IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Karen Ann Carsley,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 731 C.D. 2012
	:	
Unemployment Compensation Board of Review,	:	Submitted: September 28, 2012
	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: November 29, 2012**

Karen Ann Carsley (Claimant) petitions, pro se, for review of an Order of the Unemployment Compensation Board of Review (Board) affirming the Decision and Order of an Unemployment Compensation Referee (Referee) denying Claimant's application for unemployment compensation (UC) benefits pursuant to Section 402(b) of the Unemployment Compensation Law (Law).[1] On

[1] Act of December 5, 1936, Second Ex. Sess. P.L. (1937) 2897, as amended, 43 P.S. § 802(b). Section 402(b) provides, in relevant part, that a person shall be ineligible for compensation for any week "[i]n which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature." Id.

appeal, Claimant argues that she did not voluntarily quit her job and that she was badgered during the Referee's hearing. Because the Board's denial of UC benefits is supported by the record, we must affirm the Board's Order.[2]

Claimant filed an internet claim for UC benefits following her separation from employment as a cashier for Weis Markets, Inc. (Employer). (Claim Record, R. Item 1.) The Altoona UC Service Center issued a determination of eligibility pursuant to Section 402(e) of the Law,[3] concluding that Claimant was discharged because she was physically unable to perform grocery check-out without the use of a silver chute; however, such conduct did not constitute willful misconduct. (Notice of Determination, R. Item 4.) Employer appealed, and a hearing was held before a Referee on February 3, 2012. Claimant, pro se, and Employer's two witnesses, Dante N. DeAnnuntis (Manager) and John Warren (HR Coordinator), appeared and testified. During the hearing, the Referee requested permission from

[2] The Board argues that Claimant's appeal should be quashed because her brief does not substantially comply with Chapter 21 of the Pennsylvania Rules of Appellate Procedure. We agree that Claimant's brief includes numerous defects. For example, the brief does not comply with Rule 2119 of the Pennsylvania Rules of Appellate Procedure, requiring, among other things, that "[t]he argument shall be divided into as many parts as there are questions to be argued," "[c]itations of authorities must set forth the principle for which they are cited," "[i]f reference is made to the . . . evidence, . . . opinion or order, . . . , the argument must set forth, . . . a reference to the place in the record where the matter referred to appears," and "[w]hen the . . . refusal to find[] a fact is argued, [as here,] the argument must contain a synopsis of all the evidence on the point, with a reference to the place in the record where the evidence may be found." Pa. R.A.P. 2119. However, because we can adequately discern Claimant's pro se arguments on appeal, we will conduct appellate review.

[3] Section 402(e) of the Law provides that, "[a]n employe shall be ineligible for compensation for any week . . . [i]n which his unemployment is due to his discharge . . . from work for willful misconduct connected with his work . . . ." 43 P.S. § 802(e).

the parties to consider the appeal under both Sections 402(e) and 402(b) of the Law, to which Claimant and Employer consented. (Referee Hr'g Tr. at 18-19.)

The Referee made the following findings of fact:

1. [C]laimant was employed by [Employer] as a part-time Cashier working an average of ten hours per week from September 1983 until her last day of work on November 14, 2011, at the final rate of pay of $9.75 per hour.

2. Prior to October 2011, the process for checking out groceries at the cash register involved scanning the products as they came off of a conveyor belt and then sliding them down the chute where they would remain until the cashier or a "bagger" would place the items into bags for lifting into the customers' shopping carts.

3. [E]mployer changed the configuration of the checkout station so that groceries coming off the conveyor belt would be scanned and immediately placed in a bag that sat on a platform lower than the level of the conveyor belt.

4. The cashier was then expected to take each bag as it was filled and step forward through an opening between the bagging platform and another platform to the left of the passageway and then place the bag into the customer's cart.

5. This process required [C]laimant to lift the bag up and over into the shopping cart.

6. [E]mployer changed the configuration of the checkout counters so that employees would not twist and turn and would not have to bend over the chute or bagging platform in order to place the bags into the cart.

7. [E]mployer did provide for a removable "silver chute" for use when a bagger would be assisting the cashier so that the cashier would not stop to bag the items after scanning them.

8. [E]mployer also allowed use of the silver chute if the customer requested to bag their own groceries.

9. [E]mployer instructed [C]laimant that she was not to use the silver chute, but to use the "scan and bag" method for which the new checkout stations were designed.

10. [C]laimant brought [E]mployer physician's notes stating that she needed to use the silver chute to ease her lifting.

11. The physician's note did not prescribe [C]laimant's physical limitations.

12. [E]mployer did not require [C]laimant to provide a physician's note that described her specific medical conditions.

13. [E]mployer did not require [C]laimant to fill bags to the point where they were too heavy for her to lift comfortably.

14. [E]mployer informed [C]laimant that she was required to work without using the silver chute other than when there was a bagger or a request by the customer to bag the items.

15. [C]laimant suffers from back problems and tendonitis in her elbow.

16. [E]mployer informed [C]laimant on November 14, 2011 that she was required to perform 100% of her cashier duties in accordance with the new "scan and bag" configuration.

17. [E]mployer informed [C]laimant to bring a note that would update [E]mployer regarding [C]laimant's limitations.

18. [C]laimant did not return to work after November 14, 2011 and did not provide an updated note.

19. Continuing work was available for [C]laimant with [E]mployer.

(Referee's Findings of Fact (FOF) ¶¶ 1-19.) The Referee concluded that, even accepting as true that Claimant suffered from shoulder, back and elbow conditions, Claimant failed to demonstrate good cause for quitting when Claimant failed to

provide a doctor's note describing Claimant's actual limitations, or that Employer's new scan and bag check-out method affected her limitations more negatively than her use of the silver chute. (Referee Decision at 2.) Therefore, the Referee determined that Claimant found the scan and bag method to be bothersome, but that Claimant's mere dissatisfaction with the scan and bag method did not provide good cause for Claimant to quit. (Referee Decision at 3.) In sum, the Referee concluded that Claimant did not meet her burden to demonstrate that she had necessitous and compelling reasons for not returning to her employment. (Referee Decision at 2-3.) Claimant appealed to the Board. Upon review, the Board adopted the Referee's findings of fact and conclusions of law, and affirmed the Referee's Decision pursuant to Section 402(b) of the Law. (Board's Order at 1.)

On appeal,[4] Claimant first argues that the facts presented by Employer's witnesses were untrue and that she did not quit her employment. Essentially, Claimant is arguing her version of the facts.

It is well-established that the Board is the ultimate finder of fact, and that "[q]uestions of credibility and the resolution of evidentiary conflicts . . . are not subject to re-evaluation on judicial review." Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 276, 501 A.2d 1383, 1388 (1985)

[4] "The Court's review is limited to determining whether constitutional rights were violated, whether an error of law was committed, whether a practice or procedure of the Board was not followed or whether the findings of fact are supported by substantial evidence in the record." Western & Southern Life Insurance Co. v. Unemployment Compensation Board of Review, 913 A.2d 331, 334 n.2 (Pa. Cmwlth. 2006).

(quoting Miller v. Unemployment Compensation Board of Review, 405 A.2d 1034, 1036 (Pa. Cmwlth. 1979)). That the claimant may have testified to "a different version of the events, or . . . might view the testimony differently than the Board, is not grounds for reversal if substantial evidence supports the Board's findings." Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994). Substantial evidence is defined as "such relevant evidence which a reasonable mind would accept as adequate to support a conclusion." Guthrie v. Unemployment Compensation Board of Review, 738 A.2d 518, 521 (Pa. Cmwlth. 1999). In discerning whether there is substantial evidence to support the findings, we "must view the record in a light most favorable to the party which prevailed before the Board, giving that party the benefit of all logical and reasonable inferences deducible from the evidence." Stringent v. Unemployment Compensation Board of Review, 703 A.2d 1084, 1087 (Pa. Cmwlth. 1997).

Our review of the record reveals that there is substantial evidence to support the Board's findings rather than Claimant's version of the facts. Employer's Manager testified that Employer "installed a new cashier configuration [for] check-out" that generally eliminated the use of the silver chute, which was a new company policy. (Referee Hr'g Tr. at 10-12, 15.) When Manager saw Claimant continuing to use the silver chute, he told her that Employer wanted the cashiers to utilize the new scan and bag method; however, Claimant was not pleased with Manager's directive. (Referee Hr'g Tr. at 12.) Claimant informed Manager that she did not know if she could do it and Manager told her that, "if you can't do it, [and] if you have a physical limitation, you have to show that to us." (Referee Hr'g Tr. at 12.) Manager did not hear anything else from Claimant until the next

time he saw her using the silver chute rather than scanning and bagging. (Referee Hr'g Tr. at 13.) Manager then said to Claimant, "I [] know, we talked about it before . . . if you can't physically do the scan and bag [method], rather than the scan, throw and bag, then you . . . really can't perform the job function. You have to see [HR Coordinator]. And [he] will explain to you what the procedures are as far as . . . where we have to go for the next step." (Referee Hr'g Tr. at 13.) However, Claimant never informed Employer what her problems were; her physician's notes dated October 21, 2011 and November 11, 2011, merely stated that she required the use of the silver chute "to ease lifting" and "to assist in lifting." (Referee Hr'g Tr. at 14; Ex. E-1.) Manager informed Claimant that she was "going to have to keep up with the doctor and keep [Employer] updated every 30 days on her progress until she can [be] able to come back to work to perform her function." (Referee Hr'g Tr. at 14.)

The HR Coordinator testified that Claimant had approached him, "stating that she couldn't do [the] new process of scan and bag . . . she was more comfortable doing the scan and chute," (Referee Hr'g Tr. at 20), and Claimant never presented a weight restriction of any sort, (Referee Hr'g Tr. at 53). The HR Coordinator stated that, when Claimant did not provide a thirty-day update from a physician stating "that it was not a workplace situation or it wasn't a workplace injury," Claimant "should actually [have] been taken out of, . . . the system on 12/14 in compliance with the 30-day update on her medical status." (Referee Hr'g Tr. at 20-21.) The HR Coordinator further testified that "the scan and bag is . . . easier because there's no twisting . . . [and] the old way made you twist, made you bend over, made you actually lift higher." (Referee Hr'g Tr. at 53-54.)

There is no evidence in the record that Claimant ever provided information to Employer about her actual limitations or the nature of her problem. In sum, the record supports the Referee's findings and conclusions, as adopted by the Board, that: (1) Employer requested that Claimant obtain a physician's note clarifying her limitations; (2) Claimant never presented such a note to Employer; and (3) the physician's notes that Claimant brought to Employer before this request did not specify Claimant's actual limitations. (FOF ¶¶ 11, 17-18; Referee's Decision at 2.)

Regarding Claimant's argument that she did not voluntarily quit her employment, contrary to the Board's conclusions, "it is a claimant's burden to prove that [her] separation from employment was a discharge." Key v. Unemployment Compensation Board of Review, 687 A.2d 409, 412 (Pa. Cmwlth. 1996). "Where an employee, without action by the employer, leaves or quits work, the employee's action is considered voluntary under the Law."[5] Charles v. Unemployment Compensation Board of Review, 552 A.2d 727, 729 (Pa. Cmwlth. 1989). "Clearly, medical problems can provide a cause of a necessitous and compelling nature." Genetin v. Unemployment Compensation Board of Review, 499 Pa. 124, 128, 451 A.2d 1353, 1355 (1982) (internal quotes omitted). But "it is well-established that a claimant has an obligation to communicate her medical problems to her employer and to *explain* her inability to perform her regularly assigned duties." Fox v. Unemployment Compensation Board of Review, 522 A.2d 713, 715 (Pa. Cmwlth. 1987) (emphasis in original). Thus, a claimant is required to notify her employer of her health limitations prior to terminating her

[5] Whether an employee has a necessitous and compelling reason to voluntarily quit is a question of law fully reviewable by this Court. Pacini v. Unemployment Compensation Board of Review, 518 A.2d 606, 607 (Pa. Cmwlth. 1986).

employment because "[o]nly through communication can an employer be afforded an opportunity to accommodate a claimant's problem by offering suitable work." Id. (Emphasis omitted.)

Here, Claimant did not meet her burden to prove that her separation from her employment was a discharge; there is substantial evidence supporting the Board's findings and conclusion that Claimant voluntarily terminated her employment when she left work on November 14, 2011 and never returned. Claimant testified that she tried to call Employer on November 16, 2011 and left a voicemail that was not returned. (Referee Hr'g Tr. at 32.) However, it is undisputed that Claimant did not provide Employer with the requested physician's note describing her actual limitations or how the use of the silver chute would address such limitations, whatever they may have been. Moreover, Claimant not only admitted in her testimony that she did not have any weight restrictions, she indicated that she had a preference for the former check-out policy using the silver chute. (Referee Hr'g Tr. at 33.) Claimant testified that she believed that Employer "w[ould]n't touch [her] because [she] had a doctor's excuse." (Referee Hr'g Tr. at 33.) And, despite Claimant's testimony that she had back pain and a shoulder surgery at some time in the past, (Referee Hr'g Tr. at 33), the Board did not credit this testimony. In addition, there is no evidence that Claimant ever informed Employer directly about these problems, including whether they resulted in limitations, or how the scan and bag method would impact her more negatively than her use of the silver chute. Finally, Manager testified that Claimant "didn't keep in contact with us . . . she left us without telling us why she left us," "we had to take her off the books because we can't keep somebody in the books if they stopped coming to work," and "our intention was not ever for her not to come back." (Referee Hr'g Tr. at 16.) Thus, there is substantial evidence to support the Board's finding that Claimant

voluntarily left when she was dissatisfied with the new scan and bag method. (Referee's Decision at 3.)

It is well-settled that mere dissatisfaction with working conditions is not sufficient to establish necessary and compelling reasons to voluntarily quit employment. Monaco v. Unemployment Compensation Board of Review, 523 Pa. 41, 48, 565 A.2d 127, 130 (1989). Without knowledge of Claimant's specific limitations, Employer did not have the opportunity to address such limitations or provide an appropriate accommodation based upon her actual limitations. Therefore, Claimant did not have a necessitous and compelling reason to quit her job.

Claimant also argues that she felt badgered into answering questions during the hearing. Although Claimant argues that she was "badgered" into answering questions at the Referee's hearing that were unrelated to her case, this Court has held that the Referee in an UC case has a responsibility to assist an unrepresented claimant at the hearing so that the facts of the case necessary for a decision may be adequately developed to "insure that compensation will not be paid in cases in which the claimant is not eligible and that compensation will be paid if the facts, thoroughly developed, entitled the claimant to benefits." Robinson v. Unemployment Compensation Board of Review, 431 A.2d 378, 380 (Pa. Cmwlth. 1981). The Board's regulations provide that, "[w]here a party is not represented by counsel[,] the tribunal before whom the hearing is being held should advise h[er] as to h[er] rights, aid h[er] in examining and cross-examining witnesses, and give h[er] every assistance compatible with the impartial discharge of its official duties." 34 Pa. Code §101.21. We have interpreted this regulation as requiring a

Referee to assist a pro se claimant in adequately developing the facts necessary for a decision. Lewis v. Unemployment Compensation Board of Review, 814 A.2d 829, 832 at n.7 (Pa. Cmwlth. 2003).

Here, the hearing transcript reveals that the Referee did all that was required by the regulation in eliciting testimony about the underlying facts from the parties. Neither the regulations nor the case law require the Referee to act as an advocate for a claimant. The Referee apprised the parties, including Claimant, of their rights to counsel, to present evidence and testimony, and to examine and cross-examine witnesses. (Referee Hr'g Tr. at 3-5.) Thus, Claimant was aware of her opportunity to be represented by counsel, but declined it. When the Referee asked Claimant whether she had any questions about the procedure, Claimant responded in the negative. (Referee Hr'g Tr. at 5.) After Claimant presented her testimony, Manager exercised his right to cross-examine Claimant. (Referee Hr'g Tr. at 41-53.) Claimant was provided an opportunity to ask questions of Employer's two witnesses on cross-examination, but declined to do so in each case. (Referee Hr'g Tr. at 29, 65-66.) Claimant did not object to any questions during the hearing or express any concerns that the questions were badgering. (Referee Hr'g Tr. at 41-53.) Therefore, despite Claimant's subjective reaction that she felt badgered, Claimant chose to represent herself and failed to avail herself of the opportunity to object to any questions that she may have perceived as badgering.[6]

[6] Our Supreme Court has stated "that 'any layperson choosing to represent himself in a legal proceeding must, to some reasonable extent, assume the risk that his lack of expertise and legal training will prove his undoing.'" Vann v. Unemployment Compensation Board of Review, 508 Pa. 139, 148, 494 A.2d 1081, 1086 (1985) (quoting Groch v. Unemployment Compensation Board of Review, 472 A.2d 286, 288 (Pa. Cmwlth. 1984)).

For the foregoing reasons, we are constrained to affirm the Board's Order.

RENÉE COHN JUBELIRER, Judge

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	:	
Unemployment Compensation Board of Review,	:	
	:	
Respondent	:	

O R D E R

NOW, November 29, 2012, the Order of the Unemployment Compensation Board of Review entered in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge