

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0021

Reversed & Remanded

PROCEDURAL HISTORY: On October 12, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 90214). Claimant filed a timely request for hearing. On December 13, 2016, ALJ Shoemake conducted a hearing, and on December 20, 2016 issued Hearing Decision 16-UI-73258, affirming the Department’s decision. On January 5, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant’s argument, but only to the extent it was based on the record. Claimant submitted new information for EAB’s consideration. Because we have remanded this on other grounds, however, we decline to rule on the admissibility of the information before EAB. If claimant would like the information considered, claimant should offer the information into evidence during the remand hearing.

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-73258 should be reversed, and this matter remanded.

Claimant testified at the hearing that she had never before worked in a capacity similar to that of a playground monitor, that she had not applied and did not believe she had interviewed for that position, and that she experienced back pain while doing that work for the employer. The ALJ’s findings, however, did not include mention of those facts. The ALJ concluded that claimant quit her job with the employer without good cause because, “[a]lthough the work was not what claimant expected, she did not show that she was facing a situation so grave as to leave her no reasonable alternatives but to quit work. Claimant could have performed the work until another position became available in the classroom.” Hearing Decision 16-UI-73258 at 2. We disagree that the record supports that conclusion.

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). Generally speaking, the standard applied to determine whether an individual has “good cause” is whether the

reason the individual left work was 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 P3d 722 (2010).

Where the evidence in a case raises a question about the individual's health, however, the general standard does not apply. For an individual with a long-term or permanent physical or mental impairment, the applicable standard for determining whether good cause exists is whether the individual with impairment left work for a reason of such gravity that a reasonable and prudent person with the characteristics and qualities of an individual with that impairment would have no reasonable alternative but to leave work. OAR 471-030-0038(4).

The evidence in this case raises a question about whether whatever condition contributed to claimant's back pain at work was an "impairment" for purposes of OAR 471-030-0038(4). The ALJ must question claimant about the nature of her back condition, and ask her about any relevant diagnoses. The ALJ should ask claimant for a description of her symptoms and the severity of them, and ask claimant to explain what effect the condition had on her ability to perform the work associated with working for the employer as a playground monitor, and what was the prognosis of her condition. The ALJ should also ask claimant whether or not she is restricted from any particular activities by a health care provider.

In addition, generally speaking, reasonable and prudent persons, regardless of impairment, are not expected or required to perform unsuitable work. Factors to consider when determining whether or not work is "suitable" for an individual include, "among other factors, the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual." ORS 657.190.

Given that claimant testified working as a playground monitor caused her to experience pain, and established that she had never done that or similar types of work before, the ALJ must also inquire about whether the work was "suitable" for claimant with consideration given to the factors listed in ORS 657.190. Specifically, the ALJ should ask whether the work posed a risk to her health or safety, whether the work was appropriate for her given her level of physical fitness, and whether she was qualified to do the work in consideration of her prior training, experience and earnings. The ALJ should ask claimant whether the back pain she felt after working a shift as a playground monitor was the type of pain she felt would be injurious, or whether it was the type of discomfort one experiences when performing a new task, discomfort which is diminished or disappears after one becomes accustomed to the job. The ALJ should ask claimant what skills and experience were required to perform work as a playground monitor, whether she possessed them, and how those skills and experiences compared to the ones she had developed based on her previous jobs and any education or training she had.

Finally, the ALJ should ask claimant what, if any, harm she thought she would suffer if she continued working for the employer until another position became available in the classroom, and why she considered that possibility so grave that she quit work when she did rather than continue working for the employer. If physical discomfort is among the reasons provided, the ALJ should ask claimant whether she reported her discomfort to the employer or asked the employer if there were any steps it could take

that might allow her to work without discomfort. If medical restrictions are among the reasons provided, the ALJ should ask claimant whether she notified the employer of her medical restrictions or asked the employer to accommodate them. The ALJ should ask her what, if anything, the employer told her about the likelihood of a classroom position becoming available or how long she expected that to take, and what effect that information had on her decision to quit work when she did. The ALJ should also ask claimant how it benefited her to leave her job as a playground monitor when she did, and ask any other relevant questions she deems appropriate and follow up with the witness where necessary.

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 or not claimant had good cause to quit work, Hearing Decision 16-UI-73258 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 16-UI-73258 is set aside, and this matter remanded for further proceedings consistent with this order.¹

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

DATE of Service: January 23, 2017

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-73258 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.