VERMONT SUPREME COURT
109 State Street
Montpelier VT 05609-0801
802-828-4774
www.vermontjudiciary.org

Case No. 23-AP-072

Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

NOVEMBER TERM, 2023

Matthew J. Bennett* v. Department of Labor	}	APPEALED FROM:
	}	
	}	Employment Security Board
	}	CASE NO. 02-22-118-01

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

Claimant appeals from an order of the Employment Security Board in which it concluded that he was ineligible for unemployment compensation benefits received in 2020 and liable for the resulting overpayment and imposed administrative penalties. We affirm.

The record in this case reflects the following. Between April and September 2020, claimant filed for and received unemployment benefits. In a subsequent audit, the Department's Program Integrity Unit identified discrepancies between the wages reported by claimant in his filings during this period and his wages as reported by two employers, Cleantech Building Maintenance Inc. and Lakeside Electric Inc. The Department found that claimant intentionally misrepresented material facts when filing some of his claims by failing to report all of the wages he received from Cleantech and Lakeside. It concluded that claimant was liable for $8508 in overpaid benefits and a $1277 penalty and was disqualified from receiving benefits for twenty-two weeks. See 21 V.S.A. § 1346(b) (providing that individual claiming unemployment benefits must "certify that he or she has not, during the week with respect to which . . . benefits are claimed, earned or received wages or other remuneration for any employment . . . otherwise than as specified in his or her claim"); id. § 1347(a), (c), (e) (providing that where claimant intentionally misrepresents or fails to disclose material fact and therefore receives benefits for which they were ineligible, claimant is liable for overpayment and fifteen percent penalty and may be disqualified from receiving benefits for period of weeks).

Claimant appealed the Department's determination to an administrative law judge (ALJ). During the subsequent evidentiary hearing, claimant conceded that he received some benefits for weeks in which he was ineligible but argued that he should not be liable for the full amount of the overpayment because it was only partially his fault. Claimant alleged that his employers provided inaccurate information to the Department about his wages and that the Department's computerized claim system malfunctioned and incorrectly recorded some of his claims. In support of his arguments, claimant submitted a series of calendars which he described as containing his contemporaneous notes about the hours he worked and wages he earned between May and September 2020.

The ALJ issued a written decision in which he found that in some of claimant's unemployment filings, claimant reported that he did not work and received no wages during weeks in which he worked, and in others, claimant reported wages at approximately half the amount reported by his employers. The ALJ did not credit claimant's theory that his employers misreported his wages, observing that claimant's own notes reflected that he worked and received wages during weeks when he filed claims certifying that he neither worked nor received wages. The ALJ also did not credit claimant's hypotheses as to how the Department's computerized system could have incorrectly recorded some of his weekly claims, finding that they amounted to complete supposition. He noted that at no point did claimant receive less benefits than he was eligible for or report more wages than the employers' payroll records reflected. The ALJ therefore sustained the Department's determination.

Claimant appealed to the Board, which adopted the ALJ's findings and conclusions and affirmed his decision. This pro se appeal followed. Before turning to claimant's arguments, we address two pending motions.

After claimant filed his brief, the Department filed a motion to modify or correct the record on appeal.[1] The Department seeks to supplement the record with what it describes as evidence submitted to the ALJ "by the appellee" and inadvertently omitted from the record prepared for this appeal. See V.R.A.P. 13(b), (c) (providing that agency or board from which appeal is taken is responsible for transmitting the record, which includes the items listed in 3 V.S.A. § 809(e), to this Court); 3 V.S.A. § 809(e) (providing that record in contested administrative case includes motions and "all evidence received or considered"). However, the Department is the appellee in this case, and each of the exhibits it submitted at the hearing before the ALJ appear to be contained within the record originally transmitted. The material with which the Department proposes to supplement the record consists of what appears to be an email from claimant to the Department requesting to reschedule the hearing before the ALJ, followed by fifteen pages of documents matching the description of exhibits admitted by claimant at that hearing and referenced in his brief. We therefore assume that the Department in its motion instead intended to reference materials submitted by the claimant. Claimant did not oppose the Department's motion. See V.R.A.P. 27(a)(3) (providing that with certain exceptions "any party may file a response to a motion within 14 days after service of the motion").

Vermont Rule of Appellate Procedure 10(e) allows for the preparation of a supplemental record on stipulation of the parties, creates a procedure for the resolution of disagreements between the parties about whether the record accurately reflects what occurred below, and finally provides that "[a]ll other questions about the form and content of the record must be presented to the Supreme Court." As the Department has not indicated the presence of a stipulation or a disagreement, we proceed under this final provision. Because it is the Department's obligation to transmit the record, and because the materials with which the Department seeks to supplement the record appear to correspond to those submitted by claimant, who did not oppose supplementation of the record and references some of these materials in his brief, the Department's motion is granted.

[1] In its motion, the Department cited Vermont Rule of Appellate Procedure 10(f). We assume the Department intended to reference Rule 10(e), which governs correction or modification of the record, because a 2021 amendment to Rule 10 eliminated subdivision (f) and redesignated it as subdivision (e). See Reporter's Notes—2021 Amendment, V.R.A.P. 10.

Following the Department's motion to supplement the record, claimant filed a motion to dismiss his appeal on grounds of fairness. He argues that counsel for the Department should have entered an appearance before the ALJ and the Board, and that it is too late to do so now. He also contends—in apparent reference to the Department's motion to supplement—that had he not appealed to this Court, he would have been liable for an overpayment and penalty on the basis of an inaccurate record.[2] A docketed appeal may be dismissed "on the appellant's motion on terms agreed to by the parties or fixed by the court." V.R.A.P. 42(a)(2). The motion "must state with particularity the grounds for the motion and the order or relief sought." V.R.A.P. 27(a)(2)(A). Claimant has identified no authority in support of his arguments and, more fundamentally, it is unclear what relief he seeks. Because claimant seems to suggest that the Department should be penalized for the reasons he identifies, it is not apparent that he intends the result which would lie were his motion granted—if claimant's appeal were dismissed, the Board's determination would stand. We deny claimant's motion to dismiss because it does not satisfy the requirements of Rule 27(a)(2)(A).

On appeal, claimant challenges the procedures at the hearing before the ALJ and the Board's factual findings. He also raises questions about hazard pay he alleges he is owed by Cleantech and a letter he alleges Lakeside sent to the Department. Our review of Board decisions is "highly deferential." 863 To Go, Inc. v. Dep't of Labor, 2014 VT 61, ¶ 8, 196 Vt. 551. "Absent a clear showing to the contrary, any decisions within its expertise are presumed to be correct, valid, and reasonable." Bouchard v. Dep't of Emp. & Training, 174 Vt. 588, 589 (2002) (mem.). We will affirm its factual findings "if they are supported by credible evidence, even if there is substantial evidence to the contrary." Cook v. Dep't of Emp. & Training, 143 Vt. 497, 501 (1983).

First, claimant argues that during a June 2022 interview, the Department's representative was permitted to refer to documents which were not part of the record. Though it appears from the context that claimant is referencing the hearing before the ALJ on May 31, 2022, claimant has not cited any part of the hearing transcript in support of this argument. Cf. V.R.A.P. 28(a)(4) (providing that appellant's principal brief must contain "citations to the . . . parts of the record on which the appellant relies). However, we assume claimant is referencing a portion of the hearing during which he expressed a belief that some of the wages reported by Lakeside may not correspond with his hourly rate of pay, and the ALJ asked the Department's representative whether Lakeside provided information about claimant's hourly rate. The Department's representative replied that though it was not included in the exhibits, claimant had sent her an earnings statement from a period between August 28 and September 3, 2020, which included information about his hourly rate. She explained that she compared this documentation with the information she received from Lakeside. Claimant replied, "that's fine," but indicated that he likely had a lower hourly rate in June. The Department's representative replied that claimant also sent her earlier earnings statements, including from June, and that she would have used the hourly rate corresponding to the time period in question in making her calculations. Claimant raised no objection to this testimony before the ALJ, but did raise the issue at the subsequent Board hearing. The Board did not directly address claimant's argument on this point before adopting the ALJ's factual findings.

[2] As discussed above, the Department's motion to supplement did not suggest that the record below was inaccurate, but instead sought to supplement the record on appeal to conform with the record below.

Except where otherwise provided, neither the Board nor the ALJ are "bound by common law or statutory rules of evidence or by technical or formal rules of procedure . . . but may conduct a hearing or trial in such manner as to ascertain the substantial rights of the parties." 21 V.S.A. § 1351; Kaufman v. Dep't of Emp. Sec., 136 Vt. 72, 74 (1978) (per curiam) (holding that § 1351 requires adherence to "fundamental principles of fairness"). Here, the Department's representative briefly testified about documents which had not been entered into the record. She indicated that those documents were provided by claimant, and explained how she used them, but did not testify about the contents of the documents beyond stating that they included claimant's hourly rate. Claimant did not object to this testimony at the time it was offered, request that the referenced documents be admitted into evidence, or dispute the description of those documents. Though the better practice would have been for the Board to expressly address claimant's argument about this testimony in its decision, we find no error because we conclude that claimant's substantial rights were not violated by this testimony under the specific circumstances present here. See 21 V.S.A. § 1351; see also, e.g., Taylor v. Dep't of Labor, No. 2014-198, 2014 WL 7237872 at *2, 4 (Vt. Dec. 12, 2014) (unpub. mem.) [https://perma.cc/T9CY-RJVZ] (concluding that Board did not abuse its discretion in declining to remand case to ALJ for consideration of complete version of document which had been entered into evidence at ALJ hearing with missing page where claimant had form in hand at beginning of ALJ hearing and did not contemporaneously object to exhibit or argue that it was incomplete).

Claimant next contends that while the Department's representative was permitted to provide a statement at the hearing before the ALJ, he was not afforded the same opportunity. He also argues that the ALJ determined the outcome of his appeal before the conclusion of the hearing because the ALJ discussed a repayment plan. The hearing transcript is not consistent with these representations. Before the conclusion of the hearing, the ALJ asked claimant whether there was anything else he would like to say, and claimant made a statement. Though the ALJ mentioned that contacting the Department about a repayment schedule was an option, the ALJ went on to say, "I would wait until I issue my decision and then go from there." As a result, we do not further consider these arguments.

Claimant also raises questions related to a letter he alleges Lakeside sent to the Department and hazard pay he contends he is owed by Cleantech. To the extent claimant suggests that either of these issues could have bearing on the outcome here, he has not preserved such arguments for our review because he did not raise them below. See Allen v. Vt. Emp. Sec. Bd., 133 Vt. 166, 169 (1975) (holding that argument not raised to the Board was not preserved for appellate review).

Finally, claimant challenges the Board's factual findings. He contends that: the information in unspecified "wage charts" is unclear; his pay stubs show that the wages reported to the Department by his employers were inaccurate; the documents submitted by Cleantech were also inaccurate because claimant alleges that he was not let go, but instead quit; and the Department's claim system malfunctioned while recording his claims. We are unable to consider claimant's argument about the wage charts because claimant has not identified which of the many charts in the record he refers to. Cf. V.R.A.P. 28(a)(4). Claimant's argument that his pay stubs undermine the Board's findings about his wages is without merit because his pay stubs are not part of the record in this case. At one point in the hearing before the ALJ, claimant indicated that he would "have to dig up [his] check stubs[,]" but never requested an opportunity to do so. The factfinder did not err by not weighing evidence which was never presented to it.

Claimant's remaining arguments on this point amount to a disagreement with the factfinder's assessment of the evidence and testimony. Claimant offered two theories as to how the discrepancies identified by the Department came to be. After evaluating the evidence, the factfinder rejected those theories and concluded that the discrepancies were a result of claimant's intentional failure to accurately report the wages he earned when filing claims. Though claimant argues that the factfinder should have drawn a different conclusion, "we do not reweigh the evidence on appeal." Worrall v. Dep't of Labor, 2022 VT 46, ¶ 15, __ Vt. __; see also Cook, 143 Vt. at 501 ("Weight, credibility, and persuasive effect are for the trier of fact[.]"). Because the Board's findings are supported by the evidence, we will not disturb them on appeal. Johnson v. Dep't of Emp. Sec., 138 Vt. 554, 555 (1980) (per curiam) (explaining that this Court will not overturn the Board's factual findings "unless they are clearly unsupported by the evidence").

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Nancy J. Waples, Associate Justice