2020 IL App (1st) 192106-U
No. 1-19-2106
Order filed December 14, 2020

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

TONY WILBON, Plaintiff-Appellee, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; DIRECTOR OF ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; and BOARD OF REVIEW, Defendants-Appellants, and KARAVITES RESTAURANT, INC. d/b/a MCDONALD'S c/o UC EXPRESS ADP, INC., Defendant.	)	Appeal from the Circuit Court of Cook County. No. 19 L 50382 Honorable Michael Francis Otto, Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Walker and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: Board's decision denying unemployment benefits to claimant for failing to show he was able to work and available for work was clearly erroneous.

¶ 2 The Board of Review of the Illinois Department of Employment Security appeals from a trial court order reversing the Board's decision denying unemployment benefits to Tony Wilbon. The Board found Wilbon, who sought benefits because his employer had reduced his hours, was not able or available for work under section 500C of the Unemployment Insurance Act (820 ILCS 405/500C (West 2018)) because he had a medical condition, was under a doctor's care, and had failed to provide evidence that he could work increased hours.

¶ 3 On administrative review, the circuit court reversed the Board's decision, finding that the Department failed to admit certain documents, including the employer's protest, into evidence and thus "there was no competent evidence to support the Board's determination." The Department filed a motion to reconsider arguing the trial court misapplied the law because section 801A of the Act provides that any document in the Department's files that had been submitted by a party shall be a part of the record before the referee and shall be competent evidence bearing on the issues. 820 ILCS 405/801A (2018). Thus, the Department asserted, the employer's protest and other documents in the Department's files comprised part of the record and did not need to be admitted into evidence. The circuit court denied the motion to reconsider finding that the Board waived its section 801A argument by failing to raise it earlier.

¶ 4 The Department argues the trial court erred because the Board's finding that Wilbon was not able to work or available for work was not clearly erroneous. But, the Board's finding that Wilbon was not able to work and available for work merely because he testified that he was under a doctor's care was clearly erroneous so we affirm the trial court's decision.

¶ 5 Background

¶ 6 Wilbon began working for Karavites Restaurant, Inc. d/b/a McDonald's in 2012. (The employer will be referred to as McDonald's.) Wilbon filed for unemployment insurance benefits for December 23, 2018 through January 26, 2019, claiming he had been laid off due to lack of work. McDonald's filed a written protest stating Wilbon was still an employee but, at Wilbon's request, his hours had been reduced because he said he had a heart problem and could not work more hours until he received his doctor's approval. According to McDonald's protest, Wilbon worked two days each week and "always ask[ed] to leave early because most of the time he [felt] tire[d] or sick."

¶ 7 During a telephone interview with a Department claims adjudicator, Wilbon stated he repeatedly asked for more hours but his supervisor told him he would need a note from his doctor. When the claims adjudicator asked Wilbon if he was able to work, Wilbon said he was not being monitored by a doctor for his heart but later, when asked what he was doing to remove work restrictions, he said he was under a doctor's care and would obtain a statement from his doctor that he can work more hours, but had not yet made a doctor's appointment. The claims adjudicator was unable to reach McDonald's by telephone and relied on its protest for its version of events.

¶ 8 The claims adjudicator determined that Wilbon was ineligible for benefits because he was not able to work and available for work increased hours under section 500C of the Act (820 ILCS 405/500C (West 2018)) due to a medical restriction.

¶ 9 Wilbon appealed the decision to a Department referee. Wilbon testified at the hearing; the employer did not participate. At the beginning of the hearing, which was conducted by telephone, the referee told Wilbon "[t]here are documents that I'm going to refer to today as Agency Exhibit 1 *** [that] are already part of the Local Office record and I may refer to any or all of those document[s] during this hearing." The referee stated that the documents included "the adjudication

summary prepared by the Local Office, the [e]mployer's protest, your appeal, and the Local Office determination."

¶ 10 Wilbon testified that he did not seek a reduction in hours and said his hours were reduced because business slowed down in the winter. He had been working 30 to 35 hours per week; presently he was working just Fridays and Saturdays. Wilbon denied any medical restrictions that would keep him from working more hours and said he believed there might have been miscommunication between him and McDonald's about his medical condition. He acknowledged, however, that he was seeing a heart doctor once a month, and that he told the claims adjudicator he was under a doctor's care and was waiting to see the doctor to get a note regarding his employment. He said he gave his employer the doctor's note on February 1, and sent a doctor's note to the Department.

¶ 11 The referee affirmed the claims adjudicator's decision and determined that Wilbon was ineligible to receive benefits because he was not able to work and available for work during the relevant period. The referee found that McDonald's had requested a medical release to work increased hours, but Wilbon had not provided it. She said Wilbon was under a doctor's care, but failed to provide information regarding the type of care or whether the doctor had restricted him from working.

¶ 12 Wilbon appealed the referee's decision to the Board. He provided a written argument and attached a doctor's statement, dated March 13, 2019, stating that he had had no medical restrictions between December 23, 2018, and January 22, 2019.

¶ 13 The Board affirmed the referee's decision to deny benefits. The Board did not consider Wilbon's written argument or the March 13 doctor's statement because Wilbon had not certified that they were served on the employer as required. The Board also noted that Wilbon had not

provided a doctor's statement authorizing increased hours before or during the hearing with the referee. The Board found Wilbon's testimony that he was able to work and available for work not to be credible in light of his statements to the claims adjudicator that he was "still under a doctor's care," and his failure to provide the referee a doctor's statement showing his ability to work during the relevant period. (The referee also found Wilbon was not actively seeking work, but the Board did not address that finding, so it is not before us.)

¶ 14 Wilbon filed a *pro se* complaint for administrative review of the Board's decision. The Department filed as its answer the record of the administrative proceedings. The circuit court reversed the Board's decision, finding that Agency Exhibit 1 was not admitted into evidence and thus "there was no competent evidence to support the Board's determination."

¶ 15 The Department filed a motion to reconsider arguing that the court misapplied existing law. Specifically, the Department asserted that section 801A of the Act provides that any document in the Department's files that a party had submitted shall be a part of the record before the referee and constitute competent evidence bearing on the issues. 820 ILCS 405/801A (2018). The Department contended that because the documents in Agency Exhibit 1 (which included the employer's protest and a statement from the employer's representative that Wilbon has a heart problem and can only return to increased hours with a note from his doctor) constituted competent evidence and were deemed part of the record by operation of law, the referee was not required to specifically admit Agency Exhibit 1 into evidence.

¶ 16 The trial court denied the motion to reconsider finding that the Department waived its section 801A argument by not mentioning it during oral argument and could not raise it for the first time in a motion to reconsider. The court added that if the issue were before it, there would be "severe due process concerns" with section 801A, because the statements in Agency Exhibit 1

are "clearly at least one level of hearsay" that was not subject to cross-examination because McDonald's did not participate in the hearing before the referee.

¶ 17 Analysis

¶ 18 Standard of Review

¶ 19 We initially note that Wilbon, as the appellee, has not filed a brief. We will nonetheless decide the merits of this appeal because we can address the claimed errors without the aid of an appellee's brief. See *State Farm Mutual Insurance Co. v. Ellison*, 354 Ill. App. 3d 387, 388 (2004); see also *First Capitol Mortgage Corp. v. Talandis Construction Corp*., 63 Ill. 2d 128, 133 (1976).

¶ 20 We review the Board's decision rather than the decisions of circuit court, the referee, or the claims adjudicator. *Universal Security Corp. v. Department of Employment Security*, 2015 IL App (1st) 133886, ¶ 12. The degree of deference we afford to an administrative agency's decision depends on whether the question involves one of fact, law, or a mixed question of fact and law. *Id*. We deem the Board's factual findings and conclusions *prima facie* true and correct; we will reverse them only if they are against the manifest weight of the evidence. *Persaud v. Department of Employment Security*, 2019 IL App (1st) 180964, ¶ 14. We review the Board's legal determinations *de novo*. *Id*. ¶ 15. Mixed questions of fact and law, those where the historical facts are admitted or established and the sole question involves whether the facts satisfy the statutory standard, may be reversed only when clearly erroneous. *Id*. ¶ 16. A clearly erroneous decision leaves the reviewing court " 'with the definite and firm conviction that a mistake has been committed.' " *Id*. (quoting *American Federation of State, County & Municipal Employees, Council 31 v. State Labor Relations Board, State Panel*, 216 Ill. 2d 569, 577-78 (2005)).

¶ 21 The Board found that Wilbon was ineligible for benefits because he was not able to work or available for work due to a medical condition during the time period for which he sought to

claim benefits. The Board's decision on whether a claimant was available for work under the Act presents a mixed question of law and fact, involving an examination of the legal effect of a given set of facts, and is reviewed for clear error. *Moss v. Department of Employment Security*, 357 Ill. App. 3d 980, 984-85 (2005).

¶ 22 Able to Work and Available for Work

¶ 23 The primary purpose of the Act is to provide compensation benefits to unemployed individuals to alleviate their economic distress caused by involuntary unemployment. *Miller v. Department of Employment Security*, 245 Ill. App. 3d 520, 522 (1993). Receiving unemployment insurance benefits involves a conditional right, with the burden of proving eligibility on the claimant. *Childress v. Department of Employment Security*, 405 Ill. App. 3d 939, 943 (2010). Section 500 of the Act states that for a claimant to be eligible for benefits, he or she must: (i) be registered for work and continue to report to an unemployment office; (ii) have made a claim for benefits each week; and (iii) be able and available for work, and actively seeking work for the period of time. 820 ILCS 405/500 (West 2018).

¶ 24 The Act does not define "able to work." Section 2865.105(a) of the Department's regulations, however, states "[a]n individual is able to work when he or she is physically and mentally capable of performing work for which he or she is otherwise qualified." 56 Ill. Admin. Code § 2865.110(a). Section 2865.105(b) further states that "[t]he focus is upon the individual's condition, [and] the employer's willingness to hire him or her is not relevant." 56 Ill. Admin. Code § 2865.105(b). The Act also does not define "available for work," but section 2865.110(a) of the Department's regulations states that "[a]n individual is available for work, even if he or she imposes conditions upon the acceptance of work, unless a condition so narrows opportunities that she or he has no reasonable prospect of securing work." See 56 Ill. Admin. Code § 2865.110(a).

Courts have interpreted "available for work" to mean that "the claimant stands ready and willing to accept suitable work." *Moss v. Department of Employment Security*, 357 Ill. App. 3d 980, 985 (2005); *Miller v. Department of Employment Security*, 245 Ill. App. 3d 520, 522 (1993).

¶ 25 As the Board notes in its brief, "[t]his was not a case where the Board weighed a claimant's consistent version of events against a conflicting version of events in the employer's protest and credited the employer's version." Instead "the Board's decision was based on its assessment of Wilbon's credibility in light of the fact that he had changed his story after the claims adjudicator denied his application for benefits" The only finding before us is the Board's determination that Wilbon's testimony that he was able to work and available for work was not credible in light of his statements to the claims adjudicator that he was "still under a doctor's care," and his failure to provide the referee a doctor's statement showing his ability to work during the relevant period.

¶ 26 Because we defer to the Board's findings of fact, we accept its finding that Wilbon changed his story after initially saying he was not under a doctor's care. Indeed, during the hearing with the claims adjudicator, Wilbon testified that he was seeing a heart doctor once a month. But being under a doctor's care does not mean Wilbon was not ready for work and willing to accept suitable work. It simply means that, like so many employees, he was seeing a physician for a medical issue. Being under a doctor's care does not establish that Wilbon was not able to work or available for work under section 500C of the Act. There were no findings by the Board that Wilbon had requested his hours be reduced or had told his employer that he could not work due to a medical issue. Thus, the Board's finding affirming the denial of unemployment benefits was clearly erroneous.

¶ 27 As noted, the Board's decision turned on its findings regarding Wilbon's credibility, and not on the employer's protest or other documents in the Department's files. But, contrary to the

trial court's holding, the Board could have based its decision on those documents even if the referee did not formally admit them into evidence. Section 801A of the Act provides that "[a]t any [referee] hearing, the record of the claimant's registration for work, or of the claimant's certification that, during the week or weeks affected by the hearing, he was able to work, available for work, and actively seeking work, or any document in the files of the Department of Employment Security submitted to it by any of the parties, shall be a part of the record, and shall be competent evidence bearing upon the issues." 820 ILCS 405/801A (2018). Accordingly, the General Assembly has determined that, by operation of law, documents submitted by the parties–including employer protests–automatically become part of the record and constitute competent evidence. But the Board's decision did not address those documents, and they are not before us.

¶ 28 The Board's finding that Wilbon was not entitled to unemployment benefits because he failed to show that he was able to work and available for work was clearly erroneous. We affirm the judgment of the trial court.

¶ 29 Affirmed.