

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dolores J. Sgourakis,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 920 C.D. 2011
	:	Submitted: September 23, 2011
Unemployment Compensation Board	:	
of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON

FILED: November 17, 2011

Petitioner Dolores J. Sgourakis (Claimant), *pro se*, petitions for review of an order of the Unemployment Compensation Board of Review (Board), which affirmed the Referee's decision and denied Claimant emergency unemployment compensation (EUC) benefits pursuant to Section 4001 of the Emergency Unemployment Act of 2008¹ (EUC Act of 2008) and unemployment

¹ Title IV of the Supplemental Appropriation Act of 2008, Public Law 110-252, 122 Stat. 2323, Section 4001, 26 U.S.C. § 3304. EUC benefits are federally funded and were created by Congress pursuant to the EUC Act of 2008. *McKenna v. Unemployment Comp. Bd. of Review*, 981 A.2d 415, 417 (Pa. Cmwlth. 2009). The EUC benefits programs are administered by the states. *Id.* In Pennsylvania, unemployed claimants who are not eligible for regular unemployment compensation benefits from Pennsylvania, another state, the federal government, or Canada may be eligible for EUC benefits. *Id.* Eligibility requirements for receipt of regular unemployment compensation benefits are also applicable to EUC benefits, along with additional requirements imposed by the EUC Act of 2008. *Id.*

compensation benefits pursuant to Section 402(b) of the Unemployment Compensation Law (Law).² For the reasons set forth below, we affirm.

Claimant was employed as a part-time employee by Otis Spunkmeyer (Employer) from November 29, 2010 through December 3, 2010. (C.R., Item No. 3, p. 2.) Claimant applied for unemployment compensation benefits after voluntarily resigning from her position due to soreness from the job. The Duquesne UC Service Center (Service Center) issued a determination denying Claimant benefits pursuant to Section 402(b) of the Law. Claimant appealed the Service Center's determination, and a Referee conducted an evidentiary hearing at which both parties testified.

Following a hearing, the Referee affirmed the Service Center's determination, finding that Claimant was ineligible for benefits under Section 402(b) of the Law and Section 4001 of the EUC Act of 2008. (C.R., Item No. 10.) The Referee reasoned that Claimant failed to demonstrate cause of a necessitous and compelling nature to leave her employment after three days because Claimant had no health conditions, she was not deceived as to the position she accepted, and soreness of new employees was expected. (*Id.*) The Referee further found that because Claimant's testimony was credible, in that she did not have health restrictions to preclude her from completing physical tasks, she was reasonably attached to the labor market and not ineligible under Section 401(d)(1) of the Law.³

² Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(b).

³ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 801(d)(1). Because it was not the intent of the Act to provide health and disability benefits for an ill employee who is not physically able and available for participation in the work force, it must also appear that employee is able to work and be available for suitable work. *Genetin v. Unemployment Comp. Bd. of Review*, 499 Pa. 125, 129, 451 A.2d 1353, 1355 (1982) (citing **(Footnote continued on next page...)**)

(*Id.*) Claimant appealed to the Board, which affirmed the Referee's determination and denied Claimant unemployment compensation benefits. (C.R., Item No. 12.)

On appeal, the Board issued the following findings of fact:

1. The claimant was last employed as a part-time packer by Otis Spunkmeyer for three days, November 29, 30 and December 1, 2010, at a final rate of \$12.00 per hour.
2. The claimant was scheduled to work three days a week.
3. Part of the claimant's job duties included packing muffins. She was trained to grab two at a time. The claimant found doing so made her hands sore.
4. As a packer, the claimant had to stand all day, except for two fifteen minute breaks and a half hour lunch.
5. The claimant was aware when she accepted the position that she would have to stand all day.
6. Standing all day made the claimant's back sore.
7. In the employer's experience, it would take new employees two weeks to get used to the physical demands of the job.
8. On December 6, 2010, the claimant informed the employer that she could not perform the job duties due to soreness.
9. The employer encouraged the claimant to give it a few more days.

(continued...)

McCurdy v. Unemployment Comp. Bd. of Review, 442 A.2d 1230 (Pa. Cmwlth. 1982)); *see* Section 401(d) of the Law.

10. The claimant did not provide the employer with any doctor's note or limitations.
11. The claimant voluntarily quit her employment alleging soreness.
12. Continuing work remained available to the claimant.

(Id.)

The Board found insufficient evidence that Claimant voluntarily terminated her employment due to cause of a necessitous and compelling nature as required under Section 402(b) of the Law. *(Id.)* The Board found that Claimant quit her job based on having sore hands and a sore back after only three days of employment. *(Id.)* The Board found that Employer credibly asserted that it would take two weeks for new employees to get accustomed to the physical demands of the job. *(Id.)* Employer also encouraged Claimant to attempt the job for a few more days, but Claimant quit despite that encouragement. *(Id.)* Based on the following facts, the Board determined that the evidence was insufficient to establish that Claimant had an adequate health condition justifying resignation. *(Id.)*

The Board reasoned that a new, physically-demanding job would necessarily result in soreness and that because Claimant worked only three days, her effort to attempt the job before quitting was insufficient. *(Id.)* The Board further explained that Claimant failed to present Employer with any doctor's note stating that she was unable to perform the job requirements. *(Id.)* Accordingly, the Board concluded that Claimant failed to prove a necessitous and compelling reason for voluntarily terminating her employment. *(Id.)*

On appeal,⁴ Claimant argues that the Board committed an error of law when it concluded that Claimant did not have a necessitous and compelling reason for terminating her employment.⁵ Section 402(b) of the Law provides, in part, that a claimant shall be ineligible for compensation for any week in which the claimant's unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature. Whether a claimant had cause of a necessitous and compelling nature for leaving work is a question of law subject to this Court's review. *Wasko v. Unemployment Comp. Bd. of Review*, 488 A.2d 388, 389 (Pa. Cmwlth. 1985). A claimant who voluntarily quits his employment bears the burden of proving that necessitous and compelling reasons motivated that decision. *Fitzgerald v. Unemployment Comp. Bd. of Review*, 714 A.2d 1126 (Pa. Cmwlth. 1998), *appeal denied*, 568 Pa. 650, 794 A.2d 364 (1999). In order to establish cause of a necessitous and compelling nature, a claimant must establish that (1) circumstances existed that produced real and substantial pressure to terminate employment, (2) like circumstances would compel a reasonable person to act in the same manner, (3) the claimant acted with ordinary common sense, and (4) the claimant made a reasonable effort to preserve her employment. *Procito v. Unemployment Comp. Bd. of Review*, 945 A.2d 261, 265 (Pa. Cmwlth. 2008).

⁴ This Court's standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. § 704.

⁵ We note that in Claimant's statement of facts, she appears to dispute some of the findings of facts made by the Board, specifically findings related to her break time. (Petitioner's Brief, p. 6.) Claimant, however, failed to dispute any Board findings in her petition for review or in her brief. Such challenges, therefore, are waived. Pa. R.A.P. 2116; *Van Duser v. Unemployment Comp. Bd. of Review*, 642 A.2d 544 (Pa. Cmwlth. 1994); *Coraluzzi v. Cmwlth.*, 524 A.2d 540 (Pa. Cmwlth. 1987).

An employee's medical condition or health reason may create cause of a necessitous and compelling nature to terminate employment voluntarily. *Deiss v. Unemployment Comp. Bd. of Review*, 475 Pa. 547, 381 A.2d 132 (1977). An employee seeking to obtain benefits on health-related grounds bears the burden to demonstrate through competent and credible evidence that: (1) health reasons of sufficient dimension compelled the employee to quit; (2) the employee informed the employer of the health problems; and (3) the employee is able and available for work if her employer can make a reasonable accommodation. *Genetin*, 499 Pa. at 131, 451 A.2d at 1356. While this standard does not require medical testimony, there may be cases where a claimant's testimony and supporting documents are inadequate. *Emmitt v. Unemployment Comp. Bd. of Review*, 500 A.2d 510, 511 (Pa. Cmwlth. 1985) (quoting *Steffy v. Unemployment Comp. Bd. of Review*, 499 Pa. 367, 372, 453 A.2d 591, 594 (1982)). Further, in such cases, once an employee makes an employer aware of such health problems, the employer bears the burden to establish that it made a reasonable attempt to identify and propose possible accommodations for the employee's health problems. *Lee Hospital v. Unemployment Comp. Bd. of Review*, 637 A.2d 695, 699 (Pa. Cmwlth. 1994).

Here, Claimant may be attempting to argue that the soreness in her hands and back constitute a medical or health condition which compelled her resignation. However, Employer credibly testified that it takes new employees approximately two weeks to adjust to their new position. (C.R., Item No. 12.) Claimant was not counseled by a physician nor did she indicate that she experienced more extensive injuries beyond soreness in her back and hands. We do not believe that soreness in Claimant's hands and back constitute a health condition, let alone, a health condition of sufficient dimension to compel an

employee to quit. Therefore, to the extent that Claimant may be arguing that she terminated her employment due to a health or medical condition, her argument is without merit.

To the extent Claimant argues that her soreness created a necessitous and compelling reason to voluntarily terminate her employment, this argument also fails. First, Claimant has not proved that circumstances producing real and substantial pressure requiring termination existed. Here, the Board found that Claimant credibly testified that the physical demands of the job caused her hands and back to become sore. However, Employer also credibly testified that it takes all new employees approximately two weeks to adjust to the physical demands of the job. Therefore, Claimant's soreness does not qualify as real and substantial pressure to terminate her employment after such a short period of time. Second, because all employees have experienced soreness or discomfort related to the job and Employer candidly admitted there is a two week adjustment period, Claimant failed to prove that a reasonable person would quit after only three days of employment. Third, Claimant did not act with ordinary common sense because she only attempted employment for three days and listed no other physical symptoms beyond soreness.

Finally, we believe that the Board properly determined that Claimant did not make a reasonable effort to preserve her employment. The Board found Employer's testimony credible that Employer encouraged Claimant to attempt to work a few more days to see if her symptoms would subside. Instead, Claimant quit. This evidence does not show a reasonable effort by Claimant to preserve employment.

For the reasons discussed above, we conclude that Claimant failed to prove cause of a necessitous and compelling nature to voluntarily terminate her employment, *see Genetin*, 499 Pa. at 131, 451 A.3d at 1356, and failed to prove that she made a reasonable effort to preserve her employment, *see Procito*, 945 A.2d at 264.

Accordingly, we affirm the Board's order.

P. KEVIN BROBSON, Judge

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	:	
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ORDER

AND NOW, this 17th day of November, 2011, the order of the Unemployment Compensation Board of Review is hereby **AFFIRMED**.

P. KEVIN BROBSON, Judge