STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. DISTRICT COURT
SIXTH DIVISION

Jennifer C. Urbina	:	
	:	
v.	:	**A.A. No. 11 - 071**
	:	
Dept. of Labor & Training,	:	
Board of Review	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto. It is, therefore,

ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the Board of Review's decision is AFFIRMED.

Entered as an Order of this Court at Providence on this 28th day of March, 2012.

By Order:

/s/
Melvin Enright
Acting Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. In this case Ms. Jennifer C. Urbina urges that the Board of Review of the Department of Labor and Training erred when it held that Ms. Urbina was disqualified from receiving unemployment benefits because she was not fully Available For Work within the meaning of Gen. Laws 1956 § 28-44-12. Jurisdiction to hear and decide appeals from decisions made by the Board of Review is vested in the District Court by Gen. Laws 1956 § 28-44-52. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. For the reasons stated below, I conclude that the instant matter should be affirmed on the issue of claimant's disqualification; I so recommend.

FACTS & TRAVEL OF THE CASE

Claimant last worked as a customer service representative for Bank of America on February 16, 2010 when she stopped working due to health problems. She was in receipt of Temporary Disability Benefits (TDI), which began in February of 2010 and ended in August of 2010. Thereafter, she applied for unemployment benefits; but, on September 30, 2010 the Director determined she failed to meet the availability requirements of Gen. Laws 1956 § 28-44-12 — specifically the element that she demonstrate that she was medically able to work — and was thereby disqualified from receiving unemployment benefits. See Exhibit A-2. Claimant appealed and a hearing was held before Referee Carl Capozza on February 22, 2011, at which time Ms. Urbina testified, as did an employer representative. See Referee Hearing Transcript, at 1.

Referee Capozza issued a Decision on February 25, 2011 in which he made the following findings of fact:

> 2. Findings of Fact:
> Claimant filed her claim for Unemployment Insurance benefits on September 1, 2010. She had previously filed for and was in receipt of Temporary Disability Insurance benefits from February 27, 2010 through August 28, 2010. As of the filing date of her claim, claimant had not as yet been discharged from her physician to return to work full time without restrictions. No subsequent release form from her doctor has been provided.

Referee's Decision, February 25, 2011 at 1. Then, after quoting extensively from

Gen. Laws 1956 § 28-44-12, the Referee pronounced the following statements of conclusion:

> * * *
> Based on the credible testimony and evidence in this case, I find that claimant has failed to substantiate that she has been medically released to return to full time employment without restrictions and, therefore, it must be determined that she is not able and available for work consistent with the terms and conditions as set forth in the above Section of the Act.

Referee's Decision, February 25, 2011, at 2. Accordingly, the Decision of the Director denying benefits to Ms. Urbina pursuant to Gen. Laws 1956 § 28-44-12 (Availability) was sustained because she was not medically able to work full-time — as the Director had found.

Claimant appealed and the matter was considered by the Board of Review. On May 27, 2011, the Board of Review issued a unanimous decision which found that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto and adopted the decision of the Referee as its own. Thereafter, Ms. Urbina filed a timely complaint for judicial review in the Sixth Division District Court.

APPLICABLE LAW

This case centers on the application of the following provision of the Rhode Island Employment Security Act, which enumerates one of the several grounds upon which a claimant may be deemed ineligible to receive

unemployment benefits. Gen. Laws 1956 § 28-44-12(a), provides:

> **28-44-12. Availability and registration for work. --** (a) An individual shall not be eligible for benefits for any week of his or her partial or total unemployment unless during that week he or she is physically able to work and available for work. To prove availability for work, every individual partially or totally unemployed shall register for work and shall:
>
> (1) File a claim for benefits within any time limits, with any frequency, and in any manner, in person or in writing, as the director may prescribe;
>
> (2) Respond whenever duly called for work through the employment office; and
>
> (3) Make an active, independent search for suitable work.
>
> (b) * * *. (Emphasis added).

As one may readily observe, section 12 requires claimants to be able and available for full-time work and to actively search for work.

The test for work-availability under section 12 was established in Huntley v. Department of Employment Security, 121 R.I. 284, 397 A.2d 902 (1979):

> * * * The foregoing authorities persuasively suggest a rule of reason for Rhode Island under which a court faced with a question of availability for suitable work would make a two-step inquiry in the event that a claimant places any restrictions upon availability. First: are these restrictions bottomed upon good cause? If the answer is negative, the inquiry ends and the claimant is ineligible for benefits under the Employment Security Act. If the answer is affirmative, the second stage of the inquiry must be made: do the restrictions, albeit with good cause, substantially impair the claimant's attachment to the labor market? If the answer to this inquiry is affirmative, then the claimant is still ineligible for benefits under the Act.
>
> If, on the other hand, the restrictions do not materially impair the claimant's attachment to a field of employment wherein his capabilities are reasonably marketable, in the light of economic

realities, then he is still attached to the labor market and is not unavailable for work in terms of our statute. For example, if a claimant, as in several cases cited, is unavailable for work for 2 or 3 hours out of the 24, in a multi-shift industry, it would be harsh, indeed, to declare such an employee unavailable. If a claimant placed such restrictions upon availability that he would only be available 2 or 3 hours out of 24 for work of a nature which he was able to perform, however good the cause or compelling the reason, he would have in effect removed himself from the labor market and could not, therefore, be eligible for employment benefits.
Huntley, 121 R.I. at 292-93, 397 A.2d at 907.

STANDARD OF REVIEW

The pertinent standard of review is provided by Gen. Laws 1956 § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

42-35-15. Judicial review of contested cases.
* * *
(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[1] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[2] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[3]

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of the Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964) that a liberal interpretation shall be utilized in construing and applying the Employment Security Act:

> * * * eligibility for benefits is to be determined in the light of the expressed legislative policy that "Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family." G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the

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1 Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing R.I. GEN. LAWS § 42-35-15(g)(5).

2 Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

3 Cahoone v. Bd. of Review of Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968). Also D'Ambra v. Bd. of Review, Dept of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

> legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

ISSUE

The issue before the Court is whether the claimant was properly disqualified from receiving benefits because she failed to satisfy the availability requirement enumerated in section 28-44-12.

ANALYSIS

At the outset we should indicate that section 28-44-12 requires that – in order to be eligible for benefits – a claimant must pass the following three-prong test: that the claimant is able to work, that the claimant be available for work, and the claimant must be actively searching for work. See Gen. Laws 1956 § 28-44-12(a) and § 28-44-12(a)(3), excerpted supra at page 4.[4] It is the claimant's burden of proof to meet these conditions. The Referee concluded that Ms. Urbina was subject to a section 28-44-12 disqualification because she was not medically able to work, the first prong of the test, and because she failed to make a sufficient job search, the third prong of the test.

[4] It is confusing that section 12 is commonly known as the "Availability" section and that "availability" in a stricter sense is an element of the test.

Having examined the 18-page transcript of the hearing before the Referee closely, I find that Ms. Urbina presented no evidence that she had been cleared for work as of September 1, 2010 — the date she filed for unemployment benefits. However, the claimant did tell the Department's interviewer on September 24, 2010 that she had not been medically released to return to work. See Exhibit A-1. Thus, the record was bereft of evidence that she had been cleared to return to work as of September 1, 2010.[5]

Pursuant to Gen. Laws 1956 § 42-35-15(g), the decision of the Board must be upheld unless it was, *inter alia*, contrary to law, clearly erroneous in light of the substantial evidence of record, or arbitrary or capricious. When applying this standard, the Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact, including the question of which witnesses to believe. Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.

[5] Of course, claimant was not disqualified for a certain length of time or until she had earned a certain amount of wages. Her eligibility was subject to being restored whenever she provided proof that she was able to work full-time. Referee Capozza made this clear when he advised Ms. Urbina that the determination of her availability was an *ongoing* question; thoughtfully, he stated that she could refile for benefits in any week that she met the availability requirement. Referee's Decision, at 2. Whether she ever acted on this suggestion at a subsequent time is beyond the record in this case.

The Court, when reviewing a Board decision, does not have the authority to expand the record by receiving new evidence or testimony.

Accordingly, I find that the Board's decision (adopting the finding of the Referee) that claimant was unavailable for full-time work within the meaning of section 28-44-12 is supported by substantial evidence of record, is consistent with applicable law, and ought to be affirmed.

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review (affirming the decision of the Referee) was not affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, it was not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or arbitrary or capricious. GEN. LAWS 1956 § 42-35-15(G)(5),(6).

Accordingly, I recommend that the decision of the Board be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

MARCH 28, 2012