STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc.

DISTRICT COURT

SIXTH DIVISION

Krystal L. Belanger	:	
	:	
v.	:	**A.A. No. 12 - 241**
	:	
Department of Labor and 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 in part and REVERSED in part..

Entered as an Order of this Court at Providence on this 18th day of February, 2013.

By Order:

/s/
Stephen C. Waluk
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. Krystal Belanger urges that the Board of Review of the Department of Labor and Training erred when it held that she was disqualified from receiving unemployment benefits. 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. As we shall see, the Board of Review held Ms. Belanger to be disqualified on two grounds. For the reasons stated below, I have concluded that one of these decisions should be affirmed and one set aside; I so recommend.

I. FACTS & TRAVEL OF THE CASE

Ms. Krystal Belanger worked as a certified nursing assistant (CNA) for Summit Rehabilitation for about six months until May 16, 2012, when she was discharged. Claimant then pursued two types of financial assistance. She filed for unemployment benefits, which were denied by the Director on May 24, 2012. She also applied for — and received — Temporary Disability benefits (TDI), which ended in July, 2012. Thereafter, she filed an appeal of the Director's earlier decision denying her unemployment benefits.

To be precise, the Director had issued two decisions regarding Ms. Belanger's request for unemployment benefits: in the first, she was denied benefits because she was not available for work as required by Gen. Laws 1956 § 28-44-12; in the second, she was disqualified under Gen. Laws 1956 § 28-44-17 based on a finding that she constructively quit her position by being absent from work — a so-called "no-call, no show." Accordingly, Mr. Carl Capozza, the referee assigned to hear her appeal on September 13, 2012, conducted a separate hearing on each issue. He also considered the reasons for her late appeal, but found good cause and allowed her to be heard on both issues.

On September 21, 2012, Referee Capozza issued a decision[1] in which he made the following findings of fact on the issue of her availability:

[1] At this juncture, in the interests of clarity, I shall focus on the availability issue and defer all discussion of the section 17 disqualification to part VI of this opinion, infra.

> 2. Findings of Fact:
> The claimant filed her claim for and requested benefits effective April 29, 2012. As of that date and following the claimant was not able and available to work due to medical issues. To date the claimant has failed to provide any documentation concerning a medical release authorizing her to return to work without restrictions.

Referee's Decision, (Appeal No. 20124059 UC) September 21, 2012 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, I find that due to medical issues the claimant has not been able and available for full time work consistent with the terms and conditions as set forth in the above Section of the Act. It is, therefore, determined the claimant is subject to disqualification of benefits as previously determined by the Director until she meets all eligibility requirements.

Referee's Decision, (Appeal No. 20124059 UC) September 21, 2012 at 2. Accordingly, the Decision of the Director denying benefits to Ms. Belanger pursuant to Gen. Laws 1956 § 28-44-12 (Availability) was sustained.

Claimant appealed and the matter was considered by the Board of Review. On November 7, 2012, 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. Belanger filed a timely complaint for judicial review in the Sixth Division District Court.

II. 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.

III. 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.' "[2] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[3] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[4]

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 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

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[2] 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).

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

[4] 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).

> 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.

IV. 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.

V. 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.[5] It is the claimant's burden of proof to show that she satisfied these conditions. The Referee concluded that Ms. Belanger was subject to a section 28-44-12 disqualification because she was not medically able to work, the first prong of the test.

Having examined the 7-page transcript of the hearing before the Referee closely, I find that Ms. Belanger presented no evidence that she had been cleared for work as of July of 2012 — the time when she appealed the denial of benefits. She admitted to Referee Capozza that she had not provided such information. Referee

[5] 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.

Hearing Transcript, at 5. Thus, the record was bereft of evidence that she had been cleared to return to work as of September 1, 2012.[6]

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. 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.

VI. SECTION 17 DISQUALIFICATION

[6] 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. Belanger 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 a question beyond the record in this case.

As stated above, Ms. Belanger was also disqualified pursuant to section 28-44-17, which disqualifies those claimants who are found to have left work without good cause. A majority of the Board of Review — adopting the findings of the Referee — determined that Ms. Belanger had merited disqualification under section 17 because she failed to report to work without calling-in on several occasions. Board of Review Decision (No. 20124058), at 1. Because the Claimant never expressly resigned her position, this is what is known as being a "de facto quit" or a "constructive quit." At the hearing conducted by the Referee, Ms. Belanger testified in support of her claim for benefits. Because the Director had found she had quit without good cause, she bore the burden of proof; Referee Capozza found she failed to sustain this burden.

Ms. Belanger testified that on March 16, 2012 she was beset by mental health issues. Referee Hearing Transcript (No. 20124058), at 10. She submitted a physician's note, which excused her until March 26, 2012. Referee Hearing Transcript, at 10-11. However, she failed to return to work on March 26, 2012, due to injuries she suffered in an accident in which her car was totaled on March 25, 2012. Referee Hearing Transcript, at 12. She testified she called in to Summit and reported her situation to the third-shift supervisor. Referee Hearing Transcript, at 12-13. When she did so, she was told she would not have a job if she failed to report to work. Referee Hearing Transcript, at 14.

The employer's representative, Ms. Linda Mastrovuno, testified that Ms. Belanger was considered a no-call, no-show on March 19th even though — on March

20th — she submitted a note which covered the period through March 26th. Referee Hearing Transcript, at 14. She was further considered a no-call, no show on March 28th, March 30th, and March 31st. Referee Hearing Transcript, at 19-20.

To analyze this situation one needs to proceed from fundamental principles. Issues of attendance, whether absenteeism or tardiness or leaving before the end of one's shift have historically been addressed under section 28-44-18 of the Employment Security Act, which provides for disqualification based on proved misconduct. It is true, however, that certain cases in which an employee has broken off communications with the employer have been addressed under section 17 based upon a theory of a de facto quitting or a constructive quitting. See Sanchez v. Department of Labor and Training, Board of Review, A.A. No. 05-80, (Dist.Ct. 1/24/06)(Employee collecting TDI recipient deemed to have quit due to her failure to respond to employer inquiries and submit family leave request) and Fierlit v. Department of Employment and Training Board of Review, A.A. No. 93-162, (Dist.Ct. 2/3/94). But, in my view, the facts in this case do not support a theory of a *de facto* or *constructive* quitting.

When the Board finds a constructive quitting we are inferring that the worker has abandoned her job; in such cases we must glean from the facts and circumstances an unexpressed desire on the part of the claimant to terminate her position. Where we cannot divine such an intention, the claimant's absenteeism must be analyzed for misconduct under section 18.

In the case at bar I cannot discern any such intent to separate on the part of Ms. Belanger. She testified that she did keep in contact with Summit and explained that she had been in a car accident and would not be at work on the 26th. The employer did not refute this testimony. In fact, it is uncontested that Ms. Belanger informed a supervisor that she would be absent on March 26th. Referee Hearing Transcript, at 24. As a result, I must agree with comments made by the Member Representing Labor in his dissent — "This claimant was known to have had a medical problem. She did not quit her job. This employer chose to terminate her." Decision of Board of Review (No. 20124058), November 8, 2012, at 1 (N.J. Rendine, dissent). I therefore find that the Referee's analysis of the case under section 17 was entirely ill-conceived; the Board of Review's affirmation of the Referee's decision must therefore be set aside.

As stated above, pursuant to the applicable standard of review, this Court is not authorized to substitute its judgment for that of the Board of Review. See Gen. Laws § 42-35-15(g), supra at 5-6 and Guarino, supra at 6, fn.2. Nevertheless, the Board of Review's decision (adopting the finding of the Referee) that claimant voluntarily terminated her employment by failing to contact her employer is without support in the record and must be deemed clearly erroneous; I therefore recommend reversal on this issue.

VII. 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) on the issue of availability was not affected by error of law; however, the Board of Review's decision on the issue of leaving for good cause is affected by error. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, the Board of Review's decision on the issue of availability was not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or arbitrary or capricious, but the decision of the Board of Review on the issue of leaving without good cause is clearly erroneous. GEN. LAWS 1956 § 42-35-15(G)(5),(6).

Accordingly, I recommend that the decision of the Board be AFFIRMED in part and REVERSED in part.

/s/
Joseph P. Ippolito
MAGISTRATE

FEBRUARY 18, 2013