

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0357

Hearing Decision 17-UI-78454 Reversed & Remanded
Hearing Decision 17-UI-78498 Affirmed

PROCEDURAL HISTORY: On January 27, 2017, the Oregon Employment Department (the Department) served notice of two administrative decisions, the first concluding claimant voluntarily left work without good cause (decision # 101652) and the second concluding claimant was not available for work during the weeks of January 1, 2017 through January 21, 2017 (decision # 13029). Claimant filed timely requests for hearing on both decisions. On March 8, 2017, ALJ Snyder conducted a hearing at 9:30 a.m. on decision #13029 and at 10:45 a.m. on decision # 101652. The employer did not appear at the hearing on decision # 101652. On March 8, 2017, ALJ Snyder issued Hearing Decision 17-UI-78454, affirming decision # 101652 and on March 9, 2017 ALJ Snyder issued Hearing Decision 17-UI-78498, affirming decision # 13029. On March 24, 2017, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-78454 and 17-UI-78498. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0357 and 2017-EAB-0358).

Claimant submitted a written argument that contained information not in the hearing record. Claimant did not explain why he failed to present this information during either hearing or otherwise show as required by OAR 471-041-0090 (October 29, 2006) that factors or circumstances beyond his reasonable control prevented him from doing so. For this reason, EAB did not consider this new information when reviewing the ALJ's decision in Hearing Decision 17-UI-78498 and reaching its decision in 2017-EAB-0357. In the hearing on remand of 17-UI-78454, the ALJ should determine whether the new information is relevant to the issues on which we have remanded that matter and, if appropriate, admit that information into evidence as a hearing exhibit.

JURISDICTIONAL MATTER: In Hearing Decision 17-UI-78498, the ALJ took jurisdiction over weeks 04-17 through 09-17 in addition to weeks 01-17 through 03-17 that were considered in decision # 13029 and adjudicated claimant's availability for work during all of those weeks, 01-17 through 09-17.

While the Department's representative at hearing requested that the ALJ exercise of jurisdiction over weeks 04-17 through 09-17 in addition to the weeks considered in decision # 13029, claimant did not receive notice that the additional weeks would be at issue during the hearing and the ALJ assumed jurisdiction over them without asking claimant if he stipulated to her doing so or objected. Audio of 9:30 a.m. Hearing (Audio 1) at ~4:55. Subject to objections from the parties, EAB will take jurisdiction over weeks 01-17 through 09-17 and adjudicate the issue of claimant's availability for work during all of those weeks in decision 2017-EAB-0357. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. Unless such objection is received and sustained, EAB's adjudication of claimant's availability for weeks 01-17 through 09-17 will remain undisturbed.

FINDINGS OF FACT: (1) First Response, Inc. employed claimant as a dispatcher from June 10, 2016 until June 16, 2016.

(2) During claimant's employment he lived in Oregon and his father lived in Las Vegas, Nevada. In approximately early June 2016, claimant's father had surgery to remove a cancerous tumor and needed to convalesce from that surgery. Before June 14, 2016, claimant's father tried unsuccessfully to arrange for in-home nursing care to assist his wife, claimant's stepmother, in providing care to him during his convalescence. On June 14, 2016, claimant's stepmother died. There were no family members living in the Las Vegas area who were able to provide care for claimant's father in place of claimant's stepmother.

(3) On June 16, 2016, claimant learned that his stepmother had died. Claimant realized that his father needed him to provide care. Claimant immediately called the employer's human resources representative. Claimant explained the "situation" to the representative. Audio of 10:45 a.m. Hearing (Audio 2) at ~8:00. After some discussion, the representative stated to claimant, "Are you sure, you're not gonna be able to come back." Audio 2 at ~8:04. Claimant replied, "It's gonna take me a bit of time." Audio 2 at ~8:07. Claimant understood that he could re-apply for a job with the employer when he returned to Oregon. Audio 2 at ~13:34. The representative then made arrangements for claimant to receive the pay that was owed to him as of June 16, 2016.

(4) Shortly after June 16, 2016, claimant left for Las Vegas. When claimant left, he anticipated he would need to stay in Las Vegas for one to three months to care for his father. Audio 2 at ~12:45. After arriving, claimant cared for his father. When claimant arrived, his father was using an oxygen tank every night and needed assistance with his basic needs and had limited mobility. In mid-July 2016, a nursing agency was retained to provide some in-home for claimant's father.

(5) Sometime after claimant arrived in Las Vegas, claimant was involved in an incident of domestic violence. As a result of this incident, a local court required claimant to attend domestic violence classes. Claimant was required to attend the classes for one hour each week, either on Mondays from noon to 1:00 p.m. or 1:30 p.m. to 3:00 p.m. or on Wednesdays from 4:00 p.m. to 5:00 p.m. Claimant also enrolled in mental health rehabilitation classes that required him to attend on Tuesdays, Thursday and Saturdays from 3:00 p.m. until 6:00 p.m.

(6) On December 20, 2016, claimant filed an initial claim for unemployment insurance benefits. That claim was determined valid with a weekly benefit amount of \$200. Claimant claimed benefits for the

weeks of January 1, 2017 through March 4, 2017 (weeks 01-17 through 09-17), the weeks at issue. During the weeks at issue claimant was attending both the court mandated domestic violence classes and, until approximately mid-February 2017, the mental health rehabilitation classes.

(7) During the weeks at issue, claimant sought work in the hospitality and culinary fields. In claimant's labor market that work was customarily performed all days of the week and during all hours of the day.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-78454 is reversed and this matter is remanded for further proceedings. Hearing Decision 17-UI-78498 is affirmed and claimant is not eligible for benefits for weeks 01-7-17 through 09-17 because he was not available for work.

Decision 17-UI-78454 - The Work Separation. Claimant principally left work due to the death of his stepmother, which necessitated that he travel to Las Vegas, Nevada to assist and to provide care for his widower-father in Nevada after the death of the stepmother. 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 [she/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). Leaving work with good cause includes but is not limited to, leaving work for compelling family reasons. OAR 471-030-0038(5)(g). "Compelling family reasons" means, among other things, the illness or disability of an immediate family member that necessitates care by claimant and claimant's employer does not accommodate the request for time off. OAR 471-030-0038(1)(e)(B) 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.

In Hearing Decision 17-UI-78454, the ALJ concluded claimant did not demonstrate that he had good cause for leaving work when he did, principally because claimant did not request that his employer give him a leave of absence before quitting his job. Hearing Decision 17-UI-78454 at 2. However, the evidence was not sufficiently developed to allow a determination of whether claimant was or was not on leave or had quit work when he went to Las Vegas. The ALJ should ask claimant to fully describe what was said, and by whom, during claimant's June 16, 2016 conversation with the employer's human resources representative. The ALJ should specifically inquire whether claimant's quitting and alternatives to quitting were discussed during that conversation, what was said about those topics and what claimant understood his work status to be when he departed for Las Vegas. The ALJ should ask claimant what he meant when he testified that he "was sure he could re-apply" to work with the employer after his father's situation in Las Vegas was under control, if he had any assurances that the employer was willing to allow him to return to work at that time or if claimant understood that the work relationship had ended when he went to Las Vegas. Audio 2 at ~13:34. The ALJ should further expressly ask claimant if he pursued taking leave of absence, how he did so, the employer's reaction and if he did not request a leave of absence, the reasons why. Absent such inquiries, EAB cannot determine whether claimant did or did not have good cause to leave work when he did.

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 was had good cause to leave work when he did, Hearing Decision 17-UI-78454 is reversed, and this matter remanded for further development of the record.¹

Availability for Work and Eligibility to Receive Benefits During Weeks 01-17 Through 09-17.

To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). An individual must meet certain minimum requirements to be considered “available for work” for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (February 23, 2014). Among those requirements are that the individual be willing to work and capable of reporting to full time, part time and temporary work opportunities throughout the labor market during all of the usual hours and days of the week customary for the work being sought, and refrain from imposing conditions that limit the individual’s opportunities to return to work at the earliest possible time. *Id.*

At a minimum, claimant was not willing or capable of reporting for any work during the weeks at issue that conflicted with his court mandated domestic violence classes. As well, it appears likely that claimant was not willing to miss the mental health rehabilitation cases in order to work during the weeks at issue up until mid-February 2017. However, considering only the domestic violence classes and claimant’s compulsory attendance once per week during the weeks at issue, they took place during some of the hours and days of the customary for the work in the hospitality and culinary fields that claimant sought. As such, claimant was not willing or capable of reporting for work during all of the usual days and hours customary for the work he was seeking. Accordingly, claimant was not available for work during weeks 01-17 through 09-17, and is not eligible to receive benefits for those weeks.

DECISION: **Hearing Decision 17-UI-78454** is set aside, and this matter remanded for Further proceedings consistent with this order. **Hearing Decision 17-UI-78598** is affirmed.

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

DATE of Service: **April 13, 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.

¹ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-78454 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.

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