

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tonita Sharpe,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 431 C.D. 2014
	:	
Unemployment Compensation	:	Submitted: August 22, 2014
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: October 21, 2014

Tonita Sharpe (Claimant), pro se, petitions for review of the Order of the Unemployment Compensation (UC) Board of Review (Board) adopting and affirming the Decision of the UC Referee (Referee), which held that Claimant was ineligible for UC benefits for certain benefit weeks because she failed to register “for employment search services offered by the Pennsylvania CareerLink system” within 30 days after her original application for UC benefits as required by Section

401(b)(1)(i) of the UC Law (Law).¹ 43 P.S. § 801(b)(1)(i). On appeal, Claimant argues that she should not be denied UC benefits because she forgot to register due to caring for her disabled son and attending classes to receive her high school diploma. She also argues that the Referee erred in refusing to accept evidence in support of this argument. For the reasons that follow we vacate the Board's Order and remand this matter to the Board for further consideration.

The facts, as found by the Referee following a hearing on December 5, 2013, are as follows:

1. The Claimant established an application for Unemployment Compensation benefits, effective August 18, 2013.

2. The Department ruled the Claimant eligible and began paying UC Benefits.

3. The Claimant received the Unemployment Compensation Handbook, notifying her of the requirement to register with the Pennsylvania CareerLink office, within 30 days after the filing of the application for benefits.

4. On September 13, 2013, the Department sent a notice to the Claimant, warning her that she had failed to complete the registration requirements set forth in 34 Pa. Code Section §65.11(c) [sic].

5. As of September 22, 2013, the 30th day after the Claimant filed an application for benefits, the Claimant still had failed to complete the registration requirement.

6. On September 28, 2013, the Department disqualified the Claimant from UC Benefits for the week ending September 28, 2013, and thereafter.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 801(b)(1)(i).

7. The Claimant did complete a registration with the Pennsylvania Career Link Office on October 7, 2013.^[2]

(Referee Decision, Findings of Fact ¶¶ 1-7.) The Referee noted that Claimant acknowledged receiving the UC Handbook and the reminder letter informing her “that she was required to register for employment services within 30 days of her application for” UC benefits. (Referee Decision at 2.) Although the Referee credited Claimant’s testimony that she forgot to register due to caring for her special needs son and her efforts to obtain her high school diploma, he determined that such circumstances did not excuse her failure to register as required by Section 401(b)(1)(i). (Referee Decision at 2.) Therefore, the Referee determined that Claimant was ineligible for benefits for the compensable weeks ending September 28, 2013, “and compensable weeks prior to the Claimant’s registration dated October 7, 2013.” (Referee Decision at 2.) Claimant appealed to the Board, which adopted and incorporated the Referee’s Decision as its own. Claimant now petitions this Court for review.³

Before this Court, Claimant argues that the Board erred in holding that her failure to register with the CareerLink system rendered her ineligible for UC

² At the hearing before the Referee, Claimant testified that she attempted to register on September 28, 2013, but was unsuccessful. (Hr’g Tr. at 7-8.) The record is not clear as to why this attempt was unsuccessful. Claimant does not reference this attempt on appeal and makes no argument in her brief that September 28, 2013, rather than October 7, 2013, should be the date on which she is considered to have registered.

³ “This Court’s review is limited to determining whether the findings of fact were supported by substantial evidence, whether constitutional rights were violated, or whether errors of law were committed.” Brown v. Unemployment Compensation Board of Review, 87 A.3d 1002, 1004 n.5 (Pa. Cmwlth. 2014).

benefits for the weeks at issue⁴ despite her explanation that she forgot to register due to the heavy burden of caring for her special needs son and earning her high school diploma.⁵ Claimant also argues that the Board erred in failing to consider the documentary evidence she offered at the hearing before the Referee.

We first address Claimant's argument that the Board erred in holding that her circumstances did not excuse her failure to register with the CareerLink system. Section 401(b)(1) of the Law provides that, in order to be eligible for UC benefits, a claimant must be:

⁴ Claimant appears to believe that the Board's Order determined that she was ineligible for 26 benefit weeks. (See Claimant's Br. at 9 ("I am asking the court to find me eligible for the twenty[-]six weeks of benefits that I have received".)) However, the Board's Order only rendered Claimant ineligible for three benefit weeks, from the week ending September 28, 2013 through the week she registered with CareerLink, on October 7, 2013. (Referee Decision at 2; see also, Board's Br. at 11 n.10 (stating that because she registered on October 7, 2013, Claimant became eligible for benefits again beginning the week ending October 19, 2013).)

⁵ In her brief, Claimant sets forth the following questions for review:

1. Whether the busy medical schedule, and unpredictable school registration [f]or my special needs son [is] not considered a good enough reason for me to be found eligible to receive benefits?
2. Whether an applicant is required to have a high school diploma or equivalent prior to applying for unemployment compensation?
3. Whether the [Board] erred in the ruling at the first appeal hearing, by ignoring my documented evidence?

(Claimant's Br. at 5.) Claimant does not develop or explain her second enumerated question regarding whether a claimant is required to have a high school diploma or equivalent prior to applying for UC benefits; thus, we are unable to address this issue. However, we note that there is no requirement that a claimant hold a high school diploma, and neither the Board nor the Referee cited Claimant's possession or lack of a high school diploma or equivalent as a factor in their determinations that Claimant was ineligible for UC benefits for the weeks in question.

(1) . . . making an active search for suitable employment. The requirements for ‘active search’ shall be established by the department and shall include, at a minimum, all of the following:

- (i) Registration by a claimant for employment search services offered by the Pennsylvania CareerLink system or its successor agency within thirty (30) days after initial application for benefits.
- (ii) Posting a resume on the system’s database, unless the claimant is seeking work in an employment sector in which resumes are not commonly used.
- (iii) Applying for positions that offer employment and wages similar to those the claimant had prior to his unemployment and which are within a forty-five (45) minute commuting distance.

43 P.S. § 801(b)(1). The Department of Labor and Industry’s (Department) regulations further describe the registration requirement, stating:

(c) Work registration. A claimant shall register for employment search services in the Pennsylvania CareerLink . . . system within 30 days after the claimant files his application for benefits. See section 401(b)(1)(i) of the [L]aw. If a claimant does not register for employment search services in the Pennsylvania CareerLink . . . system within 30 days after the claimant files his application for benefits, the claimant will be ineligible for compensation for any week that ends more than 30 days after the claimant files his application for benefits unless the claimant registers by Sunday of that week.

34 Pa. Code § 65.11(c). Claimant does not dispute that she failed to register with the CareerLink system within 30 days of her initial application for UC benefits, but argues that her failure should be excused because she forgot to do so due to the burdens of caring for her son, who has special needs, and earning her high school diploma.

The Board points out that, because Section 401(b)(1)(i) represents a relatively recent amendment to the Law, there has yet to be a case evaluating

whether, and under what circumstances, a claimant might receive benefits despite failing to register as required by the Law. The Board urges this Court to adopt the standard used to determine whether a claimant may file a *nunc pro tunc* appeal from a decision of a Referee pursuant to Section 501(e) of the Law, 43 P.S. § 821(e). Under this standard, an untimely appeal “may be permitted when a delay in filing the appeal is caused by extraordinary circumstances involving fraud, administrative breakdown, or non-negligent conduct, either by a third party or by the appellant.” Mountain Home Beagle Media v. Unemployment Compensation Board of Review, 955 A.2d 484, 487 (Pa. Cmwlth. 2008). This is a heavy burden and a claimant must show that either “the administrative authority engaged in fraudulent behavior or manifestly wrongful or negligent conduct” or that “non-negligent conduct beyond his [or her] control caused the delay.” Hessou v. Unemployment Compensation Board of Review, 942 A.2d 194, 198 (Pa. Cmwlth. 2008).

It is unclear why the Board believes a *nunc pro tunc* standard should apply in a case such as the one at bar, which does not implicate jurisdictional concerns. The *nunc pro tunc* standard is not set out in Section 401(b). Instead, Section 401(b)(6) provides: “[t]he [D]epartment may waive or alter the requirements of this subsection in cases or situations with respect to which the secretary finds that compliance with such requirements would be oppressive or which would be inconsistent with the purposes of this act.” 43 P.S. § 801(b)(6). During the promulgation of the Department’s regulations implementing Section 401(b), a commenter asked whether a “good cause” standard should be incorporated into the regulations. 43 Pa. B. 4730, 4735 (2013). The Department replied that in most cases where a “good cause” standard is applied, it is because it is directed by

statute and that it would not adopt one on its own initiative. Id. However, the Department noted that, “if a claimant’s ‘good cause’ for noncompliance with the regulation also constitutes a reason why compliance ‘would be oppressive or . . . inconsistent with the purposes of’ the law, the claimant’s circumstances could be addressed under the waiver provision in section 401(b)(6) of the law and subsection (f)(6) of the regulation.” Id. The Department’s regulation implementing the waiver provision of Section 401(b)(6) states:

The Department may waive or alter the requirements of this section or section 401(b) of the law in cases or situations with respect to which the Secretary finds that compliance with these requirements would be oppressive or which would be inconsistent with the purposes of the law. See section 401(b)(6) of the law. A claimant may submit a request to the Department to waive or alter the requirements of this section or section 401(b) of the law. The claimant may complete and submit the recommended waiver request form available on the Department's web site or submit a written request that contains the same information that would be required to complete the recommended form.

34 Pa. Code § 65.11(f)(6). The waiver request form on the Department’s web site requires an individual requesting a waiver to state his or her name, social security number, the weeks for which the waiver is requested, and the reasons for the waiver. (Active Search for Work Waiver Form.)⁶ This information is included in Claimant’s Petition for Appeal from the UC Service Center’s determination. (Petition for Appeal, R. Item 3.) Thus, it appears that, pursuant to Section 401(b)(6) and Section 65.11(f)(6), there could have been consideration whether to waive the registration requirement for the weeks at issue if Claimant met the

⁶ This form may be found at <http://www.portal.state.pa.us/portal/server.pt?open=18&objID=1363836&mode=2> (last visited September 25, 2014).

requirements of showing that compliance would have been oppressive or inconsistent with the purposes of the Law.

We recognize, however, that the Board is to be given deference in its interpretation of the Law. #1 Cochran, Inc. v. Unemployment Compensation Board of Review, 579 A.2d 1386, 1391 & n.5 (Pa. Cmwlth. 1990). In this case, although it appears that Section 401(b)(6) and Section 65.11(f)(6) may provide a standard or framework for considering cases where a claimant argues that she should be granted UC benefits despite not complying with the registration requirement of Section 401(b)(1)(i), neither the Board nor the Referee discussed these provisions in denying Claimant's appeal. Because this is a matter of first impression, we believe it would be most prudent to vacate the Board's Order and remand this matter so that the Board may express its view regarding whether the waiver provisions of Section 401(b)(6) and Section 65.11(f)(6) are applicable in an appeal from a denial of benefits pursuant to Section 401(b)(1)(i) and, if so, whether the facts as found by the Board would warrant a waiver of the registration requirement under these provisions.⁷

RENÉE COHN JUBELIRER, Judge

⁷ Due to our holding on this issue, we do not reach Claimant's argument that the Referee and the Board erred in failing to consider the documentary evidence she offered to introduce at the Referee's hearing. We note, however, that it appears that such evidence would have been cumulative with Claimant's testimony, and unnecessary given that the Referee and the Board credited Claimant's testimony.

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ORDER

NOW, October 21, 2014, the Order of the Unemployment Compensation Board of Review (Board) in the above-captioned matter is hereby **VACATED** and this matter is hereby **REMANDED** to the Board for further proceedings consistent with this opinion.

Jurisdiction relinquished.

RENÉE COHN JUBELIRER, Judge