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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3333-19**

**LARISSA CASTRO DE
LA CRUZ,**

Appellant,

v.

**BOARD OF REVIEW,
DEPARTMENT OF LABOR
and YNAP CORPORATION,**

Respondents.

Submitted March 30, 2022 – Decided May 4, 2022

Before Judges Whipple and Geiger.

On appeal from the Board of Review, Department of Labor, Docket No. 201279.

Theodore Sliwinski, attorney for appellant.

Matthew J. Platkin, Acting Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Jana R. DiCosmo, Deputy Attorney General, on the brief).

PER CURIAM

Petitioner Larissa Castro de la Cruz appeals from a March 11, 2020 final decision of the Board of Review (Board), Department of Labor, denying her unemployment benefits. We affirm.

In 2012, petitioner began working at YNAP Corporation as a fulfillment associate, which involved heavy lifting. In 2014, she began work as a repairs and quality associate, which did not require heavy lifting but involved lifting and hanging clothes. That same year, she applied for temporary disability benefits "for elbow pain due to lifting heavy stuff, workplace." Her doctor did not certify that her disability was "[d]ue to an accident at work," "not related to his/her work," or "due to a condition which developed because of the work."

In 2018, petitioner was treated for swelling on her elbow. In April 2019, petitioner was diagnosed with carpal tunnel syndrome in her right wrist, and she was referred to physical therapy for lower back pain. Later that year, petitioner was diagnosed with moderate rotator cuff tendinosis in her right shoulder and lateral epicondylitis in her right elbow.

On September 18, 2019, petitioner was deemed eligible for Family and Medical Leave Act¹ leave beginning on September 23, 2019. Petitioner's last physical day of work was September 20, 2019. From September 23, 2019, to

¹ 29 U.S.C. §§ 2601 to -2654.

November 17, 2019, as documented by a doctor's note, petitioner was "off work . . . for medical reasons." She was on disability leave for eight weeks.

In October 2019, petitioner applied for temporary disability benefits for the period from September 23, 2019 to November 17, 2019. On the claim form, she stated "pain on right shoulder and elbow [from] lifting heavy objects and continue[d] use." Under the question, "Was this injury or illness caused by your job?" she checked the box "no." Petitioner's doctor did not certify that her injuries were caused or aggravated by her job.

Petitioner was supposed to return to work on November 18, 2019. By letter dated November 18, 2019, she resigned from YNAP Corporation. Petitioner wrote:

I am very sorry to be writing this letter to hand my resignation in due to medical reasons. As you are aware I have been having some medical problems over the past few months and it has left me now unable to continue working.

I have tried taking time off . . . , but it did very little for me. I have been constantly in pain, and feel that my productivity has been cut in half. That means I can no longer perform my responsibilities to the performance standards of this company.

I now need to face facts and pay more attention to my health and I am unable to do this whilst I am still working. I do hope that you understand the predicament that I am in. . . .

I will best be able to care for my health and have a better chance of recovery if I devote full attention to my medical needs now.

On November 24, 2019, petitioner applied for unemployment benefits.

By notice dated December 16, 2019, the New Jersey Department of Labor and Workforce Development, Division of Unemployment and Disability Services (Division) notified petitioner:

You are disqualified for benefits from [September 15, 2019] and will continue to be disqualified until you have worked eight or more weeks in employment and have earned at least ten times your weekly benefit rate.

You left work voluntarily on [September 15, 2019].

You indicated when filing your claim that you voluntarily left your job. You do not demonstrate good cause attributable to the work as your reason for leaving. Therefore, you are disqualified for benefits.

By a second notice dated December 16, 2019, the Division notified petitioner:

You are ineligible for benefits from [November 24, 2019] and will continue to be ineligible until there is a change in the facts upon which this determination is based.

You were not available for work from [November 24, 2019].

You indicated when filing your claim that you are unavailable and/or unable to work. Benefits are

payable only when you are able and available for work.
Therefore, you are ineligible for benefits.

On December 19, 2019, petitioner appealed to the Appeal Tribunal. On January 30, 2020, the Appeal Tribunal held a hearing in which petitioner participated pro se with an interpreter. The issues were "voluntary leaving and able, available, and actively seeking work."

Petitioner testified she quit her job because her physical health was not improving. Her doctor referred her to physical therapy, which she could not afford. She was diagnosed with tendonitis, bursitis, and another condition in her elbow. Her doctor said that she could not carry heavy things. Petitioner did not ask her employer for a position where she did not have to lift heavy things because her role did not involve heavy lifting. She could not do her job because she was constantly using her hands to carry clothes and shoes. She did not request restricted or light duties from her employer. She resigned because she felt she was not capable of continuing the work.

Petitioner previously gave her employer notice of her medical problems as she had to use paid time off. She did not give her employer medical documentation on November 18 that she could no longer perform the job or that the job aggravated her medical condition. Her employer had work available if she was able to return. Her manager told her that he would give her a warning

for the time she missed work but did not threaten to fire her. Since she filed her unemployment claim on November 24, she had been looking for office work. She would also be starting school in March. She stated that nothing prevented her from starting work immediately.

The Appeal Tribunal affirmed the Division's decision on the basis of N.J.S.A. 43:21-5 and N.J.A.C. 12:17-9.3. The Appeal Tribunal found:

[T]he claimant voluntarily left the job because she felt she was not capable of performing her work due to her medical condition. Evidence from the hearing revealed that the claimant was on an approved leave of absence due to her medical condition with a return to work date of [November 18, 2019]. . . . And, if the worker asserts that her health is the reason for leaving her job, she must present unequivocal medical evidence showing the infirmity was caused or aggravated by the duties of employment. . . . Although the claimant contended she provided the employer with medical documentation, evidence from the hearing revealed the documentation was provided in [September 2019], when the claimant began her leave of absence. There was no medical documentation provided to the employer that showed the claimant's medical condition was aggravated or caused by the work. Furthermore, the claimant did not request any accommodations from the employer prior to voluntarily leaving the job. Therefore, [t]he claimant is disqualified for benefits under N.J.S.A. 43:21-5(a) as of [November 17, 2019], as the claimant left work voluntarily without good cause attributable to such work.

In light of the indefinite disqualification imposed under N.J.S.A. 43:21-5(a), the matter of the claimant's availability is academic.

Petitioner appealed to the Board. The Board affirmed the Appeal Tribunal's decision. This appeal followed.

Our scope of review of the final decision of an administrative agency is limited. Brady v. Bd. of Review, 152 N.J. 197, 210 (1997). We will not disturb the ultimate determination of an agency unless shown that it was "arbitrary, capricious or unreasonable," ibid., or that it violated legislative policies expressed or implied in the act governing the agency or the findings on which the decision is based are not supported by the evidence, id. at 210-11. "Moreover, '[i]n reviewing the factual findings made in an unemployment compensation proceeding, the test is not whether an appellate court would come to the same conclusion if the original determination was its to make, but rather whether the factfinder could reasonably so conclude upon the proofs.'" Id. at 210 (quoting Charatan v. Bd. of Review, 200 N.J. Super. 74, 79 (App. Div. 1985)). Because petitioner challenges the Board's finding of fact, the Brady standard is applicable here.

New Jersey statute, N.J.S.A. 43:21-5(a), provides, in pertinent part:

An individual shall be disqualified for benefits:

(a) For the week in which the individual has left work voluntarily without good cause attributable to such work, and for each week thereafter until the individual becomes reemployed and works eight weeks in employment, which may include employment for the federal government, and has earned in employment at least ten times the individual's weekly benefit rate, as determined in each case. . . .

"The burden of proof is on the claimant to establish good cause attributable to such work for leaving." N.J.A.C. 12:17-9.1(c). "'[G]ood cause attributable to such work' means 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." N.J.A.C. 12:17-9.1(b). "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." N.J.A.C. 12:17-9.4. Leaving for personal reasons "however compelling" disqualifies an individual from benefits. Utley v. Bd. of Review, Dep't of Labor, 194 N.J. 534, 544 (2008).

An individual who voluntarily leaves their job for health or medical reasons may not be disqualified from unemployment benefits if they satisfy the requirements under 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.

(b) An individual who leaves a job due to a physical and/or mental condition or state of health which does not have a work-connected origin but is aggravated by working conditions will not be disqualified for benefits for voluntarily leaving work without good cause "attributable to such work," provided there was no other suitable work available which the individual could have performed within the limits of the disability. When a non-work connected physical and/or mental condition makes it necessary for an individual to leave work due to an inability to perform the job, the individual shall be disqualified for benefits for voluntarily leaving work.

(c) Notwithstanding (b) above, an individual who has been absent because of a personal illness or physical and/or mental condition shall not be subject to disqualification for voluntarily leaving work if the individual has made a reasonable effort to preserve his or her employment, but has still been terminated by the employer. A reasonable effort is evidenced by the employee's notification to the employer, requesting a leave of absence or having taken other steps to protect his or her employment.

(d) When an individual leaves work for health or medical reasons, medical certification shall be required to support a finding of good cause attributable to work.

[N.J.A.C. 12:17-9.3.]

An individual must show medical proof that their health condition was attributable to, or aggravated by, their work. See Wojcik v. Bd. of Review, 58 N.J. 341, 344 (1971).

In 1998, the Department of Labor adopted N.J.A.C. 12:17-9.3.² 30 N.J.R. 2027(a) (June 1, 1998). Specifically interpreting N.J.A.C. 12:17-9.3(b), our Supreme Court in Ardan v. Board of Review rejected the Board's "global [requirement of] proof that the claimant notif[y] the employer of her medical condition, and request[] an accommodation." 231 N.J. 589, 605 (2018). The Court explained:

We do not view N.J.A.C. 12:17-9.3(b) to generally impose a notice-and-inquiry requirement on every claimant who has departed her work because that work aggravated a medical condition. By its plain terms, the regulation defines what the claimant must prove: that there was "no other suitable work available which the individual could have performed within the limits of the disability." N.J.A.C. 12:17-9.3(b).

Applied to a vast range of workplace settings, that standard calls for an individualized determination; it does not mandate in every case that the claimant demonstrate that she notified the employer of the

² After Wojcik and before the Department of Labor adopted N.J.A.C. 12:17-9.3, we considered the medical proofs necessary for the petitioner to demonstrate that their jobs caused or aggravated a health condition, and that the causal connection led the petitioner to leave employment. See, e.g., Combs v. Bd. of Review, 269 N.J. Super. 616 (App. Div. 1994); Brown v. Bd. of Review, 117 N.J. Super. 399 (App. Div. 1971).

medical condition and sought an alternative position that would accommodate that condition. In some cases, the claimant's medical proofs, combined with evidence of the physical demands of the former employment, the small size of the workplace, or other relevant factors, will be sufficient to satisfy the claimant's burden to demonstrate the unavailability of alternative "suitable work." In other circumstances, a claimant will not be in a position to meet that burden absent proof that she notified the employer and sought an accommodation prior to resigning from the job.

[Ibid.]

Even if a petitioner need not prove notice to the employer and a request for accommodation, a petitioner must "still show[] that, at the time of the claimant's departure, either the employer had no position available that would accommodate the claimant's condition or the claimant would not have been assigned to any such position." Id. at 607. In that case, the Court concluded the petitioner did not meet this burden because "[n]othing in the record support[ed] [the petitioner]'s conclusory assertion that any effort to secure a reassignment to 'suitable work' at the Medical Center would have proven futile." Ibid.

Turning to this case, petitioner argues that the Board decision was arbitrary and capricious in concluding that she did not prove that she left her job for good cause attributable to the work. We disagree.

First, petitioner did not demonstrate her health condition was caused by her then-current job, and did not claim that her employer had "no other suitable work available." N.J.A.C. 12:17-9.3(a). She argues that her first position at YNAP Corporation involved heavy manual labor that "ruined her ability to use her hands and her shoulders." But she did not argue before the administrative tribunal that her second position involving carrying lighter objects aggravated her conditions. Moreover, she testified that YNAP Corporation had work available if she wanted to return.

Second, petitioner did not demonstrate she had a non-work-connected condition aggravated by her working conditions, and a lack of other suitable work. N.J.A.C. 12:17-9.3(b).

Third, petitioner did not demonstrate she made "a reasonable effort to preserve . . . her employment, but has still been terminated by the employer." N.J.A.C. 12:17-9.3(c). While she took disability leave prior to resigning, she did not request any other accommodations or inform her employer that she could no longer perform the job or that the job aggravated her medical condition. Her employer did not fire or threaten to fire her.

Finally, petitioner did not provide a "medical certification . . . to support a finding of good cause attributable to work." N.J.A.C. 12:17-9.3(d). While

petitioner's many years of manual labor could have caused or aggravated her conditions, she did not provide medical proofs demonstrating the causal connection between the work and her condition. While the record shows medical documentation that verifies her health conditions, the record does not show that her job caused or aggravated her health conditions in conformance with N.J.A.C. 12:17-9.3.

For example, petitioner's 2014 application for temporary disability benefits claimed she had "elbow pain due to lift[ing] heavy stuff, workplace." But her doctor did not certify that her disability was "[d]ue to an accident at work," "not related to his/her work," or "due to a condition which developed because of the work." In other words, her doctor did not give an opinion that her condition was or was not caused by her work. As another example, petitioner provided a doctor's note stating, "off work from [September 23, 2019] to [November 17, 2019] for medical reasons." Her doctor did not state that her "medical reasons" were caused or aggravated by her job. As a final example, in petitioner's 2019 application for temporary disability benefits, she stated "pain on right shoulder and elbow [from] lifting heavy objects and continue[d] use." But under the question, "Was this injury or illness caused by your job?" she checked the box "no." Moreover, petitioner's doctor did not state on her

temporary disability benefits application that her injuries were caused or aggravated by her job.

Like the petitioner in Wojcik, 58 N.J. at 343-44, petitioner has had health conditions and performed manual labor for several years. Although both petitioners' jobs could have plausibly caused or aggravated their conditions, neither provided competent medical proofs. Furthermore, unlike the petitioner in Wojcik that submitted proof that his work "may" have aggravated his condition, id. at 344, petitioner submitted no medical proof that her work may have caused or aggravated her condition. Thus, her documents fell short of the proofs required under N.J.A.C. 12:17-9.3.

Thus, we conclude, because petitioner failed to show medical certifications that her job caused or aggravated her condition, the Board's decision was based on ample credible evidence and not arbitrary, capricious, or unreasonable.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION