



Decision and Order, Finding of Fact (F.F.) ¶¶1, 6; R. Item 8, Hearing Transcript (H.T.) at 3.) On April 1, 2012, Claimant was discharged by Employer because he could not pass the Department of Transportation (DOT) physical examination required for his commercial driver's license as a result of high blood pressure. (R. Item 10, F.F. ¶¶2-3, 5-6; R. Item 8, H.T. at 3-4; R. Item 2, Internet Initial Claims at 2-4.)

Claimant filed for unemployment benefits and the Unemployment Compensation Service Center found Claimant eligible for benefits. The Service Center concluded that Claimant was not ineligible under Section 402(e) of the Unemployment Compensation Law,<sup>2</sup> because Claimant's inability to pass the physical examination did not constitute willful misconduct. (R. Item 4, Service Center Notice of Determination at 1.) The Service Center further expressly found that Claimant satisfied Section 401(d)(1)'s requirement that he be able to work and available for suitable work. (*Id.* at 1-2.)

Employer appealed the Service Center's determination, contending that benefits should be denied because Claimant's inability to pass the physical examination was his fault and not Employer's fault. (R. Item 5, Employer Appeal.) Following a request by Employer to participate by telephone, a Notice of Hearing was sent on July 11, 2012, scheduling the Referee's hearing for July 26, 2012, and directing that Claimant was to appear in person and that Employer was to participate by telephone. (R. Item 7, Referee Ex. 1 July 11, 2012 Notice of Hearing.)

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<sup>2</sup> Section 402(e) provides that an employee shall be ineligible for compensation for any week "[i]n which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work . . . ." 43 P.S. § 802(e).

At the Referee’s hearing, a representative for Employer testified by telephone, but Claimant failed to appear. (R. Item 8, H.T. at 1-2.) Employer’s representative testified that Claimant worked for Employer as a truck driver, that government regulations require that truck drivers pass a DOT physical examination, and that Claimant notified Employer that he failed his DOT physical examination because his blood pressure was too high.<sup>3</sup> (*Id.* at 3-4.) Employer’s representative testified that “[w]e allowed him to try to rectify that problem for about three weeks,” and that when Claimant remained unable to pass the physical examination, Employer notified Claimant that “we could no longer use him as a driver.” (*Id.* at 4.) Employer did not introduce any evidence that Claimant’s high blood pressure or failure to pass the physical examination was caused by any conduct or inaction by Claimant. No evidence was presented that Claimant suffered from any medical restriction other than high blood pressure or that he was restricted from any work that did not require driving.

On July 27, 2012, Claimant called the Referee’s office asserting that he had been told that he was to participate in the Referee’s hearing by telephone, but that no one had called him. (R. Item 9, Reports of Telephone Calls on

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<sup>3</sup> Claimant is correct that the Employer representative who testified at the hearing did not speak to Claimant himself and that the testimony concerning his failure to pass the physical examination was hearsay. (R. Item 7, July 6, 2012 Report on Telephone Call on Hearings.) This testimony, however, was not only admitted at the hearing without objection, but is fully corroborated by Claimant’s statements in his claim for benefits that the reason for his discharge was that he “did not pass DOT physical,” and that his medical condition that caused him to fail the physical examination was “high blood pressure.” (R. Item 2, Internet Initial Claims at 2-3.) It is therefore competent to support the Board’s findings in this case. *Stop-N-Go of Western Pennsylvania, Inc. v. Unemployment Compensation Board of Review*, 707 A.2d 560, 563 (Pa. Cmwlth. 1998); *Flores v. Unemployment Compensation Board of Review*, 686 A.2d 66, 73 (Pa. Cmwlth. 1996); *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976).

Hearings.) Claimant was told by the Referee's Office that his Notice of Hearing was clear that he was to appear in person, and that the Referee had held the hearing and would be issuing a decision. (*Id.*)

On July 31, 2012, the Referee issued a decision reversing the Service Center's determination that Claimant was eligible for benefits. The Referee found that Employer had not met its burden of proving willful misconduct because Claimant's inability to pass the required physical examination did not constitute willful misconduct. (R. Item 10, Referee's Decision and Order at 2.) The Referee, accordingly, affirmed the Service Center's determination that Claimant was not ineligible under Section 402(e) of the Unemployment Compensation Law. (*Id.*) The Referee, however, held that Claimant was ineligible for benefits under Section 401(d)(1), concluding that because of his inability to pass the DOT physical examination and his failure to appear and introduce evidence, Claimant had not met his burden to demonstrate that he was able and available for suitable work. (*Id.*)

Claimant appealed the Referee's decision to the Board, asserting only that the Referee erred because he "was able and available for work." (R. Item 12, Claimant's Petition for Appeal from Referee's Decision.) Claimant did not mention any issue at all concerning notice of the Referee's hearing or his non-appearance in his petition for appeal to the Board. The Board, on October 16, 2012, issued its decision and order in this matter, adopting and incorporating the Referee's findings and conclusions, and affirming the Referee's denial of benefits. (R. Item 13, Board Decision and Order.) Claimant filed a request for reconsideration with the Board, arguing both that he had good cause for failing to appear at the Referee's hearing and that the Board erred in holding that he was not

available for work. (R. Item 14, Claimant Request for Reconsideration.) The Board denied Claimant's request for reconsideration. (R. Item 16, Board Denial of Reconsideration.)

In this appeal,<sup>4</sup> Claimant seeks reversal of the Board's order denying him benefits on two grounds: 1) that he allegedly had good cause for failure to appear at the Referee's hearing and 2) that the Board erred in holding that he was not able and available for suitable work.

We agree with the Board that the first of these arguments is waived. Issues must be raised at the earliest possible time during an unemployment compensation proceeding so as to permit the Board to consider any alleged errors promptly and resolve the claim with finality rather than by piecemeal rulings. *Wing v. Unemployment Compensation Board of Review*, 496 Pa. 113, 117-18, 436 A.2d 179, 180-81 (1981); *Dehus v. Unemployment Compensation Board of Review*, 545 A.2d 434, 436-37 (Pa. Cmwlth. 1988). Claimant was fully aware of any inadequacy in the notice of the Referee's hearing and of his reasons for his failure to appear before he appealed the Referee's decision to the Board. Claimant, however, failed to raise his non-appearance at the hearing in his appeal to the Board or any way call to the Board's attention that this might be an issue that the Board should address until after the Board ruled on his appeal. The issue whether Claimant had good cause for his failure to appear is therefore waived and cannot constitute a basis for reversal of the Board's order. *Wing*, 496 Pa. at 117-18, 436

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<sup>4</sup> Our review of the Board's decision is limited to determining whether errors of law were committed, constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704; *Rohde v. Unemployment Compensation Board of Review*, 28 A.3d 237, 241 n.4 (Pa. Cmwlth. 2011).

A.2d at 180-81; *Grever v. Unemployment Compensation Board of Review*, 989 A.2d 400, 402-03 (Pa. Cmwlth. 2010); *Dehus*, 545 A.2d at 436-37; *Merida v. Unemployment Compensation Board of Review*, 543 A.2d 593, 596 (Pa. Cmwlth. 1988), *app. dismissed*, 524 Pa. 249, 570 A.2d 1320 (1990).

The Board's conclusion that Claimant was ineligible for benefits under Section 401(d)(1) of the Unemployment Compensation Law, however, is unsupported by the record and contrary to law. Section 401(d)(1) requires only that the Claimant be "able to work and available for suitable work." 43 P.S. § 801(d)(1). "Suitable work" is not limited to the particular type of job at which the claimant was previously employed. *Rohde v. Unemployment Compensation Board of Review*, 28 A.3d 237, 243 (Pa. Cmwlth. 2011); *Hower & Son v. Unemployment Compensation Board of Review*, 509 A.2d 1383, 1386 (Pa. Cmwlth. 1986); *Davy v. Unemployment Compensation Board of Review*, 392 A.2d 330, 332 (Pa. Cmwlth. 1978); *see also* Section 4(t) of the Unemployment Compensation Law, 43 P.S. § 753(t) (defining "Suitable Work" as "all work which the employe is capable of performing"). A claimant is "able to work and available for suitable work" under Section 401(d)(1) if he is capable of doing and available for some kind of paid work. *Rohde*, 28 A.3d at 243; *Hower & Son*, 509 A.2d at 1386; *Davy*, 392 A.2d at 332. "The law does not require that the employee be available for full-time work, for permanent work, for his most recent work, or for his customary job, so long as the claimant is ready, willing, and able to accept some suitable work." *Rohde*, 28 A.3d at 243.

While the burden is on the claimant to prove availability for suitable work, *Rohde*, 28 A.3d at 243; *Hower & Son*, 509 A.2d at 1386, Claimant's failure to appear at the Referee's hearing did not prevent him from satisfying that burden.

Claimant's registration for unemployment compensation created a presumption that he is able to work and available for suitable work, and that presumption satisfies his burden of proof, unless it was rebutted by the evidence before the Board. *Penn Hills School District v. Unemployment Compensation Board of Review*, 496 Pa. 620, 625, 437 A.2d 1213, 1216 (1981); *Rohde*, 28 A.3d at 243; *Hower & Son*, 509 A.2d at 1386.

There was no evidence before the Board that suggested or would support any inference that Claimant had restricted the hours that he could work, that he was not seeking work or that he was disabled from working. The only evidence of any limitation on Claimant's employability was that he had a level of high blood pressure that prevented him from obtaining a commercial driver's license. This showed only that he could not work at his existing job as a truck driver or do other work that required driving. That is not sufficient to overcome the presumption that Claimant was able and available to work. The mere fact that a claimant has a medical condition that disables him from working at his prior job and other jobs requiring driving does not make him unable to work or unavailable for suitable work. *Hower & Son*, 509 A.2d at 1386 (claimant held eligible for benefits despite failure to appear at referee hearing because evidence that claimant suffered seizure and that doctor had restricted him from jobs requiring driving did not negate that he was able to work and available for suitable work).

For the foregoing reasons, we reverse the Board's denial of benefits.

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JAMES GARDNER COLINS, Senior Judge

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Jerald Doug Anthony,	:	
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Petitioner	:	
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v.	:	No. 2256 C.D. 2012
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Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

**ORDER**

AND NOW, this 3<sup>rd</sup> day of July, 2013, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby REVERSED.

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JAMES GARDNER COLINS, Senior Judge