EO: 200
BYE: 201649

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

643
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0225

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 15, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 144409). Claimant filed a timely request for hearing. On February 16, 2016 ALJ Triana conducted a hearing at which the employer did not appear, and on February 18, 2016 issued Hearing Decision 16-UI-53305, affirming the Department's decision. On February 25, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Social Security Administration employed claimant as a service representative from September 20, 2002 until December 11, 2015.

(2) Claimant's position required him, among other things, to interview prospective claimants of Social Security benefits, keep detailed records of those interviews and, as necessary, follow up on those interviews and other matters relating to those claims. Claimant's position required close attention to detail, organization and a high degree of concentration.

(3) Sometime before October 2015, management at the office where claimant worked implemented new criteria for evaluating employees' performances. The new criteria emphasized efficiency in dealing with tasks and spending less time in developing one-on-one relationships with actual or prospective claimants. Sometime before October 2015, the employer reviewed claimant's performance. Claimant failed four out of the five tests on which the employer evaluated him, and the employer determined claimant's performance was unsatisfactory, principally in the areas of organization and the manner in which he dealt with clients, which the employer thought was overly "relaxed." Audio at ~17:57. As a result of this evaluation, claimant was placed on a performance plan and told that he had thirty days to improve his performance. Claimant did not pass the thirty day review. At that time, claimant was placed on a 120 day performance review plan, which allowed him additional time to try to pass the tests. The 120 day period for a third review of claimant's performance was required under the collective bargaining agreement between claimant's union and the employer. If claimant did not pass the

performance tests administered during the 120 day period, he would be discharged. The 120 day review period was to end in late January 2016.

(4) On October 13, 2015, claimant was involved in a very serious roll-over automobile accident. He sustained many injuries, including a concussion. After the concussion, claimant had substantial difficulties with his short-term and long-term memory, with absorbing and retaining information, concentrating, attending to detail, organizing himself and performing miscellaneous cognitive tasks. Claimant also experienced confusion, anxiety, severe headaches, sleeplessness and irritability resulting from the concussion. Claimant was under the care of physicians to treat the symptoms from the concussion.

(5) Around approximately the end of October 2015, claimant attempted to return to work after the automobile accident. Claimant was unable to perform his job due to the effects of the concussion. At that time, claimant had exhausted the protected leave that was available to him under the Family Medical Leave Act (FMLA) because of prior leaves necessitated by other conditions. The employer arranged for claimant to take time off using a combination of sick leave that he had accrued, donated leave from other employees and leave without pay.

(6) When claimant was away from work on leave, the symptoms he experienced from the concussion did not abate. Claimant realized he could not perform his job duties, or take or pass the employer's tests during the 120 period if he continued to remain subject to the symptoms of the concussion. In response to claimant's questions, his physicians and health care providers told him that they thought his symptoms would ultimately stop but were unable to predict with any reliability when the symptoms would lessen, subside or terminate. They told claimant every concussion was different, and the symptoms "sometimes last up to a year and sometimes longer." Audio at ~31:33.

(7) Sometime in before December 11, 2015 and while claimant was on leave, he asked representatives of the employer if the 120 period he was allowed to pass the employer's performance review tests could be extended beyond the end of January 2016 because of the impacts of the concussion on his ability to perform the review tests and his physicians' uncertainty about when the symptoms would diminish. The representatives told claimant that they could not extend the 120 day period because it was required "as per the union contract." Audio at ~24:57.

(8) Also sometime before December 11, 2015, while he was still on leave and not able to work, claimant spoke with his union representative about his situation. The representative was in contact with the employer. Claimant told the representative about his symptoms from the concussion and his concern that he could not pass the performance review tests while the symptoms continued. The union representative told claimant that the employer was correct and that the collective bargaining agreement prohibited the employer from extending the 120 period. The union representative also told claimant that if he failed the employer's third round of tests and he was discharged, he would not be hired for another federal job, but if he resigned he would not be precluded from future federal employment. The representative further told claimant that it appeared to him, given claimant's condition at the time, that "you're not going to succeed" in passing the employer's performance review tests and avoiding discharge. Audio at ~30:43. The union representative advised claimant to resign to preserve his ability to be considered for future federal employment.

(9) On December 11, 2015, while still on leave, claimant resigned and voluntarily left work. Claimant did so because he was still experiencing post-concussive symptoms that would prevent him from passing the employer's test before the end of January 2016, his physicians had no opinion on when the symptoms might subside to manageable levels, and if he returned to work he would fail the performance tests and be discharged, which would bar him from future federal employment.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with 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). "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). If a claimant has a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h) when he leaves work, he 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 his employer for an additional period of time.

In Hearing Decision 16-UI-53305, the ALJ concluded that claimant did not show he had good cause for leaving work when he did. The ALJ first reasoned that claimant did not show that he had a permanent or long-term physical impairment, so the ALJ analyzed his decision to leave work from the objective perspective of a reasonable and prudent person without impairments. Hearing Decision 16-UI-53305 at 3. While not "doubt[ing] the severity of claimant's symptoms" from the concussion, the ALJ found that claimant did not explore his reasonable options before deciding to leave work over a month and a half before the end of the 120 day performance review period, including that he could have returned and worked until close to the end of January 2016 and left work at that time if his symptoms had not abated and he remained unable to pass the employer's tests. Hearing Decision 16-UI-53305 at 3. We disagree.

At the outset, we agree with the ALJ that claimant's unrebutted testimony established that he experienced acute and severe symptoms from his concussion that persisted until he resigned from work. Although she did not state the basis for her determination that claimant was not entitled to take advantage of the individualized, modified standard for showing good cause allowed for claimants with impairments, we infer that the ALJ did so because the length of time claimant would experience to concussion symptoms was uncertain, and he was medically released for work before the end of January. Hearing Decision 16-UI-53305 at 3. However, at the time claimant resigned he did not know when the symptoms would ease and the extent to which they would. The proper focus of this analysis is what was reasonably known about the duration of claimant's symptoms at the time he resigned, which was that they might continue for a year or longer. While 29 USC §1630.2 does not set out a bright line rule about the duration of an impairment for it to be considered "long-term," 29 USC §1630.2(j)(1)(ix), which sets out guidelines for determining when an impairment may be considered "substantially limiting" for purposes of the Americans With Disabilities Act (ADA), states that the duration may be fewer than six months, and contrasts a "substantially limiting" impairment with one that is "transitory and minor." 29 CFR §1630.15(f). It was not disputed that the expected duration of claimant's impairments from the concussion could last more than one year and balancing that duration with the severity of the impairments, it appears that they were neither transitory nor minor. Reasoning by analogy from the

federal implementing regulations for the ADA, it appears appropriate to consider claimant's impairments from the concussion to have been "long-term" within the meaning of OAR 471-020-0038(4), and to consider claimant's decision to quit from the perspective of a reasonable and prudent person subject to the symptoms that affected claimant.

Claimant testified with certainty that the employer was going to discharge him if he did not pass the performance tests by the end of January 2016 and, although he asked the employer to extend the time in which he could take those tests because of the effects of the concussion symptoms, the employer told him that it could not do so under the terms of the collective bargaining agreement, a conclusion echoed by claimant's union representative. Audio at ~13:45, ~24:46. Based on claimant's description of the manner in which the concussion symptoms impacted his capacity to attend to and perform the tasks on which he was going to be tested, his conclusion was reasonable that if he took those tests while experiencing those symptoms, he would very likely fail them, which would automatically result in his discharge. Audio at ~7:46, ~12:50, ~20:11, ~20:25, ~20:32, ~23:48. Had claimant failed the performance tests, the employer would have discharged him on the grounds of inadequate performance; inadequate performance is not misconduct. Audio at ~17:57, 19:29. In *McDowell v. Employment Department*, 348 Or 605, 636 P3d 722 (2010), the Supreme Court held that when a claimant resigned to avoid a discharge that was virtually certain and would not be for misconduct, and when the discharge would seriously jeopardize claimant's future employment prospects, he had good cause to resign. Applying *McDowell*, EAB has consistently concluded that a claimant had good cause to leave work if his discharge was likely to occur in the near future, and balancing the certainty of the discharge with the degree of its stigmatizing impact, a reasonable and prudent person would have made the decision to leave work in lieu of discharge. *See Appeals Board Decision*, 13-AB-0206, February 25, 2015; *Appeals Board Decision* 12-AB-0436, March 16, 2012; Appeals Board Decision 12-AB-0206. November 28, 2012. Here, claimant testified that he resigned to protect his ability to obtain future federal employment, which he desired and which his union representative had told him would be precluded if he was discharged. Audio at ~14:20, ~19:29, ~20:32, ~21:39, ~30:43. Based on this testimony, it appears that claimant reasonably thought that his desired career path would be foreclosed if he did not avert the employer's discharge of him. A discharge of claimant would have been seriously stigmatizing.

However, the ALJ's decision turned on the fact that claimant resigned a month and a half before the date by which he would be discharged if he had not passed the performance review tests. Hearing Decision 16-UI-53305 at 3. In assessing the gravity of claimant's circumstances, the ALJ emphasized that claimant could have tried in the time remaining to meet the employer's expectations after he was released for work by his physician. *Id.* While this was theoretically possible, at the time claimant resigned he did not know when or if his physician was going to release him to work; whether he had good cause must be based on information of which claimant was aware or reasonably aware when he made the decision to resign. At that time, claimant had been under the effects of concussion symptoms for over two months without abatement. His union representative had advised him in no uncertain terms that he would fail the performance tests and his best course was to resign. His physician was unable to give him a time frame for the abatement of the concussive symptoms, from which we infer he had reason to believe that continuing his employment would be futile and would only delay an inevitable discharge. On these facts, a reasonable and prudent person suffering from concussion symptoms of the magnitude that claimant experienced would have concluded that he needed to resign from work to protect his future employment prospects, and that it was futile to wait any longer for his concussion symptoms to dissipate in the hope he could pass the performance tests.

Claimant showed good cause for leaving work when he did. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-53305 is set aside, as outlined above.

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

DATE of Service: March 23, 2016

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.
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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.