

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John M. Shugars, :
Petitioner :
 :
v. : No. 1766 C.D. 2007
 : Submitted: February 22, 2008
Unemployment Compensation Board :
of Review, :
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: March 18, 2008

John M. Shugars (Claimant) appeals from an order of the Unemployment Compensation Board of Review (Board) affirming the decision of the Referee denying him unemployment compensation benefits because he voluntarily terminated his employment without a necessitous and compelling reason pursuant to Section 402(b) of the Unemployment Compensation Law (Law).¹ Claimant contends

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(b). That section provides, in relevant part, that “an employe shall be ineligible for compensation for any week in which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature.”

that he was denied due process before the Referee, and a remand for another hearing is in order. We disagree.

Claimant was employed part-time, 30 hours per week as a liquor store clerk for the Pennsylvania Liquor Control Board (Employer) for five days from April 24, 2007, through April 28, 2007. After Employer alleged that he voluntarily quit his employment and continuing work was available to him, Claimant filed a claim for unemployment compensation benefits to the extent allowed under the law set forth in *Unemployment Compensation Board of Review v. Fabric*, 354 A.2d 905 (Pa. Cmwlth. 1976).² Claimant alleged that he could not perform the work because it required him to stand on his feet all day and he was not given any breaks. The Lancaster UC Service Center issued a determination denying him benefits under Section 402(b) of the Law because Claimant failed to prove that he exhausted all alternatives to resolve the situation which caused his separation prior to voluntarily leaving his job. Claimant filed an appeal, and a hearing was scheduled before a Referee.

² *Fabric* stands for the proposition that when a claimant quits a part-time position without a necessitous and compelling cause, he will be ineligible only to the extent his part-time wages exceed his partial benefit credit. Claimant had previously filed an unemployment claim which outcome was pending at the time of this filing. In the previous claim, he had been working as a full-time instructor at KIS Career Schools for approximately six months when he was discharged for excessive tardiness on March 28, 2007. The issue was whether he was guilty of willful misconduct. Allegedly at that hearing on May 21, 2007, Claimant testified regarding his job for employer which he held for five days and his reason for discharge. Ultimately, the Referee determined that the employer did not meet its burden of proving that Claimant was guilty of willful misconduct because there was no testimony by the employer that the dean informed the Claimant that additional tardy incidents would result in termination. Claimant was then awarded unemployment compensation benefits.

Although both Claimant and Employer were notified of the date, time and place of the Referee's hearing, neither party appeared to offer testimony. The Referee made findings based entirely on the UC Service Center's documents which were the only information on record.³ Based on those documents, the Referee

³ Those documents consisted of the following:

1. Claimant's questionnaire in which he admitted he quit for "personal reasons" described as follows: "I was working for the first couple days with no breaks and no lunch break. I have worked office type work for 25 years now and I am no longer able to be on my feet all day and do heavy lifting required and work long hours without breaks. The stores were understaffed, and had to keep working with no breaks and no lunches. There was a store that I worked at I was running the register, trying to stock the shelves and help customers. The one day I did this was \$6,000 of personal sales, I was beat at the end of the day. I explained to the district manager that I was too old to work with no lunches and be on my feet all day without a break. When I calculated my pay at the end of the week, I found that I had a half hour taken from my pay for each day, even though I was not given a chance to take a break each day. I was offered my lunch break on Friday after I talked to the district manager. Then on Saturday I was also offered my lunch period.

Claimant further added on the form: "I was given a form to fill out for my resignation and I filled that out and returned it so I would not be considered as abandoning my job. I had resigned with my last day at work being 5-28-2007 [sic]. I had told the district manager on 5-27-2007 [sic] that I was quitting and I worked out the remaining hours on my schedule that week."

2. Employer's notice of application indicating that Claimant resigned 4-29-2007 with his last day of work on 4-28-2007.

3. Employer's questionnaire indicating that Claimant left for personal reasons, Claimant did not discuss the reasons or attempt to resolve the situation which caused him to leave prior to his separation, and continuing work was available.

determined that Claimant had not met his burden of proving that he had voluntarily terminated his employment for a necessitous and compelling reason. Claimant appealed to the Board, which affirmed the Referee's decision. This appeal by Claimant followed.⁴

Claimant contends that he was denied due process when the Board refused his request for a remand hearing because his attorney was not notified of the hearing before the Referee. Employer, however, argues that the real reason Claimant was not available for the hearing was because he wrote down the wrong date of the hearing on his calendar. Employer further argues that while Claimant's attorney may not have been properly served, Claimant did not raise that argument before the Board, and it is waived on appeal.

The Board has sole discretion to decide whether to grant a request for remand. *Skowronek v. Unemployment Compensation Board of Review*, 921 A.2d 555 (Pa. Cmwlth 2007). Moreover, Section 504 of the Law provides, in relevant part:

The board shall have power, on its own motion, or on appeal, to remove, transfer, or review any claim pending before, or decided by, a referee, and in any such case and in

⁴ Our scope of review of the Board's decision is limited to determining whether constitutional rights were violated, whether errors of law were committed or whether findings of fact are supported by substantial evidence. *Owens v. Unemployment Compensation Board of Review*, 748 A.2d 794 (Pa. Cmwlth. 2000). The Board is the ultimate fact-finder and is empowered to resolve conflicts in the evidence. Findings made by the Board are conclusive and binding on appeal if the record, when examined as a whole, contains substantial evidence to support those findings. *Brannigan v. Unemployment Compensation Board of Review*, 887 A.2d 841 (Pa. Cmwlth. 2005).

cases where a further appeal is allowed by the board from the decision of a referee, may affirm , modify , or reverse the determination or revised determination, as the case may be, of the department or referee on the basis of the evidence previously submitted in the case, or direct the taking of additional evidence.

In this case, neither party appeared at the hearing. However, it was Claimant's burden at the hearing to prove that he had a necessitous and compelling reason for quitting his employment. *Nolan v. Unemployment Compensation Board of Review*, 797 A.2d 1042 (Pa. Cmwlth. 2002). The original record reflects that Claimant sent the Referee a letter dated July 16, 2007, requesting to reopen the record because "I inadvertently had written in my calendar that my U/C Appeal hearing was set for July 16, 2007 and was prepared to proceed today accordingly. Unfortunately, as I was gathering up and copying my paperwork and evidence for today's hearing a few moments ago, I discovered that I had erred and that my appeal hearing was instead last Thursday (7/12/07 at 2:00 p.m.) and not today." Claimant alleged that his mistake was due to his preoccupation with an upcoming medical procedure.

In *Savage v. Unemployment Compensation Board of Review*, 491 A.2d 947 (Pa. Cmwlth. 1985), this Court held that a claimant was properly denied the right to a remand hearing and due process rights were not violated when the claimant missed his hearing date because he misread the date of the hearing on the notice. We stated that "a claimant's own negligence is insufficient 'proper cause,' as a matter of law to justify his failure to appear at a referee's hearing and warrant a new hearing." *Id.* at 950. While Claimant allegedly may have been preoccupied with another matter, it was not sufficient "proper cause" to ignore the notice and hearing four days

earlier. Consequently, Claimant was not denied due process and was not entitled to a remand hearing.⁵

Claimant then argues that the Board erred in determining that he voluntarily quit his part-time employment. 34 Pa. Code §1051 provides that:

If a party notified of the date, hour and place of a hearing fails to attend a hearing without proper cause, the hearing may be held in his absence. In the absence of all parties, the decision may be based upon the pertinent available records. The tribunal may take such other action as may be deemed appropriate.

Because neither party attended the hearing, the Referee and Board could only rely on the documents from the UC Service Center which was all that was available as a record. It was Claimant's burden to prove that he had a necessitous and compelling reason for quitting. Based on those documents, the Board found that Claimant admitted that he voluntarily terminated his employment; Employer stated that Claimant did not discuss why he was leaving or that there may have been alternative solutions to whatever problem was causing the separation. Because the evidence of record supports those findings, the Board properly determined that Claimant failed to

⁵ For this same reason, Claimant was not entitled to a remand hearing to provide a transcribed record from his other unemployment compensation hearing relative to his employment at the KIS Career School at which he allegedly gave testimony regarding his job with Employer and why he had to leave that employment.

As for Claimant's argument that he is entitled to a remand hearing because his attorney was not served with a copy of the hearing notice and notified of the hearing, that argument is waived because it was not raised before the Board. *See* Pa. R.A.P. 1551(a) (issues not raised before the government unit are waived on appeal before this court).

meet his burden of proving that he had a necessitous and compelling reason for his voluntary termination.

Accordingly, the order of the Board is affirmed.

DAN PELLEGRINI, JUDGE

