No. 15-AA-568

DISTRICT OF COLUMBIA COURT OF APPEALS

CECELIA G. TOGBA,

Petitioner,

v.

COMMUNITY MULTI SERVICES, INC.,

Respondent.

ON PETITION FOR REVIEW FROM
THE DISTRICT OF COLUMBIA HOUSING AUTHORITY

PETITION FOR REHEARING BY THE DIVISION

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RULE 28(a)(2)(A) STATEMENT

The parties to the case are petitioner Cecelia G. Togba, the claimant below, and respondent Community Multi Services, Inc. (CMS), the employer below. Before the Office of Administrative Hearings, Ms. Togba proceeded *pro se* and CMS was represented by attorney Jason Whiteman. Before this Court, Ms. Togba remained *pro se* until after the issuance of the Memorandum Opinion and Judgment and is now represented by Jonathan H. Levy of the Legal Aid Society of the District of Columbia. CMS never identified counsel, and did not participate in the appeal. No intervenors or amici have appeared.

INTRODUCTION

For the reasons that follow, Petitioner Cecelia G. Togba hereby petitions for rehearing by the Division under this Court's Rule 40. Her previously-filed motion to extend the time to file such a petition through February 16, 2017 remains pending.

In its decision, the Division overlooked or misapprehended two individually dispositive points. *See* D.C. Court of Appeals Rule 40(a)(2). First, the Division overlooked Ms. Togba's submission to an in-person medical evaluation by a doctor employed by Community Multi Services (CMS), who reported his findings to CMS's human resources department. That action provided CMS with all the necessary medical information, making a further medical statement unnecessary under *Bublis v. DOES*, 575 A.2d 301 (D.C. 1990). Second, the Division did not note that the Administrative Law Judge (ALJ) failed to address one of Ms. Togba's arguments in favor of good cause, namely, that CMS's insistence that she obtain medical clearance to work at her own expense was a significant economic hardship.

BACKGROUND

This petition for rehearing challenges the Division's affirmance of the Administrative Law Judge's conclusion that Ms. Togba lacked "good cause" to quit her job. *See* Memorandum Opinion and Judgment dated January 19, 2017 (MOJ), at 3. The relevant facts appear to be undisputed. "In early January of 2015, Ms. Togba complained about her leg and back pain to the human resources director,

Raymond Morant, who sent her to a doctor employed by CMS for an evaluation." MOJ 2; *accord* OAH Transcript of May 5, 2015 (Transcript), at 46, 62, 64-65. Ms. Togba submitted to evaluation by CMS's doctor, who provided "finding[s]" and "remarks" to Mr. Morant. Transcript 46, 62-63. Following those findings, Mr. Morant informed Ms. Togba that she could not return to work until her own doctor provided written clearance for her to do so. *See* Transcript 14, 46-48, 55, 62-64.

In response, Ms. Togba informed Mr. Morant that she could not afford to obtain such clearance and did not have health insurance because it was too expensive. *See* Transcript 60-61. Although Mr. Morant "talked about urgent care" and "other walk-in facilities," Transcript 63, he understood that Ms. Togba would "have to pay" for any of these options and provided no alternative when Ms. Togba informed him that she "didn't have money," Transcript 47; *accord* Transcript 42, 46. Ms. Togba then sent Mr. Morant a letter that was interpreted as a resignation.

The Administrative Law Judge rejected Ms. Togba's assertion that her medical condition constituted good cause to quit. The ALJ did not rely on the nature of the medical condition itself, but, instead on Ms. Togba's alleged failure "to provide [CMS] with a medical statement before resigning." OAH Final Order (May 8, 2015), at 5. The ALJ did not address whether requiring Ms. Togba to pay for her own medical clearance constituted good cause given her lack of funds.

The Division affirmed. It noted that illness or disability aggravated by work

constitutes good cause and that Ms. Togba had a medical condition (stemming from a 2013 automobile accident) that had – at least in 2014 – required limits on her work-related physical activities. MOJ 3. The Division nonetheless viewed itself as bound by *Chimes District of Columbia, Inc. v. King*, 966 A.2d 865, 869-70 (D.C. 2009) to conclude that Ms. Togba lacked good cause because she failed to provide the "medical statement" required by 7 DCMR § 311.7 by continuing to work full time for almost a year before she quit without providing further documentation regarding her medical condition. MOJ 3-4.

ARGUMENT

There are two bases to rehear this decision. First, Ms. Togba met the "medical statement" requirement by submitting to a medical examination by a CMS in-house physician, who, in turn, provided a report on her medical condition to the CMS human resources department. Second, the ALJ ignored entirely Ms. Togba's argument, independent of her medical condition, that the requirement that she obtain written medical clearance at her own expense was a sufficiently significant economic hardship to constitute good cause.

I. *Chimes* Does Not Require an Employee to Provide a Separate Medical Statement When the Employer Already Has the Relevant Medical Information.

As the Division correctly noted, *Chimes* involved an employee whose complicated pregnancy had required work restrictions early on but whose doctor

later cleared her for work. After that clearance was given to the employer, the employee had an episode of pressure and dizziness and stopped working without providing additional medical information. 966 A.2d at 867. This Court held that the employer lacked "sufficient medical information" for there to be good cause to quit under these circumstances because the employer never received "sufficient notice that on or about [the date of the request to stop working, the employee's] pregnancy was aggravated by her work," and therefore the requirement for a "medical statement" under 7 DCMR § 311.7(e) had not been met. 966 A.2d at 869, 870. *Chimes* made clear that the "medical statement" requirement is met when the employer has information "that substantiates the employee's claim that he or she has a medical condition or disability that is being aggravated by his or her continuing to work." *Id.* at 869. The reason for this requirement is "to insure that the employer has the opportunity to ameliorate the work conditions or otherwise provide remedies and so avoid assessment for unemployment benefits." *Bublis v. DOES*, 575 A.2d 301, 303 (D.C. 1990).

The Division here based its ruling on the conclusion that, after March 2014, Ms. Togba continued to work full time and provided no further documentation of her medical condition. MOJ 3. But while Ms. Togba did not personally hand her employer documents explaining her medical condition and how it was aggravated by her work, it is undisputed that CMS had all the relevant information. It is

undisputed that, in direct response to Ms. Togba's complaints about work-aggravated pain in January 2015, Mr. Morant sent Ms. Togba to a CMS physician who determined that Ms. Togba was "not cleared for work" because she "was unable to carry heavy load or heavy duty." Transcript 63; *see* MOJ 2; Transcript 46, 62, 64-65. The Record further demonstrates that this physician reported his findings to Mr. Morant,[1] and, as a result, Mr. Morant informed Ms. Togba that should could not report to work unless and until a doctor certified that she met the job requirements. Transcript 45-47, 62-64.

In short, the employer had full knowledge of Mr. Togba's medical situation (and its relationship to her work) within a few weeks of her resignation. The information was conveyed by "medical statement[s]" by Ms. Togba to CMS's doctor, *see* Transcript 62 (referring to "what she [Ms. Togba] told our doctor"), and by the doctor's report to Mr. Morant. These communications (independently and taken together) fulfilled the purposes of the "medical statement" requirement as articulated by this Court, namely to provide information "that substantiates the employee's claim that he or she has a medical condition or disability that is being aggravated by his or her continuing to work," *Chimes*, 966 A.2d at 869, and "to

[1] CMS's doctor provided a copy of his report to Mr. Morant but not to Ms. Togba or to the ALJ. Transcript 46. However, Mr. Morant's description of this report indicates that CMS's doctor concluded that Ms. Togba's medical condition was sufficiently aggravated by her work duties that she should not work until cleared to do so by her own physician. *See* Transcript 46-48, 62-64.

insure that the employer has the opportunity to ameliorate the work conditions or otherwise provide remedies and so avoid assessment for unemployment benefits." *Bublis*, 575 A.2d at 303. Indeed, because Ms. Togba agreed to be examined by a physician employed by her employer, the employer here had maximal access to information about her medical condition. It would undermine the remedial purpose of the District's unemployment compensation laws to insist on some additional "medical statement" from Ms. Togba here purely as a matter of form, given CMS's essentially unfettered access to information regarding Ms. Togba's medical condition and its relationship to her work.

The uncontested facts listed above also distinguish this case from *Chimes*. In *Chimes*, the employer lacked information about the employee's medical condition (and its impact on her ability to do her job) because the most recent medical information it had was that, although the employee had a complicated pregnancy, she could "continue working." 966 A.2d at 867. The employer thus lacked information regarding any work-caused or work-aggravated medical condition at the time she quit and had no ability to ameliorate the work conditions or otherwise provide remedies. But here, Ms. Togba's communications with CMS's doctor and the doctor's report to Mr. Morant provided CMS with precisely that information and that opportunity (although, instead of providing any remedies or amelioration, CMS chose instead to simply tell Ms. Togba not to return to work).

Indeed, the actual holding in *Chimes* is that the doctor's note received by the employer in that case did not "meet the 'medical statement' requirement" for purposes of unemployment compensation law specifically because in that note the "doctor had cleared her to work." 966 A.2d at 870. Here, the last information CMS had about Ms. Togba was precisely the opposite: that she was *not* cleared to work due to a preexisting medical condition apparently aggravated by her work duties. Thus, CMS here had precisely the medical information that the employer in *Chimes* lacked. Given these dispositive factual differences between this case and *Chimes*, the Division erred in concluding that it was "bound by *Chimes*" to find "that Ms. Togba lacked good cause" here. MOJ 4.

This case is properly governed by *Bublis*, in which, as here, the most recent medical statement provided to the employer indicated that the employee was *not* cleared to work. Based on that medical statement and the fact that "there was no reason for the employer to believe that Bublis's status had changed with respect to her ability to work," this Court found that Bublis had met the "medical statement" requirement and quit with good cause. *Chimes*, 966 A.2d at 870 (describing *Bublis*); *see also Bublis*, 575 A.2d at 304 (finding "good cause" even though "the employer did not receive documentation in the form of a written or oral statement by a physician" because "the information possessed by the employer was enough").

The facts here are similar. At the time of the quit, CMS had recently received

the report of its own doctor stating that Ms. Togba was *not* cleared to work. That report was only a few weeks old, and CMS had no reason to believe that her status had changed. Accordingly, this case is more like *Bublis* than *Chimes* in key respects and the result should be the same as in *Bublis*, rather than *Chimes*. Because the alleged absence of a "medical statement" was the sole basis for the ALJ's finding that Ms. Togba lacked good cause to quit, the ALJ's determination that there was no good cause and his resulting disqualification of Ms. Togba from receiving unemployment compensation benefits must be reversed, and Ms. Togba should be found eligible to receive such benefits.

II. The ALJ Failed to Address Ms. Togba's Financial "Good Cause" to Quit: The Fact That She Could Not Afford the Doctor's Clearance That CMS Made a Condition for Her Continued Employment.

There is a second, independent, basis for rehearing here. It is undisputed that the letter the ALJ interpreted as resignation came in response to Mr. Morant informing Ms. Togba that she would not be allowed to return to her job unless and until she was cleared to do so by a doctor. Transcript 17, 45-48. 62-65. Ms. Togba specifically and repeatedly asserted that her economic circumstances (which included lack of resources generally, a low-wage job, and inability to afford her employer-sponsored health insurance) made it impossible for her to meet this newly-imposed work requirement. Transcript 21 (Mr. Morant, noting that "Ms. Togba cited the fact the she[] did not have health insurance."); Transcript 46 ("I don't have

money to pay for [the doctor]."); Transcript 60 ("[Insurance] was too expensive. . . . I couldn't afford it."); *accord* Transcript 42, 47. The ALJ's failure to address this legal argument warrants rehearing and reversal. *See, e.g., Badawi v. Hawk One Sec. Inc.*, 21 A.3d 607, 614 (D.C. 2011).

This Court has acknowledged that a work requirement that "might impose a significant economic hardship" can constitute good cause. *Consumer Action Network v. Tielman*, 49 A.3d 1208, 1214 (D.C. 2012) (addressing significant cut in wages and benefits). The ultimate question is whether the economic hardship imposed is such that "'a reasonable and prudent person in the labor market" would quit "in the same circumstances." *Tielman*, 49 A.3d at 1213; *accord Berkley v. D.C. Transit, Inc.*, 950 A.2d 749, 762 (D.C. 2008). Importantly, those "same circumstances" include the individual employee's specific financial situation, including both income and expenses. *Tielman*, 49 A.3d at 1216-18.

The record here includes Ms. Togba's repeated claims of financial hardship, but because the ALJ did not engage this issue, the record lacks the level of detail regarding Ms. Togba's financial situation that *Tielman* suggests would be appropriate. *See* 49 A.3d at 1218 (mentioning information regarding "compensation" as well as "living and work-related expenses"). Accordingly, unless this Court reverses outright for the reason stated in Section I, above, it should reserve and remand, as in *Tielman* itself, for the ALJ to adduce such evidence and make

appropriate findings in the first instance. *See* also *Beynum v. Arch Training Ctr.*, 998 A.2d 316, 320 (D.C. 2010) (reversal and remand where claimant's testimony "lacked specificity"); *Cruz v. DOES*, 633 A.2d 66, 72 & n.9 (D.C. 1993) (remanding for "reasonably specific findings" on relevant facts).

CONCLUSION

For the foregoing reasons, the Division should grant this petition for rehearing, withdraw the previously issued Memorandum Opinion and Judgment, and issue a new judgment awarding Ms. Togba unemployment benefits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 10, 2017, I caused a copy of the foregoing Petition for Rehearing to be served by first-class mail on:

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c/o Equifax Workforce Solutions
P.O. Box 283
St. Louis MO 63166-0283

/s/ *Jonathan H. Levy*
Jonathan H. Levy