

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0142

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 4, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 155445). Claimant filed a timely request for hearing. On January 22, 2016, ALJ R. Frank conducted a hearing, and on January 29, 2016 issued Hearing Decision 16-UI-51991, affirming the Department's decision. On February 8, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision, but only to the extent it was relevant and based on the hearing record. Pursuant to ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006) we did not consider any new information claimant included with her argument.

FINDINGS OF FACT: (1) Sequoia Mental Health Services, Inc. employed claimant as a supported employment program lead from July 29, 2015 to October 30, 2015.

(2) Claimant has a long-term physical impairment called a "Tarlov Cyst" in her neck. Tarlov Cysts most often affect an individual's nerve roots and may cause pain and other symptoms. Claimant's cyst cannot be removed. Individuals with Tarlov Cysts may receive treatment that provides pain relief, but the relief is temporary in nature.¹

(3) As a result of claimant's impairment she experienced pain from standing or sitting for long periods. She did not function well using a laptop computer because the keyboard was not ergonomic, and would have difficulty hauling a laptop computer around with her to various job sites. Claimant's physician

¹ We take notice of the generally cognizable information about Tarlov Cysts included in this finding. *See* http://www.ninds.nih.gov/disorders/tarlov_cysts/tarlov_cysts.htm. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

recommended that she be accommodated with an ergonomic keyboard and a variable height desk that would permit her to sit or stand as needed during the workday.

(4) Claimant notified the employer of her need for accommodation promptly upon beginning work and offered to provide medical documentation to support her accommodation request. Within one day of her request, claimant's supervisor provided claimant with an ergonomic keyboard. The supervisor promised he would provide the variable height desk later.

(5) Between July 29, 2015 and August 10, 2015, claimant repeatedly asked her supervisor for the variable height desk. The supervisor told claimant each time she inquired that he was awaiting a response from the employer's clinical director. Claimant experienced a great deal of pain while working without the variable height desk.

(6) On August 10, 2015, claimant provided her supervisor with a picture of a sit/stand workstation she had used in the past. The supervisor assigned the maintenance man to build one for claimant, but the maintenance man did not have the skills to build it. Later in August 2015, claimant's supervisor told claimant that he heard from the employer's clinical director, who had denied claimant's request for accommodation.

(7) In September 2015, the employer began restructuring its staff. The employer gave claimant's position to her supervisor and the clinical director notified claimant that she was being assigned new duties including additional driving and using a laptop and shared work stations. Claimant required accommodation with regard to the driving, could not use a laptop, and was concerned about potentially accommodating her at her work station if she did not have access to a specific work station.

(8) On October 4, 2015, claimant submitted a new accommodation request to her supervisor asking for a 4-day workweek and the sit/stand work station. Claimant provided the employer with a physician's note recommending the accommodations. Claimant's supervisor told claimant that her accommodation requests were denied, although he said he would "keep all quiet" if she wanted to work four days a week without telling the clinical director about it. Exhibit 1, third page.

(9) On October 9, 2015, claimant's supervisor told claimant that "if you have a problem without your accommodations" to blame the clinical director and the human resources person. Audio recording at ~14:27. He told her that it was "not [his] doing," and he knew she had arm and neck problems but "this is the way it's gonna go down." Audio recording at ~14:45. Claimant's supervisor told claimant she could talk to the clinical director if she had a problem with the denials of her accommodation requests. Claimant did not think the clinical director would be responsive to her and asked her supervisor why she would do that if the clinical director had already denied all her requests. He did not respond.

(10) By that time, claimant was attending weekly physician appointments for pain relieving injections and all of the medications she took to relieve her Tarlov Cyst symptoms had been increased. She missed work on several occasions. She often made up the time she missed, but she had to take leave without pay several times. Claimant's physician had advised her not to continue working if the employer did not accommodate her impairment. Based on the October 9, 2015 conversation with her supervisor, claimant decided to quit work. Claimant decided to give more than two weeks' notice because she did not want to abandon the clients she was already scheduled to see during that time.

(11) On October 12, 2015, claimant notified her supervisor and the clinical director that she quit work "because of [the employer's] failure to accommodate my disability." Exhibit 1, third page. Claimant's supervisor then called her to his office and stated, "I told you to do one God damn thing and talk to [the clinical director] and you cannot even follow directions." *Id.*

(12) On October 12, 2015, the clinical director spoke with claimant and her supervisor and told claimant that her resignation was the first she had heard of claimant's requests for accommodation. Claimant asked her supervisor why the clinical director would say that when he had told claimant all her requests had been denied, and the supervisor shrugged and said, "I do not know." *Id.*

(13) During the following week, claimant met with the employer's human resources person and clinical director. Those individuals told claimant that the employer had never received claimant's request for a modified work station, and the employer would do an evaluation to determine what accommodations the employer could make for claimant's new position.

(14) Sometime between October 24, 2015 and October 26, 2015, the employer completed its evaluation. The employer did not tell claimant that her requests for specific accommodations were allowed or denied, but instead merely told claimant, "give this to your doctor if you feel like it to see if you can even do a job." Audio recording at ~14:00. Claimant did not attempt to rescind her resignation, and, effective October 30, 2015, claimant quit work.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude claimant quit work with good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for leaving work when she 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). Claimant had a Tarlov Cyst, a permanent "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with that impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for her employer for an additional period of time.

The ALJ concluded that claimant quit work without good cause. He reasoned that it was "uncertain" if claimant's situation was grave because she "missed minimal work, if any, due to the alleged pain," and it was unlikely claimant would have worked in pain after resigning. Hearing Decision 16-UI-51991 at 3. The ALJ also reasoned that claimant had reasonable alternatives to quitting, including that she could have "simply stood up at will" even though she did not have a sit/stand work station, "followed the employer's repeated directives to relay her request for accommodation to another employee," or "at minimum, contacted human resources personnel with her concerns" before quitting. *Id.* The ALJ also considered it "inexplicable" that claimant was "unwilling to rescind her notice and participate" once the employer began an "analysis of her position." *Id.* We disagree.

The record does not support the ALJ's conclusion that claimant missed minimal work or "allegedly" had pain. She provided credible and unrefuted testimony that she had missed work, several times having to take leave without pay, and experienced significant amounts of pain. The fact that claimant did not miss more work and worked throughout her notice period out of a sense of responsibility to her clients does not diminish the reliability of claimant's testimony about the pain she experienced working without accommodations with a Tarlov Cyst in her neck. Not only was claimant's testimony sincere, internally consistent and uncontroverted, it was consistent with generally cognizable information available about Tarlov Cysts and with her doctor's recommendation that she quit work if the employer did not accommodate her impairment, and plausible. Absent a basis for believing that claimant was not a credible witness, we believe her testimony about the pain she felt and the effect that pain had on her.

The record does not support the ALJ's conclusion that claimant had reasonable alternatives to quitting work. There is no evidence that claimant did not "simply stand up at will" at work when necessary, much less that "simply standing" was an effective solution to address her pain from sitting or would effectively resolve claimant's concerns about the increased driving, laptop use, and other factors associated with her new position. Nor is it reasonable to expect claimant, for instance, to report to work and "simply stand up" all day without working or driving to appointments when sitting was too painful. The "employer's repeated directives" to claimant to "relay her request for accommodation to another employee" the ALJ cited as an alternative to quitting would, in essence, have involved contacting the clinical director about her requests. It was unreasonable to expect claimant to consider that a reasonable course of action, however, given that the same supervisor had repeatedly informed claimant that the clinical director had already repeatedly denied claimant's accommodation requests. Nor was it reasonable to expect claimant to contact human resources. Since her supervisor had told her that human resources was involved in the previous denials, and never referred her to human resources for further assistance, the record does not show that she had any reason to believe that contacting human resources would affect her situation.

Claimant's decision to quit work on October 30th instead of rescinding her resignation was not, as the ALJ characterized it, inexplicable. By the time claimant quit, she had been working for the employer for over four months and experiencing increasing amounts of pain. Although she had repeatedly requested accommodation for her impairment, these requests were denied. Her supervisor had, apparently, repeatedly lied to her when responding to her requests for accommodation despite his knowledge of her condition and pain and his earlier promises to provide her with a variable height desk. In addition, in spite of her repeated requests for accommodation, the employer was in the process of transferring her to a position that would, more likely than not, be harder on her body than the one she previously held. After the employer completed its analysis, claimant was not promised accommodations that would allow her to continue working, but was, instead, only told to take the results to her doctor to "see if you can even do a job," which is some indication that even the employer had doubts that it could provide her with adequate accommodation. Under the circumstances, it was reasonable for claimant to have lost trust in the employer's willingness or ability to provide her with adequate accommodations, even after the employer completed its evaluation, and reasonable that claimant did not expect her situation to improve. Given this situation, it was unreasonable to expect claimant to continue waiting an additional period of time to find out whether or not the employer would accommodate her in a way that would allow her to continue working. No reasonable and prudent person with the characteristics and qualities

of an individual with a Tarlov Cyst would have considered continuing to work for the employer for an additional period of time under the circumstances.

Claimant quit work with good cause. She is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 16-UI-51991 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, not participating.

DATE of Service: February 26, 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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