

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0961

Reversed & Remanded

PROCEDURAL HISTORY: On June 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 83302). Claimant filed a timely request for hearing. On July 22, 2016, ALJ S. Lee conducted a hearing, and on July 28, 2016 issued Hearing Decision 16-UI-64648, affirming the Department's decision. On August 18, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-64648 should be reversed, and this matter remanded for additional proceedings.

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). An individual with a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h), 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 found as fact that claimant had an allergy to spearmint and experienced an allergic reaction when a coworker chewed spearmint gum in her vicinity. Hearing Decision 16-UI-64648 at 1. The ALJ also found as fact that the allergic reaction claimant experienced involved "sniffing and sneezing." *Id.* at 2. The ALJ concluded that claimant quit work without good cause, reasoning that claimant's long-term allergies were not an "impairment" because the "condition was treatable and while highly uncomfortable . . . did not . . . impact[] major life activities," and, while claimant was "sincere in her account of the difficulties she encountered," claimant "could have continued to work for the employer while asking the employer to "take more action against her co-worker" or "working with the employer

to flex her schedule or telecommute to improve her working situation, even if it meant dealing with her co-worker's possible non-compliance." *Id.* at 3. The ALJ also stated that claimant's "belief that nothing the employer did would change [the coworker's] behavior [] may have been compelling to her but do not constitute good cause to leave employment." *Id.* We disagree that the record as developed supports those findings and conclusions.

The record established that it is more likely than not that the circumstance that caused claimant to quit work, specifically, her coworker using spearmint at or before work and exposing claimant to spearmint in the workplace, was unlikely to change. Claimant tried to speak with her coworker and the coworker walked away from her without listening. The employer had repeatedly admonished the coworker about using spearmint but the coworker persisted in behaviors that exposed claimant to her allergen in the workplace. Although the employer made earnest attempts to address claimant's complaint, it appears from this record that the situation was unlikely to change. Although the employer allowed claimant to leave work early and would have supported claimant in working from home at times, the record shows that was not feasible for claimant to take time off work during busy times and it is undisputed that the employer could not allow anyone to work full time from home due to the nature of the work. Given those circumstances, it appears that claimant's only alternatives were to continue working and chance continued exposure to the allergen, or to leave work.

Whether good cause existed in this case, then, depends on whether the chance of continued exposure to the allergen was a situation of such gravity for claimant that any similarly situated reasonable and prudent person would have concluded she had to quit work, but the record was not developed sufficiently to make that determination. Although the ALJ found that claimant's symptoms involved "sniffing and sneezing" and were "highly uncomfortable," and that her spearmint allergy was not an "impairment" because she was not sufficiently affected by it, the record shows that the ALJ did not actually ask claimant to describe her allergy symptoms or their effect during the hearing. It is generally known that many allergy sufferers experience only mild respiratory and sinus problems, but it is not uncommon for individuals with allergies to experience restricted breathing, severe cough, severe sinus problems, asthma-like symptoms, stomach upset, and/or reflux, or suffer musculoskeletal injuries from severe coughing, and, in severe cases, exposure may be life-threatening and require emergency medical treatment and/or emergency epinephrine injections. It is also generally known that while antihistamine medications reduce some respiratory and sinus symptoms, they do not necessarily resolve them, and claimant testified at the hearing that despite her use of antihistamines when her symptoms were bad, she felt sick and miserable and was unhealthy. Consequently, we cannot infer from claimant's testimony that her symptoms were limited to "sniffing and sneezing," that she took an antihistamine medication to cope with allergy symptoms in the office, that whatever symptoms she had were adequately resolved by claimant's use of an antihistamine, or that claimant could reasonably be expected to continue coping with "her co-worker's possible non-compliance" in order to remain employed. Additional evidence is, therefore, required.

To support a conclusion as to whether claimant's allergy constituted an impairment or situation of gravity, on remand the ALJ should ask claimant what her symptoms were, how they affected her health, how they made her feel, what effect they had on her major life activities (like breathing, sleeping, working, etc.), and what effect they had on her ability to do her job duties. Although claimant did not seek medical attention during the 100-hour per week tax season, the ALJ should ask claimant whether she had ever sought or obtained medical treatment for her allergy, how she dealt with the allergy outside

of work, whether she was given any advice for dealing with her allergy by a medical professional, and what, if any, advice she received about how to medicate herself when she was exposed to the allergen. The ALJ should ask claimant whether the over-the-counter antihistamine she took adequately treated her symptoms, whether she felt any side-effects from taking the antihistamine, how she felt when she took the antihistamine, and whether the antihistamine sufficiently alleviated the effect of her allergy symptoms on her ability to do her job and on any major life activities that might have been affected by the allergy symptoms. Finally, the ALJ should ask any follow-up questions and follow any lines of inquiry that result from asking those questions, and also allow the employer the opportunity to respond to claimant's testimony.

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 an impairment and quit work without good cause, Hearing Decision 16-UI-64648 is reversed, and this matter is remanded.¹

DECISION: Hearing Decision 16-UI-64648 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: September 12, 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.

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.

¹ NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-64648 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.