

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 29, 2014 Session

**METRO GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY v.
TENNESSEE DEPARTMENT OF LABOR & WORKFORCE
DEVELOPMENT, ET AL.**

**Appeal from the Chancery Court for Davidson County
No. 12338I Claudia Bonnyman, Chancellor**

No. M2013-01551-COA-R3-CV - Filed November 13, 2014

A substitute teacher filed a claim for unemployment benefits with the Tennessee Department of Labor and Workforce Development; utilizing the partial unemployment regulation to determine the claimant's eligibility for benefits, the Department approved the claim and awarded benefits. The Board of Education filed a petition for review, contending that the teacher was not entitled to benefits because she was still employed and because she had refused work assignments which she had been offered; the trial court utilized the regulation applicable to part total unemployment and affirmed the Department's decision. We affirm the holding that the part total regulation was the proper regulation to be used in determining the claimant's eligibility; because the Department did not make findings as to certain statutory factors in determining claimant's eligibility for benefits, we vacate the decision and remand the case for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Vacated in Part; Case Remanded

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P. J., M. S., and ANDY D. BENNETT, J., joined.

Saul Solomon, Director of Law; and J. Brooks Fox and Christopher M. Lackey, Assistant Metropolitan Attorneys, Nashville, Tennessee, for the appellant, The Metropolitan Government of Nashville and Davidson County, Tennessee on behalf of The Metropolitan Board of Public Education.

Robert E. Cooper, Jr., Attorney General and Reporter; and Kathryn A. Baker, Assistant Attorney General, Nashville, Tennessee, for the appellees, Tennessee Department of Labor and Workforce Development, Rutherford County Board of Education, and Cortnei S. Lewis.

OPINION

Cortnei S. Lewis (“Ms. Lewis”) was employed as a substitute teacher by the Rutherford County Board of Education (“RCBE”) for the 2010-2011 school year; her contract was not renewed for the 2011-2012 school year. On August 22, 2011, she filed a claim for unemployment compensation with the Tennessee Department of Labor and Workforce Development (“the Department”) against RCBE; the Department approved her claim and awarded her benefits.

On August 25, 2011, Ms. Lewis applied to Metropolitan Nashville Public Schools (“Metro”) for a substitute teaching position; she was hired and worked from August 31 through October 13, 2011. During part of this employment, Ms. Lewis received unemployment benefits from the claim filed on August 22; she stopped receiving benefits on September 30. On that day, she contacted the Department and was led to file a new claim for unemployment benefits; the new claim listed Metro as her employer.¹ In response to a question which asked the reason for her separation, she responded “I was laid off due to lack of work when my substitution assignment ended on Friday.” She was also asked whether she expected to return to work for the school system in a similar capacity the next term, to which she responded “I expect to substitute for . . . this school district sometime this semester as well as next school term.” The Department sent a request to Metro’s case manager, Thomas & Thorngren, for Ms. Lewis’s employment history on October 3; Thomas & Thorngren responded by letter dated October 10 stating:

Separation Reason

[Ms. Lewis] is still employed same basis and same extent.

The claimant is a substitute teacher who is not accepting all available shifts. Since 8/11, the employer has called her 53 times for assignments. She has accepted 6 assignments then canceled 3, hung up on the employer 17 times, did not answer the phone 30 times, as well as 5 additional web assignments were accepted and then 4 were rearranged.

¹ In her answer to the petition for review, Ms. Lewis stated that she was informed by a Department representative that “upon certifying [her weekly earnings] the previous week, [she] had earn[ed] more than the maximum weekly benefit amount, and when that happens, the initial claim is ended because the [computer] system assumes that the claimant has now obtained full-time employment”; that she informed the representative that she had not obtained full time employment and was advised that she could re-file her claim for benefits, which she did; and that it was not her intention to file a claim for benefits against Metro.

On October 21, 2011 the agency representative approved Ms. Lewis's claim.² On November 4 Thomas & Thorngren, on behalf of Metro, appealed to the Appeals Tribunal by letter reiterating the statements in the October 10 letter and requesting a telephone hearing "to provide [Metro] with an opportunity to present additional testimony and evidence in support of [its] appeal."

On December 6, 2011 the Appeals Tribunal mailed pre-hearing instructions and information regarding the upcoming hearing. On December 13, the Metropolitan Department of Law entered an appearance on behalf of Metro and filed the following documents which were to be offered as exhibits at the hearing: (1) a report detailing the substitute teaching assignments that Metro offered Ms. Lewis and whether she accepted or declined the assignments; (2) a fax confirmation that Metro's appeal had been filed; (3) excerpts from Metro's Handbook for Substitute Employees; (4) Ms. Lewis's substitute teacher profile; (5) Ms. Lewis's verification data form stating that she had received certain employee materials from Metro; and (6) the Memorandum and Order from the Chancery Court proceeding in *Metro. Gov't of Nashville & Davidson County v. James Neely, Comm'r of the Tenn. Dep't of Labor & Workforce Dev. et al.*, No. 10-1458-III. Following a hearing on December 16, the unemployment hearing officer affirmed the decision of the agency representative.

Metro appealed by letter to the Board of Review,³ disagreeing with the unemployment hearing officer's decision, and requesting a reconsideration of the merits. Metro's letter stated "[t]he employer believes that Ms. Lewis did not have good reasons for refusing available work, and feels that the Board should reverse this decision and disqualify [Ms.

² Chapter 7 of Title 50 of the Tennessee Code establishes the unemployment compensation fund. Claims for benefits are filed and processed in accordance with the statute and regulations established by the Commissioner of Labor and Workforce Development. Tenn. Code Ann. § 50-7-304(a). The claim is presented to an agency representative who examines the claim to make a "monetary determination" of its validity. Tenn. Code Ann. § 50-7-304(b)(1)(A). If the claim is valid, the agency representative proceeds to "render a determination on the nonmonetary issues presented." Tenn. Code Ann. § 50-7-304(b)(1)(B). Appeals of the agency representative's determinations are to the Appeals Tribunal, where a hearing is held before an unemployment hearing officer who may affirm, modify, or set aside the findings of fact and decision of the agency representative; the hearing officer's decision becomes final unless appealed to the Commissioner's Designee. Tenn. Code Ann. § 50-7-304(c)(1)-(2). The Designee has the power to affirm, modify or set aside the hearing officer's decision. Tenn. Code Ann. § 50-7-304(e)(2). A party may seek review of the Commissioner's Designee's decision by filing a petition for judicial review in chancery court. Tenn. Code Ann. § 50-7-304(h).

³ By Ch. 1042 Pub. Acts of 2010, Tenn. Code Ann. § 50-7-304 was amended effective January 1, 2011, to replace references to the "Board of Review" with "Commissioner's Designee" and to substitute a new subsection (e) setting forth the powers and duties of the designees for the former subsection (e).

Lewis] upon review of the record.” On February 9, 2012 the Commissioner’s Designee (“Designee”) issued a decision affirming the unemployment hearing officer’s decision, stating:

FINDINGS OF FACT: The claimant applied for unemployment benefits before she began working as a substitute teacher and was deemed partially unemployed and eligible for benefits based on the amount she earned from this Employer. The Claimant worked as a substitute teacher from August 31, 2011, through October 19, 2011, when she secured full-time employment with another Employer. Before she obtained full time employment and while she worked as a substitute teacher, the Claimant testified that she worked on August 31, September 2, 6, 7, 8, 9, 12, 15, 16, 19, 20, 22, 23, and 26, and October 6, 7, 10, 11, 12, and 13, 2011.

The Employer did not refute the Claimant’s testimony concerning the dates on which she worked after initially testifying that the Claimant only accepted work on six occasions. Exhibit four shows that the Claimant only accepted work through the Employer’s automated dialing system on six occasions while the majority of her work was either pre-arranged or was accepted online.

CONCLUSIONS OF LAW: The issue is whether the Claimant was partially unemployed and eligible for benefits under T.C.A. § 50-7-302(a)(1) RULE 0800-09-01.11. Partial employment presupposes that the worker is working less than full-time because the worker’s Employer is unable to provide the worker with full-time work. A worker is partially unemployed only if the worker had continuous attachment to an Employer during a given claim period; in other words, during such period as the worker is “underemployed” and not “unemployed” in the sense that an individual has no Employer. To be eligible for partial unemployment benefits, an individual must also be able and available for work during the period for which the individual is claiming the benefits.

The evidence establishes that the Claimant was working less than full-time hours although she accepted work from this Employer for twenty one days in the seven weeks she was employed as a substitute teacher. As a substitute teacher, the Employer could not provide the Claimant full-time work because of the nature of the job. She had continuous attachment to this Employer and was able to work and available for work during this period of underemployment.

Metro timely filed a petition for judicial review, contending that the Designee’s decision was “arbitrary, capricious, and characterized by an abuse of discretion” and that it was “unsupported by evidence both substantial and material in light of the record.” Specifically Metro alleged that, despite evidence in the record, the Department failed to find: (1) whether Ms. Lewis was making a reasonable effort to secure work; (2) whether she had been unemployed for a waiting period of one week; and (3) whether she was “effectively terminated from her job as a substitute teacher, rather than simply indicating a lack of immediately available work.” Metro also alleged that the Department failed to apply the correct legal standard in making its determination and that the Department was barred from taking a position inconsistent with the holding in a previously litigated Chancery Court case. Ms. Lewis filed an answer; the Department likewise answered, generally denying all of the allegations and asserting two affirmative defenses.⁴ In due course the court entered an order affirming the Designee’s decision. Metro appeals, contending that the Department failed to determine that Ms. Lewis was “able to work, available for work, and making a reasonable effort to secure work” in accordance with Tenn. Code Ann. § 50-7-302 (a)(4).

DISCUSSION

I. STANDARD OF REVIEW

The standard of review of administrative decisions in unemployment compensation cases is set forth in the statute and provides that the trial court may affirm the decision of the commissioner or may reverse, remand or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (A) In violation of constitutional or statutory provisions;
- (B) In excess of the statutory authority of the agency;
- (C) Made upon unlawful procedure;
- (D) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (E) Unsupported by evidence that is both substantial and material in the light of the entire record.

⁴ The Department asserted that: (1) Metro’s petition should be dismissed pursuant to Tenn. R. Civ. P. 12.02(6) because it failed to state a claim upon which relief could be granted and (2) the Chancery Court lacked subject matter jurisdiction because Metro failed to include Ms. Lewis’s base period employer, RCBE, as a necessary party as required by Tenn. Code Ann. § 50-7-304(i). Metro subsequently moved to amend its petition for the purpose of adding RCBE as a necessary party under Tenn. Code Ann. § 50-7-304, and the motion was granted on May 10.

Tenn. Code Ann. § 50-7-304(i)(2). The standard of review employed by appellate courts is the same as the trial courts. *DePriest v. Puett*, 669 S.W.2d 669, 673 (Tenn. Ct. App. 1984).

II. ANALYSIS

We initially address Metro’s contention that the Department is collaterally estopped by the decision in *Metro. Gov’t of Nashville & Davidson County v. James Neely, Comm’r of the Tenn. Dep’t of Labor & Workforce Dev. et al.*, No. 10-1458-III (“the *Turner* case”) from “raising . . . issues . . . involving the ‘as-needed’ nature of substitute teaching and unemployment benefits to substitute teachers when they are currently employed with the school system, with no indicia of ‘separation’.”

The doctrine of collateral estoppel, or issue preclusion, bars the same parties to an earlier suit, and their privies, from relitigating issues that were litigated and determined in a prior suit. *Barnett v. Milan Seating Sys.*, 215 S.W.3d 828, 835 (Tenn. 2007) (citation omitted). It does not apply to issues that were unnecessary for the decision in the previous suit, or if the party against whom the issue preclusion is asserted “did not have a full and fair opportunity to litigate the issue in the prior suit.” *Id.* (citation omitted). A party defending on the basis of collateral estoppel must demonstrate that “(1) the judgment in the prior case was final and concluded the rights of the party against whom the defense is asserted, and (2) both cases involved the same parties, the same cause of action, or identical issues.” *Id.* (citation omitted).

In the *Turner* case the court reviewed another decision to award unemployment benefits to a substitute teacher, and reversed the Department’s decision for three reasons: (1) Tenn. Code Ann. § 50-7-302(b)(2)(A)-(B), upon which the Appeals Tribunal made the award, did not apply because the teacher had filed her claim during the school term rather than summer recess;⁵ (2) evidence was not presented at the administrative level that the teacher was separated from her employer, which the court determined to be an “essential element” of the application;⁶ (3) the partial unemployment regulations at Tenn. Comp. R. &

⁵ The Memorandum and Order in *Turner* quotes the Appeals Tribunal’s Conclusions of Law, wherein “Tenn. Code Ann. § 50-7-302(2)(b)(3)” is cited as the statutory basis for awarding benefits to the substitute teacher; the conclusions also include a summary of the statute. We attempted to review the statute cited by the Appeals Tribunal and determined that the statute as numbered in the decision does not exist; however, the summary of the statute in the Appeals Tribunal’s decision is consistent with the wording of Tenn. Code Ann. § 50-7-302(b)(2)(A)-(B), the statute cited by the trial court.

⁶ In discussing the element of separation, the court acknowledged that *Cleveland City Schools v. Conn.*, 703 S.W.2d 164 (Tenn. Ct. App. 1985), held that a substitute teacher may be eligible for unemployment benefits where the employer “fails to utilize the claimant’s services in a situation akin to

Regs. 0800-09-01-.11 and 0800-09-01-.12 did not apply because the teacher “was never a full-time, regular worker and . . . the terms of the employment were on an ‘as needed basis’.” The Department appealed the case, but withdrew the appeal.

We do not agree that the doctrine of collateral estoppel applies in this case. First, the claimant parties are different and, according to the Department’s brief, the claims involve a different set of facts.⁷ Secondly, the issues resolved are not identical to the issues presented in this case: in *Turner* the court only considered the claimant’s eligibility under the partial unemployment regulation and was not called to consider eligibility under the part-total regulation, as in this case. Finally, while the *Turner* case became final when the appeal was dismissed, the decision at the trial court level does not set binding precedent.

This case has a unique procedural posture inasmuch as the trial court conducted its review of the decision to award Ms. Lewis benefits and affirmed the decision by interpreting the part-total regulation at Tenn. Comp. R. & Regs. 0800-09-01-.05(b) rather than the partial unemployment regulation at Tenn. Comp. R. & Regs. 0800-09-01-.11 which was used at the administrative level. In the trial court and on appeal, the Department posited that the part-total regulation should have been used at the administrative level and that the decision awarding benefits was correct notwithstanding. For its part, Metro contends that the correct legal standard was set forth in *Cleveland City Schools v. Conn*, 703 S.W.2d 164 (Tenn. Ct. App. 1985) and that there must be a cessation of employment in order for a substitute teacher to receive benefits.

The trial court has the power pursuant to Tenn. Code Ann. § 50-7-304(i)(2) to modify the decision under review. In light of the Department’s statements that the proper regulation to apply in this case is the part total regulation and that the Department’s decision to award benefits would be the same if that regulation were applied, we will consider the Department’s decision so modified and proceed to address whether the part-total regulation was the proper standard to utilize in determining whether Ms. Lewis was eligible for unemployment benefits.

We disagree with Metro’s reading of *Cleveland City Schools* as holding that cessation from employment is required for a substitute teacher to receive unemployment benefits. The

termination.”

⁷ Our knowledge of the *Turner* case is limited to the Memorandum and Order entered by the Chancery Court, which was submitted to the Appeals Tribunal as a possible exhibit at the hearing before the unemployment hearing officer, and from statements in the parties’ briefs on appeal. It does not appear that the order was introduced at the hearing; further, neither the hearing officer nor the Commissioner’s Designee discussed the decision in their respective ruling.

Court in that case considered whether Tenn. Code Ann. § 50-7-302(7)(A) [now Tenn. Code Ann. § 50-7-302(b)(2)(A)], which provides that benefits will not be paid to an employee of an educational institution during a period of unemployment if there is “reasonable assurance” that the claimant will perform services for the institution, allowed an uncertified substitute teacher who had been advised that a preference was being given to certified teachers to receive benefits. The court held that, because the teacher had been not been called for work and had been given plausible reasons for not being called to work in the future, he did not have the “reasonable assurance” within the meaning of the statute and, consequently, could be awarded benefits. *Id.* at 166. The case stands for the proposition that benefits may be payable where a substitute teacher does not have a “reasonable assurance” of continued assignments, even though the teacher may still be employed.

In accordance with Tenn. Code Ann. § 50-7-211,⁸ the Commissioner established regulations regarding total unemployment (Tenn. Comp. R. & Regs. 0800-09-01-.05(a)),⁹ part-total unemployment (Tenn. Comp. R. & Regs. 0800-09-01-.05(b)),¹⁰ and partial unemployment (Tenn. Comp. R. & Regs. 0800-09-01-.11)¹¹ to be used in administering the

⁸ Tenn. Code Ann. § 50-7-211 provides:

(a) An individual shall be deemed “unemployed” in any week during which the individual performs no services and with respect to which no wages are payable to the individual, or in any week of less than full-time work if the wages payable to the individual with respect to the week are less than the individual’s weekly benefit amount.

(b) The commissioner shall prescribe rules and regulations applicable to unemployed individuals, making distinctions in the procedures as to total unemployment, part-total unemployment, partial unemployment of individuals attached to their regular jobs, and other forms of short-time work that the commissioner deems necessary.

⁹ Tenn. Comp. R. & Regs. 0800-09-01-.05(a) defines total unemployment as “the unemployment of an individual in any week during which the individual performs no services and for which no wages are payable to the individual.”

¹⁰ Tenn. Comp. R. & Regs. 0800-09-01-.05(b) defines part-total unemployment as “the unemployment of any individual in any week of less than full-time work in which the individual earns some remuneration, but less than the individual’s weekly benefit amount, and throughout which the individual is not attached to a regular employer.”

¹¹ Tenn. Comp. R. & Regs. 0800-09-01-.11 provides:

(1) Partial employment presupposes that the worker is working less than full-time because the worker’s employer is unable to provide the worker with full-time work.

(2) A worker is partially unemployed only if the worker had a continuous attachment to an employer during a given claim period; in other words, during such period as the worker is

unemployment trust fund. Applying these regulations to the facts presented, we agree with the trial court that the proper regulation to apply to Ms. Lewis' application for benefits is the part-total regulation.

Neither party contends that the total unemployment regulation applies in determining whether Ms. Lewis is eligible for benefits; the record shows that Ms. Lewis accepted substitute teaching assignments during the seven weeks that she worked for Metro and received compensation for her services. With respect to the partial unemployment regulation, the record does not show that Ms. Lewis worked less than full time because Metro was unable to provide her with full-time work; rather Ms. Lewis testified that she did not accept all of the substitute teaching assignments she was offered, that she cancelled some assignments, and that she placed herself on a "do not call" list for a number of days.

With respect to the part-total regulation, the parties dispute whether Ms. Lewis was "attached to a regular employer," as that term is used in Tenn. Comp. R. & Regs. 0800-09-01-.05(b). Metro contends that she was "attached" because: she was still listed as a substitute teacher on its roster and continued to receive offers for substitute teaching assignments until she found full-time employment; on her application for unemployment benefits, she stated that "I expect to substitute for . . . this school district sometime this semester as well as next school term"; Metro had responded that "[Ms. Lewis was] still employed" in its response to the Department; and the Designee determined that "[Ms. Lewis] had a continuous attachment to [Metro]." The Department urges that we adopt the rationale of *Palm Beach Co. School Bd. v. Unemployment Appeals Comm'n.*, 576 So.2d 362 (Fla. Dist. Ct. App. 1991), in which a Florida court interpreted a statute in which the definition of part-total unemployment was substantially similar to that in Tenn. Comp. R. & Regs. 0800-09-01-.05(b) and hold that Ms. Lewis was not "attached to a regular employer" and is entitled to unemployment benefits.¹²

"underemployed" and not "unemployed" in the sense that an individual has no employer.
(3) To establish eligibility for partial benefits, an individual must be able and available for work during the period for which the individual is claiming the benefits.

¹² Florida Administrative Code Section 38B-2.011(1)(b) defined "part-total unemployment" as the "unemployment of any individual in any week of less than full-time work in which he earns some remuneration, but less than his weekly benefit amount, and throughout which he is not attached to a regular employer." The claimant had lost her full time job and had applied for unemployment benefits while she worked as a substitute teacher and looked for full time employment; the Florida court determined that the school district did not "regularly employ" substitute teachers as defined in Florida law, that the substitute teaching assignments were "a way of trying to make ends meet", and that there was nothing to suggest that the claimant "had settled on substitute teaching as her only occupation." *Palm Beach Co. School Bd.*, 576 So.2d at 363. The court concluded that she was not attached to a regular employer and was entitled to unemployment benefits. *Id.* at 365. The court did not cite a specific law or regulation; rather the court referenced an earlier decision holding that "substitute teachers . . . are not regularly employed by the school

The record in this case, specifically excerpts from Metro’s Handbook for Substitute Employees, leads us to conclude that Ms. Lewis was not “attached to a regular employer” as that term is used in Tenn. Comp. R. & Regs. 0800-09-01-.05(b). Pursuant to the handbook, substitute teachers “are those teachers who are employed to replace regularly assigned teachers who are on sick, professional or personal leave.” Pertinent provisions of the handbook state that “[s]ubstitute employees shall not be entitled to become members of the retirement fund or to accumulate vacation time, sick leave, or other benefits that are allowed regular employees”; that they are offered assignments on a “daily basis as needed”; and that they are paid based on a daily rate and may receive bonus pay per day if they accept assignments every day within a two-week period. The excerpts from the handbook which are in the record do not require substitutes to accept assignments in order to remain on the roster of substitute teachers or limit their efforts to pursue full-time employment. The matters cited by Metro do not establish that Metro was Ms. Lewis’ “regular employer”; rather they are indicia of the uniqueness of the substitute teaching position. Because Ms. Lewis was not attached to a regular employer, the part-total regulation applies in determining whether she was eligible for unemployment benefits.

Having determined that the part-total regulation should be applied, we next address the statutory requirements for eligibility. Metro contends that the Designee’s decision is arbitrary and unsupported by the record because it fails to address Ms. Lewis’s admission that she “did not accept all available work” from Metro and that, in the absence of such finding, Ms. Lewis is not eligible for benefits.

Tenn. Code Ann. § 50-7-302 sets forth the personal eligibility conditions for the receipt of benefits; § 50-7-302(a)(4) provides:

(a) Personal Eligibility Conditions. An unemployed claimant shall be eligible to receive benefits with respect to any week only if the administrator finds that all of the following conditions are met:

(4)The claimant is able to work, available for work, and making a reasonable effort to secure work. “Making a reasonable effort to secure work” means the claimant shall provide detailed information regarding contact with at least three (3) employers per week or shall access services at a career center created by the department. . . . In determining whether the claimant is making a

district; they are paid by the hour, receive no benefits, do not have social security or income taxes withheld from their pay, and are not restricted from accepting other employment, including full-time work.” *Palm Beach Co. School Bd. v. Unemployment Appeals Comm’n*, 504 So. 2d 505, 507 (Fla. Dist. Ct. App. 1987).

reasonable effort to secure work, the administrator shall consider the customary methods of obtaining work in the claimant's usual occupation or any occupation for which the claimant is reasonably qualified, the current condition of the labor market, and any attachment the claimant may have to a regular job.

In its Findings of Fact, the Designee included some findings relative to Ms. Lewis' employment as a substitute teacher and her efforts to secure unemployment benefits, including the fact that she worked as a substitute teacher with Metro from August 31, 2011 to October 19, and specific dates she accepted substitute teaching assignments; however, the Designee did not make findings that Ms. Lewis met the eligibility conditions set forth in § 50-7-302(a)(4), specifically, that Ms. Lewis was "able to work, available for work, and making a reasonable effort to secure work." We agree with Metro that the fact that she did not accept assignments which were offered is pertinent to the determination of her eligibility. Because the Designee failed to make the required findings, it is necessary to remand the case for further consideration.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed in part, vacated in part, and the case is remanded to the trial court with instructions to remand the case to the Department to consider the statutory eligibility conditions at Tenn. Code Ann. § 50-7-302 (a).¹³

RICHARD H. DINKINS, JUDGE

¹³ In this regard, we note that Metro has also takes issue with whether the record supports Ms. Lewis' compliance with the eligibility condition at Tenn. Code Ann. § 50-7-302 (a)(5).