IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Lewis M. McCrae, Petitioner | : | |
| v. | : | |
| Unemployment Compensation Board of Review, Respondent | : | No. 2626 C.D. 2010 |
| | : | Submitted: July 1, 2011 |

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: August 24, 2011

Lewis McCrae (Claimant) challenges the order of the Unemployment Compensation Board of Review (Board) which affirmed in part the referee's decision that Claimant was eligible for benefits under Section 402(b) of the Unemployment Compensation Law (Law)[1] and reversed in part and determined that Claimant was ineligible for benefits under Section 401(d)(1) of the Unemployment Compensation Law (Law).[2]

The facts, as initially found by the referee and confirmed by the Board, are as follows:

> 1. Claimant worked from June 8, 1998 through June 25, 2010, as a wrapper. He was paid $17.86 per hour and

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(b).

[2] 43 P.S. §801(d)(1).

worked 40 hours per week at what was his only job at the time.

2. Claimant was scheduled to work from 11:00 p.m. until 7:30 a.m.

3. Earlier in 2010, Claimant was hospitalized for a few days because he was having a problem drinking or eating.

4. As a result of his health problems, Claimant lost anywhere from 15 to 20 pounds and was physically weakened as a result.

5. Eventually, Claimant went back to work.

6. Claimant's work is at a critical point in Employer's process.

7. If Claimant takes a break, the production line stops.

8. As a result of the duties to which he was assigned, Claimant felt he could not take a break.

9. Employer told Claimant that it needed him to not take a break.

10. Claimant's work occurred in a section of Employer's facility that did not have any air conditioning.

11. In the late spring, the facility became so hot that Claimant had difficulty breathing.

12. Because Claimant did not have any breaks, he did not have an opportunity to drink fluids or eat any snacks.

13. Claimant felt he was physically not up to the challenge of doing his job.

14. Claimant talked to Employer about the fact that he was physically not up to the challenge of doing his job.

> 15. Employer did not offer Claimant any accommodation.
>
> 16. Claimant quit his job after Employer did not offer any accommodation.

Referee's Decision, September 22, 2010, (Decision), Findings of Fact Nos. 1-16 at 1-2.

The referee determined that Claimant established that he had a necessitous and compelling reason for terminating his employment with Double H Plastics, Inc. (Employer) and was eligible for benefits under Section 402(b) of the Law.

Employer appealed to the Board which affirmed the determination that Claimant was eligible for benefits under Section 402(b) but reversed in part and determined Claimant was ineligible for benefits under Section 401(d)(1). The Board reasoned:

> However, the claimant admitted that he retired from his position with the employer. He testified that he was going to work until the end of the year, but because of his health problems, elected to leave the workforce early. Based on the claimant's testimony and evidence, he has rebutted the presumption of availability. The claimant has failed to establish that he is realistically attached to the job market. Therefore, he must be denied benefits pursuant to Section 401(d)(1) of the Law.

Board Opinion, November 15, 2010, at 1.

Claimant contends that the Board erred when it determined that Claimant was not realistically attached to the workforce after he retired from his

position with Employer because he did not retire from all suitable work, that the Board's decision that he was not attached to the workforce was not supported by substantial evidence, that the Board erred when it made this determination because the only evidence was Claimant's questionnaire, and that the Board erred when it failed to remand the case for the referee to conduct a hearing on the issue of whether Claimant was available for work.[3]

Initially, Claimant contends that the Board misinterpreted his testimony and that he retired from Employer but did not retire from the workforce.

> Section 401(d)(1) of the Law, 43 P.S. §801(d)(1), provides:
>
> Compensation shall be payable to any employe who is or becomes unemployed and who
> . . . .
> (d)(1) Is able to work and available for suitable work: Provided, That no otherwise eligible claimant shall be denied benefits for any week because he is in training with the approval of the secretary nor shall any such individual be denied benefits with respect to any week in which he is in training with the approval of the secretary by reason of the application of the provisions of this subsection relating to availability for work or the provisions of section 402(a) of this act relating to failure to apply for or a refusal to accept suitable work. (Emphasis added).

[3] This Court's review in an unemployment compensation case is limited to a determination of whether constitutional rights were violated, errors of law were committed, or essential findings of fact were not supported by substantial evidence. Lee Hospital v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994).

Whether a claimant is able and available for suitable work is a question of fact unless the restriction on job availability is so untenable and illustrative of a lack of good faith so as to disqualify a claimant as a matter of law. Proof that a claimant has registered with the unemployment compensation authorities creates a presumption of availability for work. The presumption may be rebutted by evidence that a claimant's physical condition limits the type of work a claimant is able to accept or by evidence that he has voluntarily placed other restrictions on the type of job he is willing to accept. If a claimant is able to do some type of work even though he is disabled and there is a reasonable opportunity to secure such a position, then the claimant is attached to the labor force. Hower and Son v. Unemployment Compensation Board of Review, 509 A.2d 1383 (Pa. Cmwlth. 1986).

Generally, the determination of whether a claimant is available for work is a question of fact for the Board, which this Court is bound to affirm if the Board's determination of the factual issue is supported by substantial evidence. Pennsylvania Electric Company v. Unemployment Compensation Board of Review, 450 A.2d 779 (Pa. Cmwlth. 1982). Further, a woman may not be presumed to be unavailable for work because she was placed on a pregnancy leave of absence. Wincek v. Unemployment Compensation Board of Review, 412 A.2d 699 (Pa. Cmwlth. 1980).

At the hearing the referee asked Claimant about his separation from employment:

> R: Okay. Service Center was under the impression you quit this job. Did you quit this job?

C: I retired, yes. I have on my records that I retired.

. . . .

C: There was a reason that I retired, because I was going to retire at the end of the year.

R: But you did it earlier?

C: But I did it earlier because of . . . . health reason.

Notes of Testimony, September 21, 2010, (N.T.) at 3.

After detailing his health problems and his unsuccessful efforts to obtain another job with Employer, Claimant concluded, "I think that's [sic] just about clears up the whole scenario of why I . . . retired. Like I said, I was going to retire at the first of the year anyway. I was going to finish this year out and retire. I'm 70 years old, so I'm going to give it up." N.T. at 6.

On his Claimant Questionnaire for the Unemployment Compensation Service Center, Claimant stated, "I have retired." He also stated, "I told the company I was going to retired [sic] because of the workload and my health." Claimant Questionnaire, July 19, 2010, at 1.

This testimony coupled with the questionnaire clearly indicated that the Board did not misinterpret the evidence. There was nothing that indicated Claimant intended to remain part of the workforce.

Claimant next contends that the Board's determination that he removed himself from the workforce was not supported by substantial evidence and the referee failed to question Claimant about it. Substantial evidence is defined as "relevant evidence that a reasonable mind might accept as adequate to

support a conclusion." Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985). However, Claimant's testimony and the questionnaire provided substantial evidence for the determination that Claimant retired.

Claimant next contends that the only evidence on the issue of retirement was the questionnaire which indicated that he was able and available for work. A review of the record reveals that Claimant checked the boxes on the questionnaire and indicated that he was able and available for work. However, in the same questionnaire, he stated that he retired. He did the same at the hearing. While the questionnaire was inconsistent, the Board was free to determine that Claimant did retire. In unemployment compensation proceedings, the Board is the ultimate fact-finding body empowered to resolve conflicts in evidence, to determine the credibility of witnesses, and to determine the weight to be accorded evidence. Unemployment Compensation Board of Review v. Wright, 347 A.2d 328 (Pa. Cmwlth. 1975).

Claimant next contends that the referee failed to elicit testimony regarding the issue of availability for work and that the Board should remand to address this issue.

In Vann v. Unemployment Compensation Board of Review, 508 Pa. 139, 148, 494 A.2d 1081, 1085 (1985), our Pennsylvania Supreme Court stated that the referee must be impartial but is not required to "advise the claimant as to the strength of his case at any point in the hearing because he [the claimant] is not

represented by counsel." Our Pennsylvania Supreme Court further stated that it is the duty of the referee to "be impartial in giving assistance to unrepresented parties." Vann, 508 Pa. at 148, 494 A.2d at 1085-1086. Claimant had the opportunity to present his case and establish that he was still attached to the workforce. He failed to do so. This Court sees no need to remand.

Accordingly, this Court affirms.

BERNARD L. McGINLEY, Judge

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**O R D E R**

AND NOW, this 24th day of August, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge

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HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY SENIOR JUDGE FRIEDMAN FILED: August 24, 2011

I respectfully dissent. The majority concludes that Double H Plastics, Inc. (Employer) rebutted the presumption that Lewis M. McCrae (Claimant) was available for suitable work because Claimant testified that he retired from his position with Employer due to the workload and his health. I cannot agree.

Claimant had worked twelve years for Employer when, in 2010, he was hospitalized for a problem that affected his ability to drink and eat. Because of the health problem, Claimant lost fifteen to twenty pounds and became physically weak. However, Claimant eventually returned to work.

Claimant worked as a wrapper at a critical point in Employer's process. If Claimant took a break, the production line stopped. Thus, Employer told Claimant

that he could not take a break. Because Claimant could not take a break, Claimant could not drink fluids or eat snacks during his 11:00 p.m. to 7:30 a.m. shift. Also, Claimant worked in a section of Employer's facility that lacked air conditioning. In late spring, it was so hot that Claimant had difficulty breathing.

Claimant told Employer that he was no longer physically able to do his job and sought some accommodation, e.g., moving Claimant to another location. However, Employer would not make any accommodation for Claimant. As a result, Claimant retired.[1] Claimant applied for unemployment compensation benefits, and the question was whether Claimant was available for suitable work.

In determining whether a claimant is available for suitable work, "'[t]here is no requirement that the claimant be able to do the same work or type of work as he was formerly.'" *Hower and Son v. Unemployment Compensation Board of Review*, 509 A.2d 1383, 1386 (Pa. Cmwlth. 1986) (quoting *Unemployment Compensation Board of Review v. Patsy*, 345 A.2d 785, 787 (Pa. Cmwlth. 1975)). Thus, here, although Claimant was unable to do his production line job without air conditioning and without breaks to drink fluids or eat snacks, Claimant was able to do, and was available for, **suitable** work. Claimant directly asked Employer for suitable work by seeking an accommodation.

In *Tollari v. Unemployment Compensation Board of Review*, 309 A.2d 833 (Pa. Cmwlth. 1973), the claimants, like Claimant, retired because they were

[1] Claimant had planned to retire at the end of the year, but he retired earlier because of his health and Employer's unwillingness to accommodate him.

physically incapable of continuing in their jobs. They applied for unemployment benefits, asserting that they were available for suitable work. However, the claimants had not asked their employer for suitable work before retiring. This court held that the claimants would have established their availability for suitable work, and would have been entitled to benefits, if they had sought suitable work from their employer before retiring. *Id.* at 836.

Here, as indicated, Claimant sought suitable work by asking Employer for an accommodation before retiring. Under *Tollari*, this establishes that Claimant was available for suitable work. Thus, under *Tollari*, Claimant is entitled to benefits.[2]

Accordingly, I would reverse.

ROCHELLE S. FRIEDMAN, Senior Judge

[2] I also note that, in workers' compensation law, the acceptance of a retirement pension, by itself, does give rise to a presumption that the employee has voluntarily removed himself or herself from the labor market. *See City of Pittsburgh v. Workers' Compensation Appeal Board (Leonard)*, 18 A.3d 361, 365 (Pa. Cmwlth. 2011).