SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2976-22

MAIA FINKEL,

Appellant,

v.

BOARD OF REVIEW,
DEPARTMENT OF LABOR,
and THE PEASANT GRILL, LLC,

Respondents.

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Submitted May 21, 2024 – Decided June 4, 2024

Before Judges Enright and Paganelli.

On appeal from the Board of Review, Department of Labor, Docket No. 259071.

Maia Finkel, appellant pro se.

Matthew J. Platkin, Attorney General, attorney for respondent Board of Review (Janet Greenberg Cohen, Assistant Attorney General, of counsel; Ian Michael Fiedler, Deputy Attorney General, on the brief).

PER CURIAM

Plaintiff Maia Finkel appeals from a final decision of the Board of Review (Board) holding she was disqualified from receiving Pandemic Unemployment Assistance (PUA) and requiring her to repay the benefits she received. We affirm.

We glean the facts and procedural history from the record. In September 2020 Finkel applied for regular unemployment and PUA benefits. She received benefits from September 12, 2020 through March 27, 2021.

In July 2021, the Deputy re-determined Finkel was disqualified from "regular benefits from [January 12, 2020] on the ground that [Finkel] left work voluntarily without good cause attributable to such work and imposing an ineligibility for [PUA] Benefits on the ground that [Finkel] was not unemployed due to a qualifying reason identified under the Coronavirus Aid, Relief Economic Security (CARES) Act," 15 U.S.C. §§ 9001 to 9141. In addition, the Deputy requested a "refund in the sum of $6,670 received as benefits for the weeks ending [September 12, 2020] through [March 27, 2021] as provided by N.J.S.A. 43:21-16(d)."

Finkel appealed from the re-determination and the request for a refund to the Appeal Tribunal (Tribunal). On January 8, 2022, the Tribunal held a telephonic hearing. Finkel, her father, and her employer—The Peasant Grill,

LLC—testified at the hearing. Finkel testified she worked for the employer as a waitress and table busser from mid-May 2019 through January 2020. She stated she stopped working in January 2020 because she went back to college. She testified she attended college and lived in Ithaca, New York from January 2020 through May 2020.

Further, Finkel stated when she returned to New Jersey in May 2020 she did not resume working because "her parents told [her] that it was unsafe for [her] to go to work, and so [she] did not work that summer." She explained: (1) she did not test positive for COVID-19; (2) no one in her home tested positive; (3) her doctor did not advise her not to work; and (4) the employer advised her "they were going to start with the social distancing and giving masks . . . and using sanitizers."

The employer testified it did "not allow people in the store for close to a year." In addition, the employees in the store were "socially distanced" and provided with "masks and sanitizer."

Finkel testified she returned to college in New York in September 2020. She resided in New York from September 2020 through March 2021.

Finkel's father testified he was:

> a [d]octor of [p]ublic health with a wife who had a parathyroid tumor and as a person with health issues,

> the three of us in our family decided that at the time of the pandemic in May of 2020, it was not safe for our daughter or for us, for her to work in a restaurant with staff period.
>
> . . . .
>
> And she . . . made the decision that she was unwilling to work due to the pandemic. I thought that[wa]s what the CARES Act was for, but if we[we]re mistaken, then we apologize and we owe you a refund. Thank you.

The Tribunal found:

> [Finkel] worked for the . . . employer . . . from [May]19 through [January 18, 2020] when she left the job voluntarily because she feared contracting the COVID-19 virus at the job and feared she m[ight] transmit the virus to a family member. . . . [P]rior to resigning, the employer prepared to provide [Finkel] with personal protective equipment (PPE) and to enforce social distancing at the job. [Finkel] was unaware if any co-workers were ill with the virus or if she was exposed to a customer with the virus. [Finkel] did not have C[OVID] and no one in her home had the virus. [Finkel] was not advised to leave the job by any medical professional.
>
> An initial claim for unemployment benefits was filed as of [September 6, 2020] which established a weekly benefit rate of $230.00. Benefits were paid for the weeks ending [September 12, 2020] through [March 27, 2021] for a total of $6,670.00.

The Tribunal determined:

> In this case, the evidence presented indicate[d] [Finkel]'s fear of becoming ill with the virus/fear of

transmitting the virus to a loved one was a personal reason for leaving the job as the employer took reasonable precautions to reduce exposure risk in the workplace. Additionally, a medical professional did not advise the claimant to leave the job due to COVID-19 related concerns. [Finkel] did not meet the burden of proof to demonstrate the working conditions were unsafe or abnormal. Thus, [Finkel] left the job without good cause attributable to the work and [wa]s disqualified for regular benefits from [January 12, 2020] as provided under N.J.S.A. 43:21-5(a).

The CARES Act create[d] a new temporary federal program called [PUA] which is payable to qualifying individuals who are unemployed, partially unemployed, or unable or unavailable to work due to one of the COVID-19 related reasons identified in Section [9021](a)(3)(A)(ii)(I) of the CARES Act . . .

. . . .

[Finkel wa]s disqualified for regular unemployment benefits under N.J.S.A. 43:21-5(a) during the period from [January 12, 2020] and she [wa]s not eligible for PUA benefits during that period as [her] unemployment was not due to one of the COVID-19 related reasons identified in Section [9021](a)(3)(A)(ii)(I) of the CARES Act.

N.J.S.A. 43:21-16(d) provide[d] for the recovery of benefits paid to an individual who, for any reason, has received benefits to which he [or she] was not entitled.

"A refund is recoverable even if the claimant receives un-entitled benefits in good faith." Fisher v. B[d.] of Review, 123 N.J. Super. 263 (App. Div. 1973).

> In this case [Finkel] received an overpayment of benefits for the weeks in question. She [wa]s . . . obligated to refund the amount that was overpaid.

Therefore, the Tribunal decided Finkel was: (1) "disqualified for regular benefits as of January 12, 2020, under N.J.S.A. 43:21-5(a), as she left work voluntarily without good cause attributable to work"; (2) "not eligible for PUA benefits during that period as [her] unemployment was not due to one of the COVID-19 related reasons identified in [s]ection [9021](a)(3)(A)(ii)(I) of under the CARES Act"; and (3) "liable for refund the sum of $6,670, received as benefits for the weeks ending [September 12, 2020] through [March 27, 2021] as provided by N.J.S.A. 43:21-16(d)."

Finkel appealed from the Tribunal's decision to the Board. The Board determined "since [Finkel] was given a full and impartial hearing and complete opportunity to offer any and all evidence, there [wa]s no valid ground for a further hearing." The Board stated it "carefully examined" the Tribunal's decision, and based on the record, agreed with the Tribunal's decision disqualifying Finkel from benefits. However, the Board determined Finkel "left work on January 8, 2020 to return to college, not due to the pandemic." Moreover, the Board found Finkel "did not establish sufficient weeks and wages in which to qualify for a valid unemployment claim." Therefore, the Board

concluded the Tribunal's holding that Finkel was disqualified under N.J.S.A. 43:21-5(a) was "a nullity and [wa]s set aside."

Further, the Board found "[s]ince [Finkel] did not qualify for unemployment benefits, the controlling issue [wa]s whether [Finkel] qualified for PUA benefits from September 6, 2020, through March 27, 2021." The Board determined:

> [t]he evidence show[ed] that [Finkel wa]s attending school during such period, excluding the winter break. Her unemployment status was not due to any of the qualifying reasons to be eligible for PUA benefits. Hence[, Finkel wa]s ineligible for [PUA] benefits under Section [9021](a)(3)(A)(ii)(I) of the CARES Act from September 6, 2020 through March 27, 2021.

After finding Finkel was ineligible for PUA benefits under the CARES Act for this period, the Board further determined she was liable to refund the sum of $6,670 received as benefits for the weeks ending September 6, 2020 through March 27, 2021 as provided by N.J.S.A. 43:21-16(d).

On appeal, Finkel argues the Board: (1) erred in finding she left "her job voluntarily to return to college" when she was actually unemployed "because she declined two offers of employment during the pandemic because of valid and documented concerns about the safety of her prior workplace"; (2) "violated its own statute and regulations in re-determining [her] entitlement to benefits"

without satisfying N.J.A.C. 12:17-3.3(a); (3) should be equitably estopped from "recoupment"; and (4) erred by requiring "a farcical and retroactive" doctor's note to assert COVID-19 health concerns and in not accepting her father's "sworn testimony" and "affidavit" to satisfy same. We disagree.

We begin our discussion with a review of the principles governing our analysis. "In reviewing a final agency decision, such as that of the Board of Review, we defer to factfindings that are supported by sufficient credible evidence in the record." McClain v. Bd. of Review, Dept. of Labor, 237 N.J. 445, 456 (2019) (citing Brady v. Bd. of Review, 152 N.J. 197, 210 (1997)).

"[A]lthough we accord some deference to the Board's interpretation of the statutory scheme that the Legislature has entrusted it to administer, we are not bound by an unreasonable or mistaken interpretation of that scheme, particularly one that is contrary to legislative objectives." Ibid. (citing Russo v. Bd. of Trustees, Police & Firemen's Retirement Sys., 206 N.J. 14, 27 (2011)).

The scope of judicial review of an agency's action is restricted to four inquiries:

> (1) whether the agency's decision offends the State or Federal Constitution; (2) whether the agency's action violates express or implied legislative policies; (3) whether the record contains substantial evidence to support the findings on which the agency based its action; and (4) whether in applying the legislative

> policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> [George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 27 (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 563 (1963); In re Larsen, 17 N.J. Super. 564, 570 (App. Div. 1952)).]

We apply these well-established principles to the matter on appeal and affirm. First, in her briefs, Finkel describes her father as a "Certified Industrial Hygienist (CIH) for nearly [thirty] years, [who] led the development of the current federal standard governing respiratory protection in all U.S. workplaces." Moreover, she avers he provided "oral testimony" and "several sworn affidavits" regarding the employer's work environment. However, the transcript does not reveal her father provided any testimony as to the employer's work environment.

Further, Finkel's reference to her father's statement in his February 7, 2022 post-hearing affidavit, was not part of the record or considered by the Board. The Board explained Finkel "was given a full and impartial hearing and complete opportunity to offer any and all evidence, there [wa]s no valid ground for a further hearing." The Board may hear appeals "upon the evidence in the record made before the [Tribunal], or the [Board] may direct the taking of additional evidence before it." N.J.A.C. 1:12-14.3(a); see also N.J.S.A. 43:21-

6(e). However, here, the Board did not "direct the taking of additional evidence" and explained there "was no valid ground for further hearing."

Moreover, Finkel did not move before the Board to supplement the record to include her father's affidavit. See Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 98 n. 8 (1973). Nor did Finkel file a motion under Rule 2:5-5 to supplement the appellate record. Therefore, we do not consider her father's affidavit. See J.D. v. M.D.F., 207 N.J. 458, 472 n.6 (2011).

Next, we reject Finkel's claim she was entitled to benefits under PUA. The employer testified that it: (1) closed access to the workplace to the public; (2) required all employees to social distance; and (3) provided employees with masks and sanitizer. Moreover, Finkel testified she did she did not resume working because "her parents told [her] that it was unsafe for [her] to go to work, and so [she] did not work that summer." She explained: (1) she did not test positive for COVID-19; (2) no one in her home tested positive; (3) her doctor did not advise her not to work; and (4) the employer advised her "they were going to start with the social distancing and giving masks . . . and using sanitizers."

To obtain PUA, Finkel was required to establish that she was "unemployed, partially unemployed, or unable or unavailable for work because"

of the reasons stated in 15 U.S.C. § 9021(a)(3)(A)(ii)(I). Finkel argues she satisfied 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(ii)—"the individual has to quit his or her job as a direct result of COVID-19." She contends "[i]t [wa]s clear that but for the pandemic, [she] would not have been unemployed" and "[i]n that sense, her unemployment may be reasonably deemed a 'direct result' of the pandemic."

In response, the Board argues neither United States Department of Labor's (USDOL) guidance, interpreting the CARES Act, nor 15 U.S.C. § 9021 support the position that "direct result" contemplates Finkel's "generalized fear about the virus." Further, the Board contends the USDOL's guidance explains that "direct result" would apply in a situation where an individual once had COVID-19 and as a "direct result" of the resultant health complications caused thereby, they were "unable to perform his or her essential functions."

In addition, the Board posits "the CARES Act . . . incorporates provisions of the Disaster Unemployment Assistance regulations" and "those regulations limit 'direct results' to those results deriving from physical damage or destruction to the workplace, the inaccessibility of the workplace, and the employer's lack of work or loss or revenue." (citing 15 U.S.C. § 9021(h)(1)-(2); 20 C.F.R. § 615.5(c)(1)-(3)). The Board contends these "'direct results' are similarly inapplicable here."

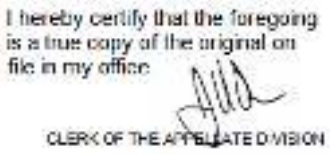
We are convinced the Board has the better arguments and concur Finkel did not satisfy 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(ii). In fact, the Board's more grounded interpretation of "direct result," comports with the meaning of the phrase more than Finkel's amorphous interpretation. Indeed, based on the evidence in the record, Finkel's interpretation would have allowed nearly anyone to speculate as to a workplace fear of contracting the virus, and the resultant transmission to other household members, as a basis for eligibility. Such an expansive interpretation cannot be countenanced. See In re Expungement Application of P.A.F., 176 N.J. 218, 222 (2003) (citing State v. Haliski, 140 N.J. 1, 9 (1995); Robson v. Rodriquez, 26 N.J. 517, 528 (1958)) ("Legislation must be construed so as to avoid absurd results.").

Moreover, there is substantial evidence in the record to support the Board's finding that Finkel's "fear of becoming ill with the virus/fear of transmitting the virus to a loved one was a personal reason for leaving the job as the employer took reasonable precautions to reduce exposure risk in the workplace." In other words, Finkel's choice to remain unemployed was not as a "direct result" of COVID-19, but instead emanated from her personal fears and choices.

Finally, there is no merit to Finkel's claim that recoupment would be inappropriate. As we recently reiterated, "N.J.S.A. 43:21-16(d) require[d] the full repayment of unemployment benefits received by an individual who, for any reason, regardless of good faith, was not actually entitled to those benefits."[1] Sullivan v. Bd. of Review, Dep't. of Labor, 471 N.J. Super. 147, 155 (App. Div. 2022) (quoting Bannan v. Bd. of Review, 299 N.J. Super. 671, 674 (1997)). In addition, according to N.J.A.C. 12:17-14.1, "[t]he Division shall issue a demand for refund of unemployment benefits in each case when a determination of overpayment is made."

To the extent we have not specifically addressed any of Finkel's remaining contentions, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.



[1] The version of N.J.S.A. 43:21-16(d) in effect when the Board issued its decision required repayment of mistakenly paid unemployment benefits regardless of whether the error was on the part of the agency. N.J.S.A. 43:21-16(d) (2017) (amended July 13, 2023).