

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Angelika Kogan,	:	
	:	No. 499 C.D. 2013
Petitioner	:	Submitted: August 16, 2013
	:	
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE FRIEDMAN

FILED: September 25, 2013

Angelika Kogan (Claimant) petitions for review of the March 12, 2013, order of the Unemployment Compensation Board of Review (UCBR) affirming the decision of a referee to deny Claimant unemployment compensation (UC) benefits. The UCBR determined that Claimant was ineligible for UC benefits because she was not able and available for work under section 401(d)(1) of the Unemployment Compensation Law (Law).<sup>1</sup> We affirm.

Claimant worked for Pinnacle Products International, Inc. from September 2, 2011, until October 12, 2012, as a shipper. On May 31, 2012, Claimant

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §801(d)(1).

had a baby. Initially, Claimant's mother watched the baby, but her mother had to return to work. Claimant had no money for child care and applied for subsidized child care; however, there was a one-year waiting list. (Findings of Fact, Nos. 1-6.)

Claimant resigned from her employment to provide care for her child. Claimant was not able and available to work for the weeks at issue. (Findings of Fact, Nos. 7-8.)

Claimant applied for UC benefits, which the local service center denied. Claimant appealed to the referee, who conducted a hearing. The referee concluded that Claimant had a necessitous and compelling reason to resign from her job because she had to care for her infant and that she made reasonable attempts to procure child care but was unsuccessful.<sup>2</sup> However, the referee also concluded that Claimant was not able and available for work and, therefore, denied Claimant benefits under section 401(d)(1) of the Law.

Claimant appealed to the UCBR. The UCBR adopted the referee's findings and conclusions, agreed that Claimant was not able and available for work, and affirmed. Claimant now petitions this court for review.<sup>3</sup>

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<sup>2</sup> The referee concluded that Claimant was not ineligible for benefits under section 402(b) of the Law, 43 P.S. §802(b), because she had cause of a necessitous and compelling nature for voluntarily leaving her work.

<sup>3</sup> Our scope of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether the findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

On appeal Claimant maintains that the UCBR erred in determining that she was not able and available for work. We disagree.

Section 401(d)(1) of the Law, 43 P.S. §801(d)(1), provides that an unemployed individual who “[i]s able to work and available for suitable work” is entitled to UC benefits. An individual who applies for UC benefits is presumed to be able and available for work. *GTE Products Corporation v. Unemployment Compensation Board of Review*, 596 A.2d 1172, 1173 (Pa. Cmwlth. 1991). “This presumption of availability can be rebutted only by evidence of illness, refusal to work, disability or other factors indicative of Claimant not being realistically attached to the labor force.” *Scardina v. Unemployment Compensation Board of Review*, 537 A.2d 388, 390 (Pa. Cmwlth. 1988). If the employer rebuts the presumption of availability, the burden shifts to the claimant to prove that she is available for some type of work and that there is a reasonable opportunity for such work. *Rohde v. Unemployment Compensation Board of Review*, 28 A.3d 237, 243 (Pa. Cmwlth. 2011). The UCBR’s finding as to availability, if supported by substantial evidence, is binding on this court. *Penn Hills School District v. Unemployment Compensation Board of Review*, 496 Pa. 620, 630, 437 A.2d 1213, 1218 (1981).

Here, when asked by the referee why she no longer worked for Employer, Claimant responded that she had a baby at home and that she needed to take care of him. (N.T., 12/26/12, at 3.) As to her work availability, Claimant testified:

R All right. So there came a time period where you couldn’t work anymore because you were taking care of him?

C Yeah and right now I'm looking after my child because of some problems he's having.

R Okay. So you're not able to work at this time?

C These couple of months, no.

R These past couple of months, no?

C The past and right now for a couple of months, I don't feel like I can work.

(*Id.* at 4.) Claimant's own testimony that she quit work to care for her son and Claimant's admission that she couldn't work right now rebutted the presumption that she was able and available for work.

In her brief, Claimant argues that she met her burden of proving that she was able to do some type of work and that there was a reasonable opportunity for her to secure such work. *See Rohde*, 28 A.3d at 243. Specifically, Claimant maintains that she is available to work from home and indicated that fact to Employer. As previously stated, however, because Claimant testified that she could not perform any work, Claimant failed to meet even the first prong of the test. As such, we conclude, as the UCBR did, that Claimant is ineligible for UC benefits for the weeks at issue.

Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Senior Judge

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O R D E R

AND NOW, this 25<sup>th</sup> day of September, 2013, we affirm the March 12, 2013, order of the Unemployment Compensation Board of Review.

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ROCHELLE S. FRIEDMAN, Senior Judge