

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0120

Reversed & Remanded

PROCEDURAL HISTORY: On December 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 92149). Claimant filed a timely request for hearing. On January 21, 2016, ALJ Murdock conducted a hearing, and on January 25, 2016 issued Hearing Decision 16-UI-51601, affirming the Department's decision. On February 1, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

The ALJ marked a statement by claimant as Exhibit 2 but excluded it from evidence, concluding it was unduly repetitious of claimant's testimony. However, the statement contains details that were not part of claimant's testimony, and was not, therefore, entirely repetitious of it. The ALJ erred by excluding Exhibit 2 from evidence, and we admit it at this time to complete the record. *See* OAR 471-041-0090(1). Any party that objects to our doing so must submit objections, in writing, to EAB within 10 days of the date of service of this decision. Unless such objection is received and sustained, Exhibit 2 will remain part of the record.

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-51601 must be reversed as unsupported by a complete record, and this matter remanded.

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). "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). For an individual with a permanent or long-term “physical or mental impairment,” as defined at 29 CFR §1630.2(h), good cause for leaving is such that a reasonable and prudent person with the characteristics and qualities of such individual would leave work. A claimant who quits work must show that no reasonable and prudent person would have continued to work for his employer for an additional period of time.

The ALJ concluded that claimant quit work without good cause because "he failed to establish that he faced a grave health situation that left him no reasonable alternative but to quit work," a "medical professional had not recommended that he leave work for the sake of his health," and, "to whatever extent he needed some medical accommodations, he did not pursue that alternative to quitting work." Hearing Decision 16-UI-51601 at 2.

As a preliminary matter, the record shows that, at the time claimant quit work, he was diagnosed with sub acromial bursitis, a history of depression and acute stress. However, the ALJ did not make sufficient inquiry about the duration or magnitude of claimant's conditions from which we can determine whether claimant's sub acromial bursitis, history of depression and/or acute stress disorder were "permanent or long-term impairment[s]" such that we need to apply the standard of a reasonable and prudent person of ordinary sensitivity, exercising ordinary common sense, or that of a reasonable and prudent person with the characteristics and qualities of an individual with such impairment(s). *See* OAR 471-030-0038(4).

Next, we disagree with the ALJ that claimant did not pursue alternatives to quitting. Claimant was too understaffed to reduce his own work hours or refrain from lifting. Claimant had asked the employer to transfer or allow him to step down to a lesser position, but the employer refused. Taking time off work or a leave of absence were not reasonable alternatives under the circumstances because, while doing so would remove claimant from the working environment that was affecting his physical and possibly mental health, it was unlikely to change the underlying working conditions that were causing claimant's problems, to which claimant would ultimately have to return at the end of any time off or leave period. No reasonable alternatives exist on this record.

In order to establish good cause for quitting work, however, claimant must also prove by a preponderance of the evidence that his reason for quitting work was grave. The record must be developed before we can determine whether or not gravity existed here. For example, the record shows that claimant had acute stress disorder and a history of depression. Exhibit 1. However, the ALJ did not ask claimant about the effect his working conditions had on his mental health. He also had sub acromial bursitis for which he was given a cortisone injection and was advised about daily stretching and other at-home treatments. Exhibits 1 and 2. He worked 60 to 80 hours each week, was understaffed, and, as such, had no choice but to continue working long hours and lifting heavy items at work. Although claimant's physician did not recommend that he quit work for the sake of his health, that would be just one factor in determining whether claimant was facing a grave situation because of the effect working had on his health and on his life, and the record fails to show whether other factors existed that would demonstrate that claimant faced a grave situation because of his health. For example, the ALJ did not ask how claimant's acute stress disorder, history of depression and sub acromial bursitis affected claimant, whether and how much pain his physical condition caused him, how his continued employment affected his mental and physical health both at work and otherwise, what the prognosis for recovery was if claimant continued working long hours and lifting heavy objects, and why claimant felt

that his continued employment affected his health to such a degree that he believed he had no reasonable alternative but to quit work.

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 for quitting work, Hearing Decision 16-UI-51601 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 16-UI-51601 is set aside, and this matter remanded for further proceedings consistent with this order.¹

Susan Rossiter and J. S. Cromwell

DATE of Service: February 4, 2016

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 Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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¹ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-51601 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.