STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Dawn Gomez	:	
	:	
v.	:	**A.A. No. 15 - 073**
	:	
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 matter is REMANDED to the Board of Review for further proceedings.

Entered as an Order of this Court at Providence on this 28th day of December, 2015.

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. Dawn Gomez urges that the Board of Review of the Department of Labor and Training erred when it held that she was not entitled to receive Temporary Disability Insurance Benefits while she was in nursing school. 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 decision issued by

the Board of Review in this matter was made through an improper procedure. I shall therefore recommend that the matter be REMANDED to the Board of Review.

I
FACTS AND TRAVEL OF THE CASE

Ms. Dawn Gomez was employed as a certified nursing assistant (CNA) at Rhode Island Hospital until February 2, 2015, when she became ill.[1] She applied for, and received, temporary disability insurance (TDI) benefits.[2] But when the Department learned that, while receiving benefits, she had been attending the CCRI nursing school, it curtailed her benefits, effective March 28, 2015.[3] It did so because the clinical part of the course she was taking (two days per week at Newport Hospital) was very much like her job.[4]

A formal decision on Ms. Gomez' continuing eligibility was issued by the Department on June 2, 2015. It stated, in its entirety —

> You filed a claim for Temporary Disability Insurance. Information received indicates that you are attending school and or classes wherein the requirements are not materially

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1 See TDI Claim Summary, dated June 5, 2015, in electronic record at 26.

2 Id.

3 See "Facts of the Case," in the electronic record at 27.

4 Id.

> different from your customary work.
>
> Rule 3 of the Rules for the Temporary Disability Insurance Program states, in part "an individual shall be deemed to be sick in any week in which, because of his or her physical or mental condition, is unemployed, has been examined by a Qualified Healthcare Provider and has been deemed to be financially unable to perform his or her regular or customary work or services and is unable to attend classes or school. This includes attending clinical classes/training for specific programs following accepted and approved Medical Duration Guidelines."
>
> Section 28-41-15(a) of the Rhode Island Temporary Disability Insurance Act states, in part, "If the claim is determined to be invalid, the Director shall likewise notify the claimant and any other interested parties of that determination and the reasons for it."
>
> Since you are attending school and or classes, your claim cannot be approved.[5]

Claimant appealed from this decision and, as a result, Referee Carl Capozza held a hearing on June 25, 2015, at which Ms. Gomez appeared, as did a representative of the Department, Ms. Kathy McCaughey.

In his decision, issued on July 1, 2015, the Referee made the following Findings of Fact regarding Claimant's eligibility:

> All the testimony, medical certification and other pertinent documents presented have been made a part of the record.
>
> Under consideration of all the evidence submitted, the Referee finds that the Director's decision constitutes a proper adjudication of the facts. The conclusions of the Director as to

[5] Decision of Director, June 2, 2015, in the electronic record at 28.

> the applicable laws and regulations thereto are correct and proper, and such findings and conclusions are hereby affirmed.
>
> **Decision**: Benefits are denied as previously determined by the Director under the provisions of TDI Rule 3(F) of the Rhode Island Temporary Disability Insurance and Rules.[6]

Thus, while Referee Capozza found the Director's decision to be a proper adjudication of the case, he made no new findings regarding the evidence and testimony presented to him at the hearing he conducted.

Claimant filed an appeal and the matter was considered by the Board of Review. On August 4, 2015, the members of the Board of Review issued a unanimous decision holding that the Referee's ruling was a proper adjudication of the facts and the law applicable thereto; accordingly, the decision of the Referee was affirmed.[7] Finally, on August 14, 2015, the Claimant filed a complaint for judicial review in the Sixth Division District Court.[8]

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6 Decision of Referee, July 1, 2015, at 1.

7 Decision of Board of Review, August 4, 2015, at 1.

8 See Complaint, dated August 14, 2015, at 1, in electronic record.

II
STANDARD OF REVIEW

The standard of review is provided by R.I. Gen. Laws § 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.' "[9] The Court will not substitute

[9] Guarino v. Department of Social Welfare, 122 R.I. 583, 588, 410 A.2d 425, 428 (1980)(citing Gen. Laws 1956 § 42-35-15(g)(5)).

its judgment for that of the Board as to the weight of the evidence on questions of fact.[10] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[11]

III
ANALYSIS

A
The Evidentiary Record — The Hearing

1
The Department's Witness

At the hearing conducted by Referee Capozza, the Department's representative, Ms. Kathy McCaughey, testified that Ms. Gomez, prior to the February 2, 2015 onset of her disability, had been a CNA.[12] She claimed and received TDI benefits (for eight weeks until the week-ending March 28, 2015) but further benefits were withheld[13] when the Department learned

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10 Cahoone v. Board of Review of the Deparment of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 214-15 (1968).

11 Cahoone, ante n.10, 104 R.I. at 506-07, 246 A.2d at 215. Also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039 (R.I. 1986).

12 Referee Hearing Transcript, at 5, 12-13.

13 The Department took this action under the authority of TDI Rule 3.

she had been attending nursing school.[14] It was not school attendance per se that caused the disqualification, but the fact that her educational week consisted of three days of classes and two days of clinical rotation at Newport Hospital.[15] Indeed, it looked to the Department like it was her schooling that caused her stress-related disability, not her job.[16]

2

Claimant's Testimony

Ms. Gomez told the Referee that she had started school in the fall semester; shortly after she had begun, she was sent by her primary care physician to see a psychiatric nurse practitioner, Ms. Larham, who later recommended that she be out of work, because she was

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Referee Hearing Transcript, at 4.

[14] Referee Hearing Transcript, at 4.

We may also note at this juncture that, during her testimony, Ms. McCaughey also mentioned that the standard medical duration for anxiety and depression claims is four to eight weeks, which Ms. Gomez had already received; this period is subject to extension only in "extraordinary circumstances." Referee Hearing Transcript, at 6-7. This fact caused the Referee to question whether the case was moot. Referee Hearing Transcript, at 7.

[15] Referee Hearing Transcript, at 4-5.

[16] Referee Hearing Transcript, at 6. Ms. McCaughey drew this inference from the fact that Ms. Gomez' doctor had given her a May 8, 2015 return-to-work date, which was just after the end of the school semester. Referee Hearing Transcript, at 7.

"decompensating."[17] She attributed her problems during the second semester to the decline of her marriage.[18] Ms. Gomez said that while she was out of work she was "less stressed."[19] Ms. Gomez said that (if she had remained at work) she would have been fired, due to her crying and lack of performance.[20] She felt her CNA license was also in jeopardy while she was working.[21]

But, while Ms. Gomez conceded that her schoolwork did cause stress, she suggested that it was only mentioned (in a report submitted by her doctor), because she was not then working.[22] When the Referee asked — Why hadn't she dropped out of school and kept working? — she said that "life goes on," explaining that she was crying at work (because of her

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17 Referee Hearing Transcript, at 8, 11-13.

18 Referee Hearing Transcript, at 8, 14.

19 Id.

20 Referee Hearing Transcript, at 9.

21 Id. Curiously, and perhaps ironically, she did not believe herself to be in jeopardy for any mistakes she made while doing her clinical; to the contrary, she said that her professor would be responsible for any errors she might make. Referee Hearing Transcript, at 9, 15.

22 Referee Hearing Transcript, at 9-10.

family situation), but not at school.[23] She added that she barely passed the course.[24]

B

Discussion

In my view, this Court is unable to resolve the instant case on the merits because the Board of Review's decision does not meet the statutory standard. I shall now explain why it does not.

The Board's decision, like so many it makes, adopts the Referee's decision as its own. Now, concededly, the Board is specifically authorized to issue rulings based on the record developed by the Referee.[25] When it does so, it can accept the decision of the Referee as a proper adjudication of the facts and the law. The problem here is that the Decision of the Referee, adopted by the Board as its own, also contains no specific findings of fact.

But while the Board may render decisions with only one finding — i.e., that the Decision of the Referee was a proper adjudication of the facts and the law applicable thereto — referees, or, as they are known in the

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23 Referee Hearing Transcript, at 10-11.

24 Referee Hearing Transcript, at 11.

25 See Gen. Laws 1956 § 28-41-22 (TDI appeals) and Gen. Laws 1956 § 28-44-47 (unemployment appeals).

Employment Security Act, "appeal tribunals," may not. Gen. Laws 1956 § 28-41-21 provides —

> After a hearing, an appeal tribunal shall make findings and conclusions promptly and on the basis of the findings and conclusions affirm, modify, or reverse the director's determination. Each party shall promptly be furnished a copy of the decision and supporting findings and conclusions. This decision shall be final unless further review is initiated pursuant to § 28-41-22 within fifteen (15) days after the decision has been mailed to each party's last known address or otherwise delivered to him or her; provided, that the period may be extended for good cause. (Emphasis added).[26]

By its plain language, this provision requires referees to make findings. But, in the instant case, the Referee did not. So, the Board adopted an unlawful decision as its own.

But, even if the Referees did not have a clear statutory compulsion to make findings, fairness would require that they do so. As stated ante, the Board has the discretion under § 28-41-22 to adjudicate cases based on the record considered by the Referee. But, when it holds a hearing (and takes additional evidence) it must make findings. We trace this principle to a case

[26] See, to similar effect, Gen. Laws 1956 § 28-44-46 (unemployment appeals).

decided almost thirty years ago — Achorn v. Department of Employment Security, Board of Review.[27]

In Achorn, Chief Judge Laliberte considered a case with a similar procedural posture. After conducting a full hearing on Ms. Achorn's appeal from a referee's decision finding her disqualified from receiving benefits, the Board of Review issued a decision in which it summarily affirmed the decision of the referee, adopting the decision as its own.[28] Reading two procedural provisions of the Employment Security Act together, the Chief Judge concluded that the Board's decision did not pass muster.

In my estimation, Chief Laliberte's teaching in Achorn deserves deference not only because of its many years' precedence but its unimpeachable logic. Quite simply, the Board cannot adopt findings of fact that were never made by its referee.

C

Resolution

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

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[27] A.A. No. 81-368, (Dist.Ct. 12/6/86)(Laliberte, C.J.).

[28] Achorn, ante, slip op. at 4.

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.[29] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[30]

Nevertheless, the Decision of the Board must be made pursuant to lawful procedure. Since the Board's decision (adopting the finding of the Referee) was not properly made (in that it failed to include proper findings of fact), I must recommend that it be vacated. Upon remand, the Board may choose to author a new decision making appropriate findings based on the record previously created or it may hold a new hearing; or, it may refer the matter back to the Referee for this purpose.

V
CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review was made upon unlawful procedure. Gen. Laws 1956 § 42-35-15(g)(3).

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[29] Cahoone, ante n.10, 104 R.I. at 506, 246 A.2d at 215.

[30] Cahoone, id., and D'Ambra, ante at 6, n.11, 517 A.2d at 1041. See also Gen. Laws § 42-35-15(g), ante at 5 and Guarino, ante at 5, n.9.

Accordingly, I recommend that the decision of the Board be vacated and the matter REMANDED to the Board of Review for further proceedings.

/s/
Joseph P. Ippolito
MAGISTRATE

December 28, 2015