

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-182

OCTOBER TERM, 2017

Grace Jones	}	APPEALED FROM:
	}	
v.	}	Employment Security Board
	}	
Department of Labor	}	
(Mack Molding Company, Inc., Employer)	}	DOCKET NO. 01-17-098-14

In the above-entitled cause, the Clerk will enter:

Claimant Grace Jones appeals the decision of the Employment Security Board denying her unemployment compensation benefits. We reverse.

The record shows that claimant received temporary total disability workers' compensation benefits on account of a work-related injury to her upper extremities. Her employer terminated her temporary total disability benefits effective December 11, 2016 when she reached an end medical result. On December 28, 2016, she filed her claim for unemployment compensation. A claims adjudicator determined that claimant was ineligible for benefits. In so concluding, the claims adjudicator stated, "According to your health care provider, you are currently unable to work." Claimant pursued an administrative appeal to the Administrative Law Judge (ALJ).

In addition to her testimony, claimant offered several exhibits at the administrative appeal. Her physician's medical certification described her condition as "bilateral osteoarthritis of the first carpometacarpal joint," and indicated that claimant was unable to perform her prior work on a full time basis. Her doctor indicated that effective 9/21/16 she could work a full eight hour work day with modified duties. In particular, she was limited to three hours per day of fine or gross hand manipulation and ten pounds of lifting. She was not to engage in repetitive pinching, gripping or grasping bilaterally.

Claimant testified that her last job with employer was as a "finisher." Sometimes she would prepare plastic units for the painters, and other times she would assemble the units and pack them for shipping. Sometimes the plastic pieces were small enough to fit in her hand, and other times they were larger than her. She explained that she left that job because her employer could not accommodate restrictions for her hand. With reference to her prior employment experience, she testified that she previously did painting work, but could not do that with her physical restrictions because she could not hold the brush or spray gun for so many hours. She also noted that she had done assembly work throughout most of her working career.

Claimant testified that she earned a GED in 1995, and was currently engaged in online courses and working with her vocational rehabilitation counselor to train for office work. She acknowledged that she was just starting with those courses. In the meantime, she had been looking

for work. Claimant submitted logs of the jobs for which she had applied, including multiple counter attendant jobs, office jobs, a dishwashing position, and a waitress job. The hearing officer opined that the counter jobs would likely require her to lift and handle items as she cashed people out, and claimant explained the difference between such jobs and assembly. In particular, she explained that in assembly she had a constant grip on small washers and screws, or whatever tool she was using, and she held them in her hand, gripping and grasping constantly, without putting them down and picking them back up. In contrast, if she worked at a cash register, she would move things around, but would not have to continually grip them, and would work the buttons on the register.

No other witnesses testified and there was no other evidence.

The administrative law judge (ALJ) made the following findings after an evidentiary hearing at which claimant appeared and testified. Claimant was employed as a finisher for approximately six years until she stopped work due to bilateral osteoarthritis in her hands. Her last day of work was September 19, 2016. Claimant's prior work history primarily involved painting. She was no longer physically able to do that work because she cannot perform repetitive gripping or grasping. Claimant has a GED and has taken some math and introductory computer classes. Claimant's goal is to get a job in an office, but she has also applied to retail positions.

The ALJ concluded that because claimant's employment ended due to a certified health condition, claimant was disqualified from receiving benefits for the week ending December 31, 2016. The ALJ concluded that claimant had not demonstrated that she was able to work. The ALJ concluded that claimant's goal of working in an office was not consistent with her current skills and abilities, and claimant's physical restrictions of avoiding repetitive gripping or grasping were incompatible with the retail jobs for which she had applied, as "retail work is highly repetitive." In May 2017, the Employment Security Board issued a decision adopting the ALJ's factual findings and legal conclusions and affirming the denial of benefits. One Board member dissented. Claimant appealed to this Court.

The Employment Security Board's decision "is entitled to great weight on appeal." Fleece on Earth v. Dep't of Emp't & Training, 2007 VT 29, ¶ 4, 181 Vt. 458. This Court will affirm the Board's factual findings absent clear error, and will uphold its legal conclusions if they are reasonably supported by the findings. 863 To Go, Inc. v. Dep't of Labor, 2014 VT 61, ¶ 8, 196 Vt. 551.

The Board did not err in concluding that claimant was disqualified from receiving benefits for a week because she stopped working due to a certified health condition that prevented her from carrying out her work as a finisher/assembler. Pursuant to the then-applicable statute, an individual is disqualified for unemployment compensation benefits for at least one week and up to six weeks after filing a claim for benefits if the individual leaves his or her last employer "without good cause attributable to such employing unit, because of a health condition . . . which precludes the discharge of duties inherent in such employment." 21 V.S.A. § 1344(a)(3). Claimant acknowledges that she left her prior job because of health issues that prevented her from doing that job, and the record evidence supports the Board's findings and conclusion on this point. Accordingly, we affirm the Board's determination that she was disqualified from receiving benefits for the week ending December 31, 2016.

However, we conclude that the Board's determination that claimant was ineligible to receive any unemployment compensation benefits because she was unable to work was not supported by the evidence. In order to receive benefits, an individual must register and report to

an unemployment office, file a claim, and be “able” and “available” to work. 21 V.S.A. § 1343(a)(3); In re Platt, 130 Vt. 329, 332 (1972). A claimant with a physical disability that gives rise to work restrictions may still be entitled to benefits if the claimant is able and available to do suitable work in spite of the disability. See Willard v. Vt. Unemp’t Comp. Comm’n, 122 Vt. 398, 405 (1961).

In this case, although claimant had a longer term goal of office work, for which she was receiving vocational rehabilitation services, she had applied for a series of “counter-attendant” jobs, including at a paint store, a hardware store, and a flooring store. There was no evidence that the essential physical requirements for these jobs required a lifting capacity in excess of her ten pound limitation, or repetitive or consistent use of her upper extremities for more than a total of three hours in a day. Nor was there any evidence that these positions were beyond her qualifications. Although we recognize as a matter of common experience that some cashier positions—say, in a high-volume grocery store—require consistent use of one’s hands and arms, including a fair amount of gripping, that is not necessarily the case in many of the kinds of establishments to which claimant was directing her job-search activities. The ALJ’s assumption on that point, adopted by two of the three members of the Board, is unsupported by any evidence in the record. The finding is contradicted by claimant’s own testimony describing the distinction between the physical acts of her prior job that she could no longer do, and the act of moving items on a counter or punching keys in a register. Because the Board’s findings and ultimate conclusion as to claimant’s ability to work was not supported by record evidence, we cannot uphold the Board’s determination.

Reversed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice