

# MEMORANDUM DECISION

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## IN THE COURT OF APPEALS OF INDIANA

K.H.,  
*Appellant-Petitioner,*

v.

Review Board of the Indiana  
Department of Workforce  
Development,  
*Appellee-Respondent*

August 24, 2023

Court of Appeals Case No.  
23A-EX-413

Appeal from the Review Board of  
the Indiana Department of  
Workforce Development

Gabriel B. Paul, Chairman  
Lawrence A. Dailey, Member  
Heather D. Cummings, Member

Review Board No.  
23-R-0171

**Memorandum Decision by Judge Weissmann**  
Judges Riley and Bradford concur.

## **Weissmann, Judge.**

- [1] K.H. has a medical condition that makes her particularly susceptible to COVID-19 complications. At the onset of the COVID-19 pandemic, K.H. applied for and received unemployment benefits while on a leave of absence from her job. But within a few months, a claims investigator denied K.H.’s unemployment benefits, concluding that her medical condition rendered her “unable to work” and thus ineligible for unemployment benefits. An Administrative Law Judge (ALJ) and the Review Board of the Indiana Department of Workforce Development (Review Board) both affirmed this decision. K.H. now appeals to this Court, arguing that the earlier tribunals erred in concluding that she was unable to work. Finding K.H. does not qualify for unemployment benefits, we affirm.<sup>1</sup>

## **Facts**

- [2] When the COVID-19 pandemic struck, K.H. worked in a dental office as a hygienist. The dental office closed for several months due to the pandemic. When it reopened in early May 2020, employees were required to follow CDC guidelines on COVID-19 prevention, such as wearing masks and social distancing. But K.H. did not return to work. K.H. has a blood clot condition that makes her high risk with respect to COVID-19 complications. Accordingly,

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<sup>1</sup> As the tribunals below noted, this appeal does not concern K.H.’s eligibility for pandemic unemployment assistance benefits under the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020. *See generally* 15 U.S.C. § 9001, *et seq.*

her physician recommended that she wear an N95 respirator alongside a face shield while working. And because PPE was not widely available at the time, K.H. went on temporary leave, with her employer's permission, until the required protection could be located. She applied for unemployment benefits during this time.

[3] Around July 10, K.H.'s employer acquired KN95 masks and asked K.H. to return to work. Because these were not the recommended N95 respirators, K.H. responded that she would consult her physician. K.H.'s physician approved K.H. to use the KN95 masks but recommended that she initially return to work only two or three days per week. K.H. therefore requested that her employer allow an acclimation period, during which she would wear the new protective gear but only work part-time. The dental office denied her request and fired K.H. on July 29, 2020, for failure to return to work.

[4] Several months later, a claims investigator assigned to K.H.'s unemployment application found that K.H. was not unemployed but on an employer-approved leave of absence due to her inability to work. The investigator therefore concluded that K.H. had improperly received unemployment benefits. K.H. appealed that decision to an ALJ, who affirmed the claims investigator's decision. Although the ALJ found that K.H. required a specific mask, and that the masks first provided by her employer were insufficient, K.H.'s conditions left her "unable to work anywhere without this PPE." App. Vol. II, p. 6.

[5] Ultimately, the ALJ concluded that K.H. was ineligible for unemployment benefits from May 9 through August 1, 2020, because she “was not able and available for full-time work.” *Id.* at 7. The Review Board affirmed the ALJ’s decision.

## **Discussion and Decision**

[6] Decisions of the Review Board are reviewed for legal error and treated as conclusive and binding to all questions of fact. Ind. Code § 22-4-17-12(a); *see also McClain v. Rev. Bd. of Ind. Dep’t of Workforce Dev.*, 693 N.E.2d 1314, 1316-17 (Ind. 1998). Our review is correspondingly limited to “the sufficiency of the facts found to sustain the decision and the sufficiency of the evidence to sustain the findings of fact.” Ind. Code § 22-4-17-12(f). We neither reweigh the evidence nor reassess witness credibility in making our determination. *Chrysler Grp. v. Rev. Bd. of Ind. Dep’t of Workforce Dev.*, 960 N.E.2d 118, 122-23 (Ind. 2012).

[7] Indiana’s unemployment benefits system exists to “provide for payment of benefits to persons unemployed through no fault of their own.” Ind. Code § 22-4-1-1. A potential claimant is not eligible to receive benefits unless the person:

- (1) is physically and mentally able to work;
- (2) is available for work;
- (3) is found by the department to be making an effort to secure full-time work; and

(4) participates in reemployment services and reemployment and eligibility assessment activities as required by [Ind. Code § 22-4-13-3.2] or when directed . . . under [Ind. Code § 22-4-13-3.5].

Ind. Code § 22-4-13-3.

- [8] K.H. was unable and unavailable to work under this statute. As the record shows, she required specific PPE, such as an N95 respirator in conjunction with a face shield, to work during the pandemic’s early stages. This PPE was unavailable to her between early May and August 2020. Thus, on the advice and recommendation of her physician, K.H. was unable and unavailable to work during this period. *See M.M. v. Rev. Bd. of Ind. Dep’t of Workforce Dev.*, 921 N.E.2d 16, 18 (Ind. Ct. App. 2009) (finding claimant was “unable to work” for purposes of receiving unemployment benefits where physician recommended claimant not work due to medical condition).
- [9] K.H. contends that the ALJ erred in concluding she was on an employer-approved leave of absence when she applied for unemployment benefits. This is shown, she says, by the fact that she and her employer never had an explicit discussion about a formal leave of absence. But other facts in the record sustain the ALJ’s finding. Specifically, K.H.’s employer removed her from its work schedule until it could obtain proper PPE, and once the PPE was located, the employer directed K.H. to return to work. These facts contain every indication that K.H. and her employer understood that K.H. was on a temporary break until it was safe for her to return to work.

[10] K.H.'s alternative argument that her employer's actions violated federal worker protection rules is similarly without merit. K.H. never raised these concerns to her employer. And at the fact-finding hearing, she merely stated her belief that the Occupational Safety and Health Act required her employer to provide "everyone" with N95 respirators. Tr. Vol. II, p. 8. Setting aside K.H.'s admission that these masks were not generally available during her leave of absence, K.H. identifies no federal regulation creating such a requirement. The regulations she cites merely require employers to provide "respirators which are applicable and suitable for the purpose intended." Appellant's Br., p. 7 (citing 29 CFR § 1910.134(a)(2)). K.H.'s employer did exactly that when it located KN95 masks, which K.H.'s physician approved.

[11] Finding no error in the denial of unemployment benefits, we affirm.

Riley, J., and Bradford, J., concur.