

-DECISION-

Claimant:
LINDA CARPENTER

Decision No.: 2315-BH-07

Date: October 25, 2007

Appeal No.: 0709579

Employer:
FAMILY AND NURSING CARE INC

S.S. No.:

L.O. No.: 61

Appellant: Employer

Issue: Whether the claimant was able, available and actively seeking work within the meaning of the Maryland Code, Labor and Employment Article, Title 8 Section 903.

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the *Maryland Rules of Procedure, Title 7, Chapter 200*.

The period for filing an appeal expires: November 24, 2007

- APPEARANCES -

FOR THE CLAIMANT:
Present
Donald Mooney (Friend)

FOR THE EMPLOYER:
Mindy Kursban-Counselor
Neal Kursban-Executive V.P.

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearing. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file.

A claimant may not impose conditions and limitations on her willingness to work and still be available as the unemployment insurance statute requires. *Robinson v. Maryland Empl. Sec. Bd.*, 202 Md. 515 (1953). However, *Md. Code Ann., Lab. & Empl. art.*, § 8-903(b) provides, "The Secretary may not use the disability of a qualified individual with a disability as a factor in finding that an individual is not able to work under subsection (a)(1)(i) of this section."

In this case, the Board is not persuaded that the claimant suffers from a recognized "disability" which requires an accommodation from the requirement that she be able and available for full-time employment. *Md. Code Ann., Lab. & Empl. art.*, § 8-903(a)(i) and (ii).

The Americans with Disabilities Act ("ADA") defines a "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.". The claimant's principal assertion is that she is substantially limited in, *inter alia*, the major life activity of working. The claimant asserts that her back injury is a physical impairment restricting her ability to work full time. Although working is a major life activity, *see 29 C.F.R. § 1613.702(c) (1998)*, in order to prove that her ability to work has been substantially impaired, the claimant must show a disability that significantly restricts her ability to perform a broad class of jobs, not that she is only unable to perform a particular position. *Cline v. Wal-Mart Stores*, 144 F.3d 294, 303 (4th Cir. 1998). Therefore, whether the claimant is "disabled" turns on whether her back injury is substantially limiting. *See Pollard v. Highs of Baltimore*, 281 F.2d 462, 467 (4th Cir. 2002).

Judge Posner of the 7th Federal Circuit best sums up the position of the Board: "The number of Americans restricted by back problems to light work is legion. They are not disabled." *Quoting, Mays v. Principi*, 301 F.3d 866, 869 (7th Cir. 2002). Although the claimant submitted medical evidence supporting her assertion of the existence of a back problem or injury, *see Claimant's Exhibit B1*, there is no opinion as to a reasonable degree of medical certainty that the claimant is unable to work full time or that her medical issues result in the limitation of a major life activity. Although her back injury may affect her functional ability to "sit, stand, walk, lift, carry and travel" there is no medical opinion or order that the claimant cannot perform full-time sedentary work in an office or administrative setting. *See Claimant's Exhibit B1*.

The Board finds that the MVA grant to the claimant of a license plate for "Persons with a Disability" is not persuasive or dispositive. *See Claimant's Exhibit B2*. The Board is persuaded that the claimant's restrictions upon her availability work are self-imposed and that there is insufficient evidence that she is

unable to work full-time. The Board is persuaded that although the claimant has some physical limits on her work activities, that these restrictions do not substantially limit the major life activity of working.

FINDINGS OF FACT

The claimant was employed as a part-time administrative and office worker. The claimant self-restricted her work to twenty to thirty hours per week when performing work for this employer. The claimant suffers from chronic lower back pain and fibromyalgia. Despite these medical conditions, the claimant is not under a physician's medical restriction which would limit her ability to perform sedentary office or administrative work. The claimant is not "disabled" within the meaning of the Americans with Disabilities Act. Since filing her claim for benefits, the claimant has not sought full-time work and has self-restricted her search to part-time work only.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-903 (Supp. 1996) provides that a claimant for unemployment insurance benefits shall be (1) able to work (2) available for work; and (3) actively seeking work. In Robinson v. Maryland Employment Sec. Bd., 202 Md. 515, 97 A.2d 300 (1953), the Court of Appeals held that a claimant may not impose restrictions upon his or her willingness to work and still be available as the statute requires.

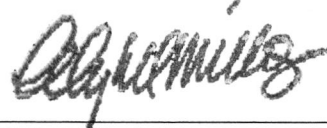
Md. Code Ann., Labor & Emp. Article, Section 8-903 (b) states that the Secretary may not use the disability of a qualified individual with a disability as a factor in finding that an individual is not able to work under Section 8-903 (a) (1) (i).

The evaluation of the evidence and findings of fact are incorporated herein by reference. *Md. Code Ann., Lab. & Empl. art., § 8-903(a)* is a conjunctive test. The claimant must meet all three requirements: that she be able, available and actively seeking work. The claimant has not met her burden in this case. The Board finds, based upon a preponderance of the credible evidence, that the claimant is not available for full-time work because of self-imposed restrictions. The claimant is otherwise able to work full-time in her traditional field of office and administrative work. The claimant has not been actively seeking full time work. Therefore, the Board shall reverse the hearing examiner's decision.

DECISION

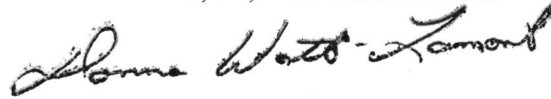
The claimant is not able to work, available for work and actively seeking work within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 903. She is disqualified from receiving benefits from the week beginning April 22, 2007 and until she is meeting the requirements of the Law.

The decision of the Hearing Examiner is reversed.



Clayton A. Mitchell, Sr., Associate Member

Francis E. Sliwka, Jr., Associate Member



Donna Watts-Lamont, Chairperson

Date of hearing: October 16, 2007

Copies mailed to:

LINDA CARPENTER

FAMILY AND NURSING CARE INC

SUSAN BASS

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

LINDA CARPENTER

SSN #

Claimant

vs.

FAMILY AND NURSING CARE INC

Employer/Agency

Before the:

Maryland Department of Labor,

Licensing and Regulation

Division of Appeals

1100 North Eutaw Street

Room 511

Baltimore, MD 21201

(410) 767-2421

Appeal Number: 0709579

Appellant: Claimant

Local Office : 61 / COLLEGE PARK

CLAIM CENTER

June 22, 2007

For the Claimant : PRESENT , DONALD MOONEY

For the Employer : PRESENT , NEAL KURSBAN

For the Agency:

ISSUE(S)

Whether the claimant is able, available for work and actively seeking work within the meaning of the MD Code Annotated, Labor and Employment Article, Title 8 Sections 903 and 904; and/or whether the claimant is entitled to sick claim benefits within the meaning of Section 8-907.

FINDINGS OF FACT

The claimant opened a claim for unemployment insurance benefits and established a benefit year beginning April 22, 2007 and qualified for a weekly benefit amount of \$238.

The claimant has been actively seeking part-time work. The claimant is willing to work from 20 to 30 hours a week performing office or administrative work where she has a long employment history. The claimant retired from working full time in 2005. The claimant is 67 years old. The claimant stopped working full-time because of chronic back problems. Specifically, over the years the claimant's back problems had become progressively worse. The claimant has had three serious back surgeries. The claimant was told by her physician that in time, "her body would tell her" when it was time for her to stop working full time hours." That time came for the claimant in 2005.

The claimant's last employment began in June 2006 and ended in March 2007. The claimant was performing work as an executive assistant. The claimant's original work schedule was for four hours a day, four days a week. However, at times the claimant worked up to 22 hours a week as necessary. The claimant became separated from that employment, when the employer needed a full time employee and the claimant was incapable of working full time hours.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-903 (Supp. 1996) provides that a claimant for unemployment insurance benefits shall be (1) able to work (2) available for work; and (3) actively seeking work. In Robinson v. Maryland Employment Sec. Bd., 202 Md. 515, 97 A.2d 300 (1953), the Court of Appeals held that a claimant may not impose restrictions upon his or her willingness to work and still be available as the statute requires.

Md. Code Ann., Labor & Emp. Article, Section 8-903(b) states that the Secretary may not use the disability of a qualified individual with a disability as a factor in finding that an individual is not able to work under Section 8-903(a)(1)(i).

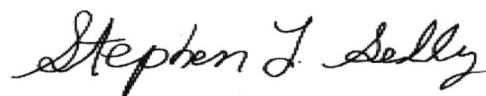
EVALUATION OF EVIDENCE

The claimant gave credible testimony that she is not physically capable of working full time hours at this stage in her life. As noted above, a qualified person with a disability may not be disqualified from receiving unemployment benefits. In this case, the claimant must only look for a part time job out of necessity rather than choice as at this stage of her life she is unable to work full time hours. Therefore, especially as Maryland Law forbids the use of a disability as a factor in determining whether or not a person is able to work, it is held the claimant is in fact qualified to receive benefits under the circumstances of this case even though she is only seeking part-time work.

DECISION

IT IS HELD THAT the claimant is able, available and actively seeking work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-903. Benefits are allowed from the week beginning April 22, 2007, provided that the claimant meets the other eligibility requirements of the Maryland Unemployment Insurance Law. The claimant may contact Claimant Information Service concerning the other eligibility requirements of the law at ui@dllr.state.md.us or call 410-949-0022 from the Baltimore region, or 1-800-827-4839 from outside the Baltimore area. Deaf claimants with TTY may contact Client Information Service at 410-767-2727, or outside the Baltimore area at 1-800-827-4400.

The determination of the Claims Specialist is reversed.



S Selby, Esq.
Hearing Examiner

Notice of Right to Request Waiver of Overpayment

The Department of Labor, Licensing and Regulation may seek recovery of any overpayment received by the Claimant. Pursuant to Section 8-809 of the Labor and Employment Article of the Annotated Code of Maryland, and Code of Maryland Regulations 09.32.07.01 through 09.32.07.09, the Claimant has a right to request a waiver of recovery of this overpayment. This request may be made by contacting Overpayment Recoveries Unit at 410-767-2404. If this request is made, the Claimant is entitled to a hearing on this issue.

A request for waiver of recovery of overpayment does not act as an appeal of this decision.

Notice of Right of Further Appeal

Any party may request a further appeal either in person, by facsimile or by mail with the Board of Appeals. Under COMAR 09.32.06.01A(1) appeals may not be filed by e-mail. Your appeal must be filed by July 09, 2007. You may file your request for further appeal in person at or by mail to the following address:

Board of Appeals
1100 North Eutaw Street
Room 515
Baltimore, Maryland 21201
Fax 410-767-2787

NOTE: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing : June 05,2007
TW/Specialist ID: RWD2Q
Seq No: 002
Copies mailed on June 22, 2007 to:
LINDA CARPENTER
FAMILY AND NURSING CARE INC
LOCAL OFFICE #61
SUSAN BASS