SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1935-20

SHELLY COHEN,

Appellant,

v.

BOARD OF REVIEW,
DEPARTMENT OF LABOR,
and NEXTEP BUSINESS
SOLUTIONS, INC.,

Respondents.

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Submitted March 9, 2022 – Decided April 6, 2022

Before Judges Gooden Brown and Gummer.

On appeal from the Board of Review, Department of Labor, Docket No. 201507.

Karpf, Karpf & Cerutti, PC, attorneys for appellant (Andrew R. Olcese, on the brief).

Matthew J. Platkin, Acting Attorney General, attorney for respondent Board of Review (Donna Arons, Assistant Attorney General, of counsel; Roger M. Castillo, Deputy Attorney General, on the brief).

PER CURIAM

Petitioner Shelly Cohen appeals from the January 28, 2021 final agency decision of the Board of Review (Board) upholding the Appeal Tribunal's (Tribunal) determination that Cohen was disqualified for unemployment benefits under N.J.S.A. 43:21-5(a) because she left work voluntarily without good cause attributable to such work. We affirm.

We glean these facts from the record. Cohen was employed by Nextep Business Solutions, Inc. (Nextep) as a mystery shopper, beginning October 8, 2018, until she tendered her resignation in an October 30, 2019 email, effective November 9, 2019. On November 10, 2019, she filed a claim for unemployment benefits. On December 11, 2019, the Deputy Director (Deputy) of the Division of Unemployment and Disability Insurance denied the claim on the ground that Cohen was disqualified for benefits from November 10, 2019, because she left work voluntarily without good cause attributable to the work.

Cohen appealed the Deputy's determination and, on January 23, 2020, the Tribunal conducted a telephonic hearing. At the hearing, Cohen testified she resigned because Nextep did not provide her with the financial resources necessary to perform her job duties and the work environment "became physically [and] mentally . . . unsafe for [her]." Cohen explained she was not

given "enough money" for accommodations when she travelled for work visiting various stores, she worked "excessive hours," and, although she was a salaried employee, she was paid "under minimum wage" relative to the excessive number of hours she worked. She also stated she developed issues with her "hip," "back," "wrist[s]," and "legs" from performing the job. Upon questioning, Cohen acknowledged she did not obtain any medical documentation to support her claim that her physical issues were caused or aggravated by her work or that she required any accommodation to perform the job. Cohen also conceded she had not sought a leave of absence prior to resigning and never filed an official complaint with the Wage and Hour Division of the Department of Labor in relation to her wage and hour violation allegation.

Nicole Fowler testified for Nextep and explained that mystery shoppers worked primarily "on the road or in . . . hotels," "set their own schedule[s]," and received an allowance of "a couple . . . thousand dollars" to "use . . . as needed" as long as performance standards were met. Fowler also confirmed that Cohen never sought a leave of absence, never notified Nextep that her hours were excessive or that the job was causing her mental and physical issues, and never submitted any documentation from a medical provider stating that she had a physical or mental condition that was caused by the work, aggravated by the

work, or required an accommodation for her to remain employed. Additionally, according to Fowler, Cohen resigned from her position with two weeks written notice, did not provide a reason for resigning,[1] and continuing work was available had Cohen not resigned.

In a January 23, 2020 decision, the Tribunal upheld the Deputy's decision but modified the date of disqualification to November 3, 2019. The Tribunal found that Cohen "left the work voluntarily," "cited no reason" for leaving in her written resignation, "did not seek a leave of absence in lieu of resignation," "did not make the employer aware of any concerns prior to her resignation," and "left continuing work." Further, although Cohen "testifie[d] she left due to safety concerns," she failed to "establish[] that the working conditions were so unsafe, unhealthful, or dangerous as to constitute good cause attributable to such work." See N.J.A.C. 12:17-9.4 ("An individual shall not be disqualified for benefits for voluntarily leaving work if he or she can establish that working conditions are so unsafe, unhealthful, or dangerous as to constitute good cause attributable to such work.").

[1] Cohen did not dispute that she did not provide a reason for resigning in her resignation email.

The Tribunal also found that although Cohen "allege[d] she left work for health or medical reasons," she "never sought or obtained any written medical certification a physical or mental condition was caused by or aggravated by the work or that any accommodations were necessary or requested to remain on the job." According to the Tribunal, "medical certification shall be required to support a finding of good cause attributable to work." See N.J.A.C. 12:17-9.3(d). The Tribunal concluded Cohen resigned "because she became dissatisfied with her conditions of employment" and leaving work for such personal reasons was not "work-connected" and was therefore subject to disqualification under N.J.S.A. 43:21-5(a).

Cohen appealed the Tribunal's decision to the Board, asserting that "the job requirements put intense stresses" on her "physical" and "mental health" and placed her in "constant unsafe situations." Contrary to her testimony at the hearing, she stated that in her resignation email, she indicated her willingness "to switch" to a "non-travel position," but her employer "did not respond to that request." To support her claims regarding her medical issues, Cohen included with her appeal a handwritten note on a prescription form dated February 3, 2020, from an orthopedic medical practitioner diagnosing Cohen with a tear in her gluteus maximus muscle and back pain "from frequent driving and getting

in and out of the car." Cohen also included a handwritten note from a licensed clinical social worker dated February 13, 2020, stating that Cohen contacted her in July 2019 with symptoms "consistent with a diagnosis of [a]djustment reaction with [a]nxiety [and d]epression" that "seemed to be related to job stress."

After considering Cohen's appeal, on May 11, 2020, the Board remanded the case to the Tribunal "for additional testimony from the claimant and the employer regarding the details of how the claimant's work schedule was set up and how many shopping trips she was required to do within a specific period of time" as well as any "rebuttal" testimony. On June 1, 2020, the Tribunal conducted a second telephonic hearing in accordance with the remand order. However, the employer did not participate.

At the second hearing, Cohen testified she had "misspoke[n]" at the first hearing and that she had, in fact, explained to her manager in an email how her schedule did not "account for . . . extra duties" which required her to "work[] overtime," causing "exhaustion" and "body and mind issues." Cohen admitted, however, that her email did not cite any specific medically diagnosed condition.

Referring to the February 3, 2020 prescription form submitted with her appeal, Cohen testified she first saw the doctor on April 26, 2019, for "back"

and "hip" pain, did not see him anytime between April 26, 2019 and February 3, 2020, and was not examined by the doctor on February 3, 2020, when she obtained the note. Cohen also acknowledged she never informed her employer that her doctor diagnosed her with a work-related injury or about the need for any accommodation to remain employed, and only obtained the note which post-dated her employment because she believed the examiner had requested it during the first hearing.

Referring to the February 13, 2020 note from the social worker, Cohen testified she first saw the social worker in July 2019, continued seeing her between July 2019 and February 2020, and obtained the note, which also post-dated her employment, for inclusion in her appeal. Cohen acknowledged that the social worker did not provide a diagnosis based on any tests performed. Further, although Cohen claimed she requested an accommodation to relieve her anxiety and depression in an email to her employer, she did not provide a copy of the email. Cohen also admitted she never filed a worker's compensation claim for any of her alleged work-related injuries or any written complaint with any other governmental agency regarding her allegations of an unsafe work environment.

In a June 1, 2020 decision, the Tribunal again upheld the Deputy's decision, explaining Cohen failed to "establish[] that the working conditions were so unsafe, unhealthful, or dangerous as to constitute good cause attributable to such work." Cohen appealed the Tribunal's June 1, 2020 decision. On January 28, 2021, the Board affirmed the Tribunal,[2] stating:

> Although we recognize that [Cohen] provided some medical documentation to the . . . Tribunal, it was insufficient to establish that the work caused or aggravated any medical condition at the time that she left the work voluntarily. [Cohen] provided a doctor's note dated February [3], 2020 which indicated that she had a tear in her muscle that was caused by frequent driving. However, [Cohen] testified that this diagnosis was made by the doctor in April 2019[,] but she continued to work for seven months after that diagnosis without informing the employer at any time. Furthermore, she did not see that doctor again until she went to his office in February 2020, three months after she left her job, in order to get a note to provide the unemployment office. The additional medical documentation from the social worker was also not considered unequivocal medical documentation as it does not establish that the work caused or aggravated her condition. [Cohen] never informed the employer that she believed the work caused her any medical problems. Simply telling the employer that the long hours of work were causing "mind and body" issues is

[2] Acknowledging that the Tribunal erroneously reopened the matter after the June 1, 2020 decision, and issued three subsequent decisions after the erroneous reopening, the Board set aside the subsequent decisions and reinstated the June 1, 2020 decision.

> not considered informing the employer that the work caused or aggravated any medical conditions.
>
> In this case, [Cohen] did not give the employer a reasonable opportunity to resolve the matter before leaving the work voluntarily.

This appeal followed.

Our "capacity to review administrative agency decisions is limited." Brady v. Bd. of Rev., 152 N.J. 197, 210 (1997). "In reviewing the factual findings made in an unemployment compensation proceeding, the test is not whether [we] would come to the same conclusion if the original determination was [ours] to make, but rather whether the factfinder could reasonably so conclude upon the proofs." Charatan v. Bd. of Rev., 200 N.J. Super. 74, 79 (App. Div. 1985). "If the Board's factual findings are supported 'by sufficient credible evidence, [we] are obliged to accept them.'" Brady, 152 N.J. at 210 (quoting Self v. Bd. of Rev., 91 N.J. 453, 459 (1982)); accord Messick v. Bd. of Rev., 420 N.J. Super. 321, 324-25 (App. Div. 2011). Only if the Board's action was arbitrary, capricious, or unreasonable should it be disturbed. Ibid..

The burden of establishing entitlement to unemployment compensation benefits is on the claimant. Zielenski v. Bd. of Rev., 85 N.J. Super. 46, 51 (App. Div. 1964). "So, too, when an employee quits his job voluntarily, he has the burden of proving that he did so with good cause attributable to his work." Id.

at 52; see N.J.A.C. 12:17-9.1(c) ("The burden of proof is on the claimant to establish good cause attributable to such work for leaving."). In that regard, N.J.S.A. 43:21-5(a) provides that "[a]n individual shall be disqualified for benefits . . . [f]or the week in which the individual has left work voluntarily without good cause attributable to such work. . . ." Although a worker may be eligible for benefits if the "separation from employment[] was caused by work-related factors," a "worker who voluntarily quits [a] job" for "personal circumstances of the worker, unrelated to an alteration in the terms or conditions of employment, . . . cannot show 'good cause' qualifying him [or her] for benefits." Utley v. Bd. of Rev., 194 N.J. 534, 544-45 (2008).

In Domenico v. Board of Review, 192 N.J. Super. 284 (App. Div. 1983), we set forth the factors to be considered in determining the existence of good cause as follows:

> In scrutinizing an employee's reason for leaving, the test is one of ordinary common sense and prudence. "Mere dissatisfaction with working conditions which are not shown to be abnormal or do not affect health, does not constitute good cause for leaving work voluntarily." The decision to leave employment must be compelled by real, substantial and reasonable circumstances not imaginary, trifling and whimsical ones. . . . [I]t is the employee's responsibility to do what is necessary and reasonable in order to remain employed.

> [Id. at 288 (quoting Medwick v. Rev. Bd., 69 N.J. Super. 338, 345 (App. Div. 1961)).]

See also N.J.A.C. 12:17-9.1(b) (defining "good cause attributable to such work" as "a reason related directly to the individual's employment, which was so compelling as to give the individual no choice but to leave the employment"). Critically, an employee who leaves "for personal reasons, however compelling, . . . is disqualified" from benefits under the statute. Utley, 194 N.J. at 544.

Here, Cohen asserted she resigned from Nextep for work-related health or medical reasons and because of unsafe working conditions. An individual who leaves work for health reasons that have a work-connected origin is not subject to disqualification for voluntarily leaving work, if he or she can establish "that working conditions [were] so unsafe, unhealthful, or dangerous as to constitute good cause attributable to such work." N.J.A.C. 12:17-9.4. When an individual leaves work for health or medical reasons, however, a "medical certification shall be required to support a finding of good cause attributable to work." N.J.A.C. 12:17-9.3(d).

In Wojcik v. Board of Review, 58 N.J. 341, 344 (1971), our Supreme Court affirmed the Board's denial of unemployment benefits "since the only medical evidence supporting Wojcik's claim was his doctor's equivocal statement that his work 'may' have aggravated his condition." See also Israel v.

Bally's Park Place, Inc., 283 N.J. Super. 1, 5 (App. Div. 1995) (finding claimant met good cause standard "by showing, through uncontroverted medical evidence, that her [alcoholism] has been and will be aggravated by the casino environment"); Brown v. Bd. of Rev., 117 N.J. Super. 399, 404 (App. Div. 1971) (finding a "lack of adequate competent evidence" and "no medical testimony" to support the claimant's allegation that his "work duties 'aggravated' his long-standing diabetic condition").

Here, contrary to her arguments, Cohen failed to meet her burden of establishing entitlement to unemployment compensation benefits. By her own admission, Cohen never provided her employer with any medical documentation that the work caused or aggravated a medical condition and the documentation provided to the Board during the appeal did not constitute uncontroverted medical evidence that her work caused her medical conditions. Further, Cohen denied requesting a leave of absence because of a physical or mental condition and provided no evidence that she requested an accommodation to remain on the job.

On the other hand, Nextep confirmed receiving no notification of a medical condition or request for an accommodation from Cohen, maintained that continuing work was available had Cohen not resigned, and asserted Cohen

provided no reason for resigning, an assertion Cohen did not dispute during her testimony. See N.J.A.C. 12:17-9.3(a) ("An individual who leaves work because of a disability which has a work-connected origin is not subject to disqualification for voluntarily leaving work, provided there was no other suitable work available which the individual could have performed within the limits of the disability."); see also N.J.A.C. 12:17-9.3(c) (explaining that "a reasonable effort to preserve his or her employment" on the part of a claimant "is evidenced by the employee's notification to the employer, requesting a leaving of absence or having taken other steps to protect his or her employment").

Cohen also argues she resigned "after [Nextep] repeatedly ignored her requests to be paid properly for the excessive amount of overtime she worked doing tasks not accounted for in her schedule." Irrespective of the claimed violation of statutory wage laws, for which the supporting evidence before the Board was insubstantial, Cohen's testimony before the Tribunal, and position before the Board, was that she resigned because of the job's impact on her physical and mental health, not because of any wage and hour violation. Indeed, in her first appeal to the Board, Cohen categorically stated she resigned because

she "had no choice but to choose [her] physical health, mental health and physical safety."

In sum, we are satisfied there was sufficient credible evidence in the record to support the Board's decision, and the Board's action was thereby neither "arbitrary, capricious, [n]or unreasonable." Brady, 152 N.J. at 210.

Affirmed.