor and to Keenan as the branch manager.

Keenan described the events surrounding Claimant's separation from employment. Keenan explained that he saw Claimant in the office on the morning of

² Section 402(e) of the Law, 43 P.S. §802(e), provides, in relevant part:

An employe shall be ineligible for compensation for any week –

- (e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work...

43 P.S. §802(e).

February 15, 2007, and this was the first time he saw Claimant for the whole month of February. Considering it odd not to see someone in the office for fourteen days, Keenan told Claimant that he wanted to speak with him. Claimant replied that he was headed out for an appointment but that he would be back in the afternoon. Keenan stayed at the office until 8:00 or 8:30 that evening and did not see Claimant, nor did he see Claimant during the day on February 16, 2007.

Keenan called Claimant at approximately 5:00 p.m. on Friday, February 16 and left a message for Claimant. Claimant returned the call and told Keenan that he had a “tough week” and that he had not returned to the office the day before because his appointment did not go well and he became depressed and went home. Keenan began to question Claimant as to his whereabouts on each day that week, and while Claimant fumbled for answers he became increasingly aggravated and belligerent. Keenan testified that, at that point, Claimant was screaming at him and said, “I don’t need to take this shit from you. I don’t need to be questioned ... and I resign,” to which Keenan replied, “That’s unfortunate ... but your resignation’s accepted.” Notes of Testimony, April 16, 2007, at 7, 25 (N.T. ____). Keenan instructed Claimant to bring in his letter of resignation, his laptop, and other Employer-issued items, which Claimant agreed to do the next morning. Keenan then called Claimant’s supervisor, Dick Hovack, at home and told him Claimant had resigned.

Keenan continued working in the office that evening and received a telephone call from Claimant approximately an hour later, asking if he could come in and talk to Keenan. Keenan agreed and told Claimant to make sure he brought his letter, laptop and building key with him because he thought Claimant wanted to turn in everything that evening rather than waiting until the next morning. Claimant

subsequently arrived, came into Keenan's office, shut the door and told Keenan that he had overreacted earlier and had not meant to resign; he had made a mistake. Claimant then asked Keenan if he would fire Claimant, "as a friend." Keenan replied, "you resigned, I can't fire you. You've already resigned, we've accepted your resignation." N.T. 7. Keenan testified that Claimant stated he would not leave the office unless Keenan fired him. Keenan called Hovack and the three of them had a conference call for forty minutes during which Claimant kept insisting that someone fire him and Keenan and Hovack kept telling him that he had already quit and his resignation had been accepted. Keenan stated that in order to get Claimant to leave, he finally said to Claimant, "You're fired." N.T. 8. He hung up the phone with Hovack, walked Claimant to his desk to get his belongings, and walked him out the door.³

Claimant testified on his own behalf and vehemently denied having quit his job. According to Claimant's version of events, he had a conversation with Hovack on the morning of February 16, 2007, about his production and Hovack said that Claimant needed to close three mortgages in March. Because he had already spoken to Hovack, Claimant was surprised that Keenan also questioned him about his whereabouts, accusing him of not being in the office. Claimant admitted that he did not like being questioned by Keenan because he felt that Keenan was not his boss. Claimant testified that during the course of the conversation, Claimant asked Keenan, "do you want me to resign?" but Claimant did not actually resign. N.T. 27. When

³ Keenan explained the firing as:

... I said it once and I prefaced it by saying, Chuck, you resigned. We accepted your resignation. If you want me to say you're fired, you're fired, whatever ... I have to go home.

N.T. 8.

Claimant went to Keenan's office later that night, Claimant shut the door because he wanted to talk about some personal issues concerning health and finances, but Keenan did not want to hear about them. Claimant testified that Keenan repeatedly asked him to resign but Claimant responded that he would not resign, and Keenan finally shouted, "You're fired." N.T. 8. Claimant denied asking Keenan to fire him. Claimant got the impression that he was fired for insubordination because Hovack stated during the conference call that Claimant should separate from the company because of his insubordination and lack of time spent in the office.

The Referee accepted as credible the testimony and version of events given by Employer's witness, Keenan. The Referee found that Claimant was not discharged by Employer; he quit while on the telephone with Keenan and his resignation was immediately accepted. The Referee further determined that Keenan was asking Claimant reasonable business-related questions concerning his job performance and that this questioning did not constitute a necessitous and compelling reason for Claimant to leave his job. Therefore, the Referee reversed the decision of the UC Service Center and denied benefits.

Claimant appealed to the Board. The Board adopted the Referee's findings of fact and conclusions of law, and affirmed the decision of the Referee. Claimant now petitions this Court for review.⁴

On appeal, Claimant raises two issues for our consideration. First, Claimant argues that the Referee erred in considering an issue that was not before

⁴ Our scope of review is limited to determining whether constitutional rights have been violated, errors of law were committed, or whether findings of fact are supported by substantial evidence. *Sheets v. Unemployment Compensation Board of Review*, 708 A.2d 884, 885 n.3 (Pa. Cmwlth. 1998). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Korpics v. Unemployment Compensation Board of Review*, 833 A.2d 1217, 1219 n.1 (Pa. Cmwlth. 2003).

him. Second, Claimant argues that the Referee and the Board erred in failing to consider the totality of the circumstances when determining whether Claimant voluntarily terminated his employment.

We turn, first, to Claimant's argument that the Referee considered an issue that was not actually before him. Claimant contends that because the only issue before the UC Service Center was whether Claimant was terminated for insubordination, the Referee was limited to resolving that issue; he lacked the authority to consider whether Claimant resigned. The Board counters that the parties agreed to have the Referee decide the issue of voluntary resignation.

With regard to issues on appeal, the pertinent unemployment compensation regulation states:

When an appeal is taken from a decision of the Department, the Department shall be deemed to have ruled upon all matters and questions pertaining to the claim. In hearing the appeal the tribunal shall consider the issues expressly ruled upon in the decision from which the appeal was filed. *However, any issue in the case may, with the approval of the parties, be heard, if the speedy administration of justice, without prejudice to any party, will be substantially served thereby.*

34 Pa. Code §101.87 (emphasis added). In other words, "the referee is directed to consider only those issues expressly ruled upon by the Department of Labor and Industry, *unless the parties agree otherwise.*" *Glesk v. Unemployment Compensation Board of Review*, 525 A.2d 1249, 1251 (Pa. Cmwlth. 1987) (emphasis added).

Claimant is correct that the UC Service Center considered only whether Claimant was discharged for insubordination. However, the Notice of Hearing expressly stated that voluntary termination under Section 402(b) could be an issue at the hearing before the Referee. Certified Record Item No. 7. More importantly, when it became apparent at the hearing that there was a dispute as to whether

Claimant quit or was fired, the Referee asked the parties for permission to consider whether Claimant voluntarily resigned. Both Claimant and Employer specifically agreed to have the Referee decide that issue. N.T. 14. Therefore, the issue was properly before the Referee by agreement of the parties, and the Referee did not err in considering it.

Turning to Claimant's second issue, he argues that the conclusion that he voluntarily terminated his employment is not supported by substantial evidence because the Referee and the Board failed to consider the totality of the circumstances surrounding Claimant's separation from employment. Claimant lists five circumstances he believes were important to the case and were not considered:

(1) Claimant suffers from depression and was *pro se* at the Referee's hearing. This relates to the evidence submitted by Claimant.⁵

(2) Whether Keenan loaned Claimant \$3,600 and whether the failure of Claimant to repay that loan would motivate Keenan to seek Claimant's resignation.

(3) Employer's failure to present the testimony of Dick Hovack or Keenan's assistant, Christine, creates a negative inference that Keenan's testimony was not credible.

(4) The day following Claimant's separation from employment, Keenan alleged in a private criminal complaint that Claimant committed a criminal trespass. This shows a high level of animosity on Keenan's part and confirms that Keenan was highly motivated to terminate Claimant.

⁵ Claimant specifies that he is not claiming this is a case where a voluntary termination arose from a health condition, *i.e.*, his depression. Claimant's brief at 22. Rather, it is Claimant's position that he never resigned, but was terminated by Employer.

(5) The Referee failed to admit evidence that Employer itself characterized Claimant's departure as a "termination." This was a February 26, 2007, letter from Employer that Claimant sought to introduce into evidence. Therein, Employer discussed health benefits and stated, "Our records indicate that you have experienced a COBRA Qualifying Event: TERMINATION."

Under Section 402(b) of the Law, a claimant who voluntarily terminates his employment without a necessitous and compelling reason is not entitled to unemployment compensation benefits. In cases where a claimant is said to have voluntarily quit, this Court must determine whether the facts surrounding the claimant's separation from employment constitute a voluntary resignation or a discharge. *Charles v. Unemployment Compensation Board of Review*, 552 A.2d 727, 729 (Pa. Cmwlth. 1989). This is a question of law subject to our review. *Id.* In determining whether a claimant intended to leave his employment, "the totality of the circumstances surrounding the incident must be considered." *Fekos Enterprises v. Unemployment Compensation Board of Review*, 776 A.2d 1018, 1021 (Pa. Cmwlth. 2001). It is the claimant's burden to prove that he was discharged as opposed to voluntarily resigning. *Key v. Unemployment Compensation Board of Review*, 687 A.2d 409, 412 (Pa. Cmwlth. 1996).

We will briefly address the five circumstances raised by Claimant. His first contention that he suffers from depression and appeared *pro se* at the hearing suggests that Claimant believes he should have been given some type of special consideration. The regulation governing hearings before the Referee provides in relevant part:

In a hearing the tribunal may examine the parties and their witnesses. Where a party is not represented by counsel the tribunal before whom the hearing is being held should advise him as to his rights, aid him in examining and cross-examining

witnesses, and give him every assistance compatible with the impartial discharge of its official duties.

34 Pa. Code §101.21(a). A review of the hearing transcript reveals that the Referee did aid Claimant and gave him every assistance in presenting his case. A claimant who chooses to represent himself cannot later complain that the case could have been presented more effectively with the assistance of counsel. *Rodgers v. Unemployment Compensation Board of Review*, 476 A.2d 1014, 1016 (Pa. Cmwlth. 1984).

As far as any loan from Keenan is concerned, Claimant mentioned it only briefly at hearing and was told that he could discuss it further during his own testimony. However, Claimant never developed the facts about that loan.

Employer's failure to present testimony from Hovack or Keenan's assistant, Christine, does not give rise to an adverse inference. Hovack was not a party to the conversation where Claimant quit his job and, further, Claimant himself testified that when he went to Keenan's office, he closed the door because he did not want Christine to hear the conversation.

Turning to the alleged criminal complaint showing Keenan's animosity toward Claimant, the Referee properly sustained an objection to that evidence on grounds of relevance. The alleged event occurred after Claimant quit on February 16, 2007.

Finally, the Referee also excluded the letter from Employer concerning COBRA coverage where the word "termination" was used because it did not say that Claimant was fired and was not relevant to the legal question of whether Claimant quit or was fired on February 16. There is no dispute that Claimant's employment had terminated.

Claimant asserts that the Board did not consider the totality of the circumstances in concluding that he resigned. However, this is not really a "totality

of the circumstances” case wherein this Court must glean from Claimant’s words and actions whether he intended to quit. There was a telephone conversation between Claimant and Keenan on February 16, 2007, during which Claimant stated point blank that he was resigning and Keenan replied that he accepted the resignation. The resignation was complete at that time.⁶ Claimant is actually attacking the credibility determinations that were made in this case. The Referee and the Board accepted Keenan’s testimony as credible and rejected Claimant’s testimony, and we may not disturb those findings on appeal.⁷ Although Claimant insists that he was fired, the credibility findings essentially end the inquiry on that point. Keenan’s credited testimony is substantial evidence, and it supports the finding that Claimant stated he was quitting his job.⁸ In turn, the findings that Claimant quit in response to questioning from Keenan concerning his whereabouts and work performance support the conclusion that Claimant is ineligible for unemployment compensation benefits because he voluntarily terminated his employment without a necessitous and compelling reason.⁹

⁶ A resignation becomes effective when it is clearly accepted. *Spadaro v. Unemployment Compensation Board of Review*, 850 A.2d 855, 859 (Pa. Cmwlth. 2004).

⁷ The Board is the ultimate fact finding body and arbiter of credibility. *Peak v. Unemployment Compensation Board of Review*, 509 Pa. 267, 276-277, 501 A.2d 1383, 1388 (1985).

⁸ The findings of fact made by the Board are conclusive on appeal so long as the record, taken as a whole, contains substantial evidence to support those findings. *Taylor v. Unemployment Compensation Board of Review*, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977).

⁹ Claimant requests a remand for a new hearing before a Referee because the totality of the circumstances was not considered. Our disposition of the case renders this request moot. At any rate, Claimant did not request a remand in his appeal to the Board. Because the issue of a remand for a new hearing is being raised for the first time on appeal to this Court, it is waived. *See Merida v. Unemployment Compensation Board of Review*, 543 A.2d 593, 596 (Pa. Cmwlth. 1988) (holding that an issue not specifically raised before the Board is waived).

Claimant also mentions that his petition for review to the Board stated only that he was unrepresented before the Referee and was obtaining counsel. Claimant contends that the Board **(Footnote continued on the next page . . .)**

Accordingly, we affirm the decision of the Board.

MARY HANNAH LEAVITT, Judge

(continued . . .)

should have treated the appeal as a Motion for Appointment of Counsel and that this Court should remand to the Board for consideration of the appeal now before this Court, in light of the fact that Claimant now has counsel. We reject this assertion. As explained, this is not a case where the totality of the circumstances must be examined. The case turned on a credibility determination as to what was said during the telephone conversation between Claimant and Keenan. Further, neither the Board nor this Court deemed Claimant's challenge to the conclusion of a voluntary resignation to be waived based on the contents of Claimant's petition for review to the Board. The Board considered the evidence and adopted the findings and conclusions of the Referee. The Board acted appropriately and no remand to the Board is warranted.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Charles P. Damico,	:	
Petitioner	:	
	:	
v.	:	No. 1730 C.D. 2007
	:	
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

ORDER

AND NOW, this 23rd day of May, 2008, the order of the Unemployment Compensation Board of Review in the above-captioned matter, dated August 15, 2007, is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge