

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

James J. Hrabia, :  
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 Petitioner :  
 :  
 v. :  
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 :  
 Unemployment Compensation Board :  
 of Review, : No. 1409 C.D. 2014  
 Respondent : Submitted: December 19, 2014

BEFORE: HONORABLE DAN PELLEGRINI, President Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
PRESIDENT JUDGE PELLEGRINI

FILED: January 14, 2015

James J. Hrabia (Claimant) petitions, *pro se*, for review of an order of the Unemployment Compensation Board of Review (Board) affirming the Referee's denial of unemployment compensation benefits on the basis that Claimant lacked a necessitous and compelling reason for voluntarily terminating his employment and, therefore, is ineligible for benefits under Section 402(b) of the Unemployment Compensation Law (Law).<sup>1</sup> For the following reasons, we affirm.

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<sup>1</sup> Unemployment Compensation Law, Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §§751–914. Section 402(b) of the Law provides in pertinent part:

**(Footnote continued on next page...)**

I.

During Claimant's employment with Biotest Medical Incorporated (Employer) as a full-time medical courier, Claimant was diagnosed with a malignant tumor on his spine and underwent surgery to remove the tumor in December 2013. Approximately two months later, Claimant filed for benefits, claiming that his employment was terminated after he informed Employer that he was unable to lift more than 20 pounds due to his surgery and after he declined Employer's offer of part-time work which may have violated his restriction.

In its separation information provided to the Unemployment Compensation Service Center (Service Center), Employer asserted that Claimant voluntarily quit for medical reasons because he informed Employer that he would be unable to return to work until the late summer or early fall of 2014, and that even then, Claimant would "more likely only be able to work p[art-]t[ime] with restrictions." (Certified Record [C.R.] at 4a.). The Service Center granted Claimant's claim, finding that although Claimant informed Employer of his

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**(continued...)**

An employe shall be ineligible for compensation for any week—

...

(b) In which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature, irrespective of whether or not such work is in "employment" as defined in this act . . . .

43 P.S. §802(b).

restrictions, Employer did not offer alternative work and, therefore, Claimant had a necessitous and compelling reason for voluntarily leaving his job.

## II.

Employer appealed, contending that Claimant failed to apprise Employer of his 20-pound lifting restriction and lacked a necessitous and compelling reason for quitting. At a hearing before the Board, Claimant testified that after work on December 3, 2013, he underwent an MRI which revealed a tumor and because emergency surgery was required to remove it, he contacted his supervisor, Dan Stokes, to advise that he needed time off. Claimant stated that after he recovered at the end of January 2014, he contacted Employer's General Manager, Kevin Lamb, to advise that he could return to work with restrictions but that Mr. Lamb informed him that his position had been reassigned. Nonetheless, Claimant explained that there were other positions he could have fulfilled if given the opportunity, such as telemarketing, sales, security, dispatching or recruiting positions.

On cross-examination, Claimant stated that he continued to experience pain although it was markedly decreased from that which he experienced before his surgery. He stated that presently, he would be able to perform the duties of a medical courier even with his restrictions but that it would be painful to do so. He conceded that he did not provide Employer with any documentation of his restrictions, that he did not inform Employer that he was willing to return to work full-time, and that Employer never informed him he was not welcome to return. Instead, he explained:

[Employer] [had] my phone number, so [it] never called me and [it] knew what I was going through, even though [it] didn't have written information. And all the people out there in the hospitals knew, the route that I ran, everybody knew what was going on with me. And [Employer] certainly knew every—even though [it] didn't have written information, [it] knew what was going on with me.

(C.R., Referee's Hearing 4/7/14, at 14.)

On behalf of Employer, General Manager Lamb testified that following Claimant's surgery, Supervisor Stokes left several voice messages for Claimant inquiring about his status, but Claimant did not return the calls. He stated that around January 2014, he personally spoke to Claimant and advised that his old route was unavailable but "he was a good employee and that [Employer] would find a place for him when he wanted to come back." (*Id.* at 15.) Mr. Lamb stated that during that conversation, Claimant advised that he would be unavailable for work until late summer or early fall, at which time he would likely have some unspecified restrictions on his lifting, that he most likely could not return to a full-time position, and that he would need days off between the days he worked for recovery purposes. Mr. Lamb further explained, "So I told [Claimant] we valued him as an employee and that when he got up to snuff to please give me a call and we would find something for him." (*Id.*) He stated that neither he nor Employer ever received anything from Claimant indicating his ability to return. Mr. Lamb acknowledged that had Employer received notice of Claimant's restrictions, it would have made every effort to offer him a position within those restrictions as

most of Employer's drivers can be assigned light-duty work. He noted that Employer never laid off or terminated Claimant.

Following the hearing, the Referee reversed the Service Center's decision, explaining:

Medical problems can provide a reason to temporarily or permanently end an employment relationship and allow for approval of unemployment benefits under Section 402(b) of the Law. In such cases, Pennsylvania Courts have held that the eligibility rests upon a finding that there existed at the time of separation, a bona fide illness or injury which prevented the employee from performing their regular work duties. It is also incumbent upon the employee to notify the employer of their [*sic*] restrictions and to thereafter remain available for work should accommodation be offered.

(C.R., Referee's Decision/Order, at 2.) Crediting Claimant's testimony that he had a medical condition which prevented him from performing his job duties as a medical courier but finding that Claimant failed to notify Employer of his specific restrictions or that he could return to work prior to the late summer or early fall, the Referee found that Claimant failed to inform Employer of his restrictions in a manner allowing Employer to offer him work within those restrictions and, therefore, that Claimant failed to make a reasonable effort to preserve his employment under Section 402(b) of the Law, 43 P.S. §802(b).

Claimant then appealed to the Board, challenging the Referee's factual findings that: (1) Claimant voluntarily quit his job; (2) Claimant advised

Employer he would be unable to return to work until late summer or early fall; (3) Claimant failed to inform Employer of his medical restrictions; and (4) Claimant advised Employer that when he does return to work, he will likely need days off between those worked. After considering the entire record in the matter, the Board affirmed the Referee's decision without further elaboration. Raising the same issues, this appeal followed.<sup>2</sup>

### III.

On appeal, Claimant first challenges the finding that he voluntarily quit his job for medical reasons, contending that he was discharged instead.<sup>3</sup> In this regard, Claimant essentially invites us to reject the fact-finder's credibility determinations and to subscribe to his theory of events. However, as we have stated time and time again, questions of credibility and evidentiary weight are within the sole discretion of the Board. *See Eduardo v. Unemployment Compensation Board of Review*, 434 A.2d 215, 217 (Pa. Cmwlth. 1981).

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<sup>2</sup> Our review is limited to determining whether the Board's findings of fact are supported by substantial evidence in the record, whether errors of law were committed, whether agency procedure was violated, or whether constitutional rights were violated. *Gillins v. Unemployment Compensation Board of Review*, 633 A.2d 1150, 1153 (Pa. 1993). We have defined "substantial evidence" as such "relevant evidence that a reasonable mind might consider adequate to support a conclusion." *Palladino v. Unemployment Compensation Board of Review*, 81 A.3d 1096, 1100 n.3 (Pa. Cmwlth. 2013), *appeal denied*, 95 A.3d 278 (Pa. 2014).

<sup>3</sup> A claimant bears the burden of proving that his employment was involuntarily terminated. *Malloy v. Unemployment Compensation Board of Review*, 523 A.2d 834, 836 (Pa. Cmwlth. 1987).

General Manager Lamb’s testimony that Employer did not terminate Claimant but instead advised him that it would find a position for him when he was ready to return to work, that Claimant advised he would be unable to perform until late summer or early fall, and that Employer never received any indication from Claimant that he was able to return to work provides substantial support for this finding. Moreover, further support is offered by Claimant’s own admission that Employer never informed him that he was not welcome to return to work.

Because we find that the Board did not err in holding that Claimant voluntarily left his employment, we must address next whether he had a necessitous and compelling reason for doing so. *Malloy v. Unemployment Compensation Board of Review*, 523 A.2d 834, 836 (Pa. Cmwlth. 1987). As we stated in *Malloy*, “an unemployment compensation claimant must establish that he acted with ordinary common sense in quitting his job, that he made a reasonable effort to preserve his employment and that he had no other real choice than to leave his employment.” *Id.* While medical problems may provide justification for leaving one’s job, it was not the legislature’s intention “to provide health and disability benefits for an ill employee who is not physically able and available for participation in the work force” through promulgating the Law and, therefore, to be eligible for benefits under Section 402(b), a claimant must be able to work and must be available for suitable work. *Genetin v. Unemployment Compensation Board of Review*, 451 A.2d 1353, 1355–56 (Pa. 1982). When an employee cannot perform his regular duties but can work within restrictions imposed by his physician, he must inform his employer of those restrictions and thereby allow the employer to determine whether continuing work within those restrictions is

available. *Cullen v. Unemployment Compensation Board of Review*, 666 A.2d 772, 773–74 (Pa. Cmwlth. 1995).

In this regard, Claimant challenges the factual determinations that he advised Employer that he would be unable to work until late spring or early fall, that he failed to inform Employer of his 20-pound lifting restriction, and that he would need days off between the days he worked.<sup>4</sup> Again, we must reject the Claimant’s invitation to reassess and reweigh the evidence upon which the Referee based his credibility determinations. Based upon General Manager Lamb’s testimony which was deemed credible and which expressly addressed these issues, the subject findings have substantial evidentiary support.<sup>5</sup> Because these findings, including the finding that Claimant failed to inform Employer of his medical restrictions, are supported by substantial evidence, the Board did not err in finding that Claimant lacked a necessitous and compelling reason for quitting his job. *See Cullen*, 666 A.2d at 774 (explaining that when an employee fails to apprise his employer of his medical restrictions, the employer has “no opportunity even to attempt to reasonably accommodate [a] [c]laimant by providing him with suitable

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<sup>4</sup> Claimant also challenged the Referee’s finding regarding his hourly rate of pay and additional benefits. However, because this finding does not impact whether Claimant had necessitous and compelling reasons for voluntarily terminating his employment, we need not address the issue.

<sup>5</sup> We note that on appeal, the pertinent inquiry is whether the Board’s findings lack substantial evidentiary support, not whether an alternate set of facts advanced by the petitioner are supported by the record. *Lewis v. Workers’ Compensation Appeal Board (Andy Frain Services, Inc.)*, 29 A.3d 851, 856 (Pa. Cmwlth. 2011) (“It does not matter that there is evidence of record which could support a finding contrary to that made by the WCJ, the only inquiry is whether there is evidence of record which supports the WCJ’s finding.”), *appeal denied*, 42 A.3d 295 (Pa. 2012).

work”); *Malloy*, 523 A.2d at 837 (finding that Claimant did not have a necessitous and compelling reason to quit his job when he failed to talk with the owner of the company in an effort to preserve his employment).

Additionally, Claimant contends that the Referee and the Board incorrectly determined that Employer was not aware of Claimant’s medical condition and that Employer offered Claimant accommodations. However, no such findings were rendered. The Referee and the Board determined not that Claimant failed to inform Employer of his medical condition, but rather, that he failed to inform Employer of his 20-pound lifting restriction, and that Employer was not legally obligated to offer him work within his restriction as it was unaware of the same.

Accordingly, because substantial evidence supports the finding that Claimant failed to make a good-faith effort to preserve the employment relationship insofar as he failed to advise Employer of his specific medical restrictions and that Claimant lacked a necessitous and compelling reason for quitting his position, the Board’s decision that Claimant is ineligible for benefits pursuant to Section 402(b) of the Law, 43 P.S. §802(b), is affirmed.

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DAN PELLEGRINI, President Judge

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 Respondent : No. 1409 C.D. 2014

**ORDER**

AND NOW, this 14<sup>th</sup> day of January, 2015, the order of the Unemployment Compensation Board of Review dated July 1, 2014, at No. B-566126, is affirmed.

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DAN PELLEGRINI, President Judge