

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0717

Reversed & Remanded

PROCEDURAL HISTORY: On December 31, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 73845). Claimant filed a timely request for hearing. On March 5, 2014, ALJ Erwin conducted a hearing that was continued to March 28, 2014. On March 28, 2014, ALJ Dorr conducted the continued hearing, and on April 4, 2014, issued Hearing Decision 14-UI-14310, concluding the employer discharged claimant, not for misconduct. On April 24, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument to the extent it was based on the record.

CONCLUSIONS AND REASONS: Hearing Decision 14-UI-14310 should be reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further development of the record.

Claimant was a patrol deputy for the employer, Multnomah County Sheriff's Office (MCSO), between July 19, 1993 and April 2012 when he was working an assignment with the Portland Police Bureau's Transit Police Division (TPD). At that time, when TPD's unit commander discussed with claimant certain performance deficiencies that had been observed, claimant explained the deficiencies by disclosing he had been diagnosed with Parkinson's disease about four years earlier. Exhibit 11. TPD promptly ended claimant's assignment and the employer, which had been unaware of claimant's Parkinson's, placed claimant in a light duty assignment while it assessed claimant's ability to perform the essential functions of his deputy sheriff position. The employer sent claimant to two independent medical exams (IME), had him tested for agility and officer involved shooting ability in the field with full equipment and, a year after performing the IME, had one of the medical examiners review the unit commander's reports regarding claimant's performance deficiencies with TPD. The employer

considered all the information and ultimately concluded that claimant was unable to perform the essential functions of his position as a patrol deputy and notified him that it intended to terminate his employment in that capacity for “unfitness.” Transcript at 16. However, as alternatives to termination, the employer offered claimant the opportunity to continue his employment with the county by “voluntarily demot[ing]” to non-law-enforcement positions for the county or taking a medical leave of absence as a deputy sheriff to apply for disability retirement during which he would potentially exhaust his paid leave, and if denied, returning to his light duty position with MCSO until October 16, 2014, when he would formally retire. Exhibit 11. After claimant declined those alternatives, the employer terminated his employment as deputy sheriff on October 29, 2013.

This matter comes before EAB to determine whether claimant should be disqualified from receiving unemployment insurance benefits because of his separation from work. In the Department’s initial determination, its authorized representative concluded claimant voluntarily left work without good cause because he refused to accept the employer’s offer of continued employment with the accommodations of allowing him to apply for disability retirement and retire on October 16, 2014. Decision # 73845. The ALJ concluded the employer discharged claimant, not for misconduct, reasoning that there was no evidence of wilful or wantonly negligent conduct and because the employer’s offer of continued work was contingent on claimant exhausting his paid leave after which the leave would be unpaid, the employer’s offer “[did] not constitute an offer of continued work, but rather an offer to remain employed without compensation.” Hearing Decision 14-UI-14310 at 3.

The ALJ’s analysis ignores that “work” is defined as the “continuing relationship” between an employer and an employee and not in terms of a particular job or compensation. OAR 471-030-0038(1) (August 3, 2011). Under OAR 471-030-0038(2), if the employee could have continued to “work” for the same employer for an additional period of time, the work separation is a voluntary leaving; if the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2) (August 3, 2011). Here, because there was no dispute that claimant could have maintained a continuing relationship with the employer by applying for disability retirement and retiring on October 16, 2014 or by taking a job outside of the law enforcement section of the MCSO and working indefinitely, the work separation was a voluntary leaving. Transcript at 55.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he (or she) 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). “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). Claimant had Parkinson’s disease, a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h). Therefore, claimant’s decision to leave work must be analyzed using the standard of a reasonable and prudent person with the characteristics and qualities of an individual with such impairment. OAR 471-030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 722 (2010). A claimant with Parkinson’s disease who quits work must show that no reasonable and prudent person with that impairment would have continued to work for the employer for an additional period of time.

Although the ALJ made some inquiries at hearing regarding the nature of the work separation, he did not disclose his conclusion at hearing or inform claimant that if he concluded the work separation was a voluntary leaving, claimant had the burden to establish good cause. Moreover, although it was clear claimant had Parkinson's disease and that he asserted it did not prevent him from performing the essential functions of a deputy sheriff on October 29, 2013, the ALJ did not inquire regarding the prognosis for claimant's condition or whether that prognosis was a factor in claimant's decision to decline the offered alternatives to discharge. Finally, although claimant asserted that the reduction in his PERS benefits would have been substantial had he accepted a non-law-enforcement position from the employer, the ALJ did not inquire regarding the details of the reduction in question. In the absence of the information in question, claimant was denied a genuine opportunity to be heard on the matter of his voluntary leaving and we cannot determine whether claimant's circumstances presented him with a grave situation that necessitated he quit work when he did.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant had good cause to quit work when he did, Hearing Decision 14-UI-14310 is reversed, and this matter is remanded for development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 14-UI-14310 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

DECISION: Hearing Decision 14-UI-14310 is set aside, and this matter remanded for further proceedings consistent with this order.

Susan Rossiter and J. S. Cromwell;
Tony Corcoran, not participating.

DATE of Service: June 19, 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.