

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0348

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 29, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause (decision # 95811). Claimant filed a timely request for hearing. On February 5, 2014, ALJ Erwin conducted a hearing, and on February 13, 2014 issued Hearing Decision 14-UI-10322, affirming the Department's decision. On February 27, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

With his application for review claimant requested an in-person hearing before EAB. However, EAB performs a *de novo* review of the record of the hearing before the ALJ, and does not conduct hearings. See ORS 657.275(2). Claimant's request for an in-person hearing before EAB therefore is denied. Claimant also argued that the ALJ erred in excluding a document he offered into evidence at the hearing. However, the record shows that claimant failed to provide a copy of the document to the employer prior to the commencement of the hearing as required by OAR 471-040-0023 (4) (August 1, 2004). Audio Record at 12:00. The ALJ therefore did not err in excluding the document. The ALJ also allowed claimant's representative to offer the information contained in the document into evidence via testimony, and the witness did so. Transcript at 42. The ALJ specifically asked claimant's representative if there was any other information contained in the document that he wanted to offer into evidence via testimony, and the representative stated there was not. Transcript at 43. Thus, even if the ALJ had erred in excluding the document, the error would have been harmless. EAB considered all relevant information received into evidence at the hearing, including the testimony of claimant's representative regarding the information contained in the document excluded by the ALJ.

FINDINGS OF FACT: (1) Starvin Marvin's Seafoods employed claimant as an on-call dock worker from October 18, 2010 to June 29, 2013.

(2) Claimant suffered from diabetes, chronic back pain, and “memory impairments.” Transcript at 42. Claimant’s duties included the “dump on the off load,” which involved standing on a steel platform on a forklift and guiding a metal bucket of seafood lifted by a crane over the “dump tank.” Transcript at 6-7. In Spring 2012, claimant injured his elbow while performing that duty. Claimant did not notify the employer, did not see a doctor, and did not miss work.

(3) During the last year of claimant’s employment, the employer reduced his hours.

(4) In February 2013, claimant injured his toe while dumping an off load, and did not see a doctor until after the toe became severely infected. The toe ultimately was amputated, and claimant did not return to work until May 2013.

(5) On June 29, 2013, claimant quit work due to the reduction in hours, and because he no longer wanted to dump off loads. Claimant did not ask the employer if he could be excused from dumping off loads. The employer had other duties available for claimant to perform.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant quit work without good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). If an individual quits work due to a reduction in hours, he has left work without good cause unless continuing to work substantially interferes with return to full time work, or unless the cost of working exceeds the amount of remuneration received. OAR 471-030-0038(5)(e). Otherwise, “good cause” is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work. OAR 471-030-0038(4) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 722 (2010). Claimant had diabetes, chronic back pain, memory impairments, and a permanently injured foot, permanent or long-term “physical or mental impairments” as defined at 29 CFR §1630.2(h). A claimant with those impairments who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairments would have continued to work for his employer for an additional period of time.

Claimant quit work due, in part, to a reduction in hours. However, claimant did not assert or show that continuing to work for the employer substantially interfered with his return to full time work, or that that cost of working for the employer exceeded the remuneration he received. Thus, to the extent claimant quit work due to a reduction in hours, he quit work without good cause.

Claimant also quit work because he no longer wanted to dump off loads after having been injured twice in approximately fifteen months. However, claimant did not ask the employer if he could be excused from dumping off loads, and the record fails to show that his physical or mental impairments prevented him from doing so. The employer’s office manager testified that the employer had other duties available for claimant to perform. Transcript at 32. Absent a showing that the employer was unwilling or unable to excuse claimant from dumping off loads, claimant failed to establish he had no reasonable alternative

but to quit. We therefore conclude that claimant quit work without good cause, and that he is disqualified from the receipt of benefits.

DECISION: Hearing Decision 14-UI-10322 is affirmed.

Tony Corcoran and D. E. Larson;
Susan Rossiter, not participating.

DATE of Service: March 20, 2014

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310, or visit the website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.