

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 30, 2024

CV-23-1077

In the Matter of the Claim of SARAH
MOI-THUK-SHUNG,
Appellant.

MEMORANDUM AND ORDER

COMMISSIONER OF LABOR,
Respondent.

Calendar Date: May 3, 2024

Before: Garry, P.J., Reynolds Fitzgerald, Fisher, McShan and Powers, JJ.

Sarah Moi-Thuk-Shung, Long Island City, appellant pro se.

Letitia James, Attorney General, New York City (*Gary Leibowitz* of counsel), for respondent.

Garry, P.J.

Appeal from a decision of the Unemployment Insurance Appeal Board, filed October 14, 2022, which ruled that claimant was ineligible to receive unemployment insurance benefits because she was not capable of working.

Claimant worked as a customer service representative until September 14, 2020, when she left her employment due to impending neck surgery related to a June 2020 motor vehicle accident.¹ In December 2020, claimant filed a claim for unemployment insurance benefits, effective June 8, 2020. Claimant certified for benefits for the weeks ending September 20, 2020 through August 21, 2021, indicating that she was ready, willing and able to work during that period of time. Based upon her certifications,

¹ The surgery was performed on September 30, 2020.

claimant received unemployment insurance benefits, as well as federal pandemic unemployment compensation and pandemic emergency unemployment compensation pursuant to the Coronavirus Aid, Relief and Economic Security Act of 2020 (the CARES Act).

The Department of Labor subsequently found that claimant was ineligible for unemployment insurance benefits from September 14, 2020 to August 21, 2021 because she was not capable of working, charged her with recoverable overpayments of the federal benefits and imposed a monetary penalty based upon a finding that she made willful misrepresentations to obtain those benefits. Following a hearing, an Administrative Law Judge upheld the determination and the Unemployment Insurance Appeal Board affirmed. This appeal ensued.

We affirm. "In order for a claimant to be eligible for unemployment insurance benefits, he or she must be ready, willing and able to work in his or her usual employment or in any other employment for which he or she is reasonably fitted by training and experience" (*Matter of Lynch [Commissioner of Labor]*, 217 AD3d 1309, 1310 [3d Dept 2023] [internal quotation marks, brackets and citations omitted]; *see Matter of Lefkow [Commissioner of Labor]*, 208 AD3d 1408, 1409 [3d Dept 2022]). "Whether a claimant is ready, willing and able to work is a question of fact for the Board to resolve and its determination will not be disturbed if supported by substantial evidence" (*Matter of Henry [Commissioner of Labor]*, 211 AD3d 1296, 1297 [3d Dept 2022] [internal quotation marks and citations omitted]).

In a questionnaire submitted to the Department in May 2022, claimant's treating physician indicated that he began treating claimant on September 14, 2020. According to the physician, claimant was unable to perform the duties of her customer service position from September 30, 2020 to August 20, 2021 due to neck pain, back pain and her neck surgery. The physician further indicated that there was no time period in which claimant was able to work with limitations in her usual occupation or any other occupation. The physician did, however, add a handwritten note on the questionnaire stating that claimant could work if she is not continually confined to working at a desk, and claimant similarly testified. The Board rejected the statement and testimony for lacking a medical explanation, noting that the physician did not complete the section of the questionnaire dedicated to identifying and quantifying claimant's limitations. Inasmuch as "it is within the exclusive province of the Board to evaluate evidence and the inferences to be drawn therefrom, and the Board is the final arbiter of witness credibility" (*Matter of Jani-King of N.Y., Inc. [Commissioner of Labor]*, 214 AD3d 1088, 1090 [3d Dept 2023] [internal

quotation marks and citations omitted]; *see Matter of Douglas [Commissioner of Labor]*, 217 AD3d 1311, 1312 [3d Dept 2023]), substantial evidence supports the Board's determination that claimant was ineligible for state unemployment insurance benefits because she was unable to work during the relevant time period that she certified for benefits (*see Matter of Lynch [Commissioner of Labor]*, 217 AD3d at 1311; *Matter of Kozklowksi [Commissioner of Labor]*, 211 AD3d 1275, 1276 [3d Dept 2022]).

Given the foregoing, claimant was also ineligible to receive federal pandemic assistance under the CARES Act (*see Matter of Javino [Commissioner of Labor]*, 219 AD3d 1619, 1620 [3d Dept 2023]) and, therefore, the federal benefits received by her were recoverable (*see 15 USC §§ 9023 [b] [1]; [f] [2]; 9025 [e] [2]; Matter of Lauriello [Commissioner of Labor]*, 213 AD3d 1129, 1131 [3d Dept 2023]). Finally, in light of the evidence in the record that claimant was unable to perform any work during the relevant time period, the Board's factual finding that claimant made willful misrepresentations in certifying and obtaining benefits will not be disturbed (*see Matter of Augustine [Commissioner of Labor]*, 27 AD3d 937, 938 [3d Dept 2006]).

Reynolds Fitzgerald, Fisher, McShan and Powers, JJ., concur.

ORDERED that the decision is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court