

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-118

NOVEMBER TERM, 2019

Karen Gochnauer* v. Department of Labor	}	APPEALED FROM:
	}	
	}	Employment Security Board
	}	
	}	DOCKET NO. 12-18-011-09

In the above-entitled cause, the Clerk will enter:

Claimant appeals pro se from a decision by the Employment Security Board denying her request for unemployment compensation benefits. We affirm.

Claimant filed an application for unemployment compensation in November 2018. A claim adjudicator denied her request, finding that claimant failed to show that she was able and available to work as required by 21 V.S.A. § 1343(a)(3). Claimant appealed this decision to an administrative law judge (ALJ), which denied the claim on the same basis. The ALJ held an evidentiary hearing; claimant did not submit any exhibits in support of her position. The ALJ found as follows. Claimant was laid off in March 2018 after working full-time at the front desk of the Stowehof Inn for thirty years. Claimant wanted to return to work but she had trouble finding employment. She had a limited education; she worked for the same employer for thirty years; and she was struggling to control her diabetes and to maintain her mental and emotional health. Claimant wanted to find a job that involved limited interaction with the public and she was interested in working with animals. Claimant had not been able to identify many opportunities that met her limitations.

Claimant had been working with her health care providers to address her physical and emotional health. They recommended that she not return to full-time work but it was not clear for how long. Claimant had also started working with a vocational rehabilitation counselor. At the time of the hearing, claimant expected the counselor to submit a work-search waiver request to the Department of Labor shortly.

Based on these findings, the ALJ concluded that claimant was disqualified from receiving benefits because she failed to show that she was able and available to work. See 21 V.S.A. § 1343(a)(3) (stating that to be eligible to receive unemployment benefits, claimant must be “able to work” and “available for work”). The evidence showed that claimant’s healthcare providers had not yet released her to full-time work. Claimant acknowledged that there was a very limited labor market for her services, particularly given her education, training, and experience. She had identified only one opening for a potentially suitable job at a veterinary clinic. The opening was for a night-shift job, however, and claimant had poor night vision. Claimant appeared to recognize that she needed help from her healthcare providers and others before she would be able and available to work full-time again.

With respect to claimant's work with a vocational rehabilitation counselor, the ALJ concluded that until the counselor submitted a work-search waiver request to the Department, claimant's obligation to search for work remained in effect. She explained that if the work-search requirement was waived, claimant would still need to be able and available to work for each week that she sought unemployment compensation benefits.

Claimant appealed to the Employment Security Board. The Board found the ALJ's decision supported by the findings and the evidence and it thus upheld the ALJ's decision.* This appeal followed.

Claimant asserts that she was advised by her doctor that she could not work between October 2018 and mid-January 2019. She maintains that, since that time, she has been searching for work but she has not received unemployment benefits.

At the outset, we emphasize that our review is limited to the evidence presented below. See V.R.A.P. 10(a) (explaining that "record on appeal consists of . . . the original documents, data, and exhibits" filed below, as well as "any transcript of the proceedings," and "a certified copy of the docket entries"). Claimant has included various materials that post-date the ALJ hearing and

* There is no recording of the Board proceedings because the recording system malfunctioned. Consequently, we directed claimant to prepare a statement of the evidence from that proceeding and serve it on appellee, the Department of Labor. The Department was then given fourteen days to respond or file objections. See V.R.A.P. 10(d).

Claimant filed a document that largely recounts her version of the history of this matter, beginning with when she was laid off from her job at the Stowehof and continuing well past the hearing before the Board. With respect to the Board proceeding, she appears to assert that she told the Board that the vocational rehabilitation counselor needed information from one of her doctors before she could move forward. Claimant contends that one of the Board members called the Career Center and the Vocational Rehabilitation offices during the hearing and left a message. She also states that the Board requested that she submit a Medical Certificate and "Able and Available statement" from her doctor, which she did.

The Department objects to this filing, asserting that it was "neither testimony nor evidence introduced at the evidentiary hearing below, nor a summary of such testimony or evidence." It also objects, with one exception, to the inclusion of various documents provided by claimant because these documents were not submitted at the evidentiary hearing below. The Department does not object to the inclusion of claimant's Medical Certification and Ability and Availability Statement, which were submitted to the Unemployment Insurance Division of the Department of Labor. The Department contends that, although this document was not admitted as an exhibit at the evidentiary hearing below, it was relevant to claimant's request for benefits and thus, it does not object to this document being made part of the record on appeal.

We cannot determine from these filings what transpired at the hearing before the Board. We cannot include documents in the record that were not before the Board. The record shows that the Board affirmed the ALJ's decision without any reference to having accepted or requested any additional materials. Even claimant represents that, at most, the Board left a message at the Vocational Rehabilitation offices. For purposes of this appeal, we presume that no new evidentiary material was presented to the Board.

we have not considered them. Many, if not all, of claimant’s arguments also concern her actions after the evidentiary hearing before the ALJ. We similarly do not consider those arguments.

We are asked to decide if the Board, based on the evidence presented to the ALJ, erred in concluding that claimant was disqualified from receiving unemployment benefits as of November 2018. We defer to the Board’s decision on review. “Absent a clear showing to the contrary, any decisions within its expertise are presumed to be correct, valid, and reasonable.” Bouchard v. Dep’t of Emp’t & Training, 174 Vt. 588, 589 (1989). We review findings of fact for clear error, and we will uphold the Board’s conclusions “if fairly and reasonably supported by those findings of fact.” Id.

The Board’s conclusion that claimant was not able and available to work is supported by the record. Claimant testified at the ALJ hearing that she had not been looking for work since November 2018. She stated that she had been working with health professionals and Vocational Rehabilitation; she understood that these individuals were preparing her to look for suitable work. When asked if a doctor had restricted her from working, claimant replied yes. She later replied that she did not know if her doctors would say that she was physically and mentally able to work a full-time job if one were offered to her. Based on the evidence provided, and mindful that claimant bore the burden of proving she was able and available to work, the Board did not err in concluding that she failed to meet that burden here. As summarized by the ALJ, the evidence showed that claimant was working with her medical providers and possibly Vocational Rehabilitation to try to get to a place where she could find a job and work. She was, however, not yet able and available to work. See In re Dunn, 131 Vt. 261, 265 (1973) (explaining that “availability requirement is said to be satisfied when an individual is willing, able and ready to accept suitable work . . . , that is, when he [or she] is genuinely attached to the labor market,” and “labor market for an individual exists when there is a market for the type of services which he offers in the geographical area in which he [or she] offers them” (quotation omitted)).

To the extent that claimant asserted that she did not have to engage in a work search, she did not submit a work-search waiver at the evidentiary hearing in support of her position. Thus, the Board did not err in finding that “unless and until the [vocational rehabilitation] counselor submit[ted] a work-search waiver request to the Department, the claimant’s obligation to search for work remain[ed] in effect.” To the extent that claimant’s circumstances have changed, her remedy is to contact the Department to have her eligibility reviewed from that point forward. We find no grounds to disturb the Board’s opinion here.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice