

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1047

Reversed & Remanded

PROCEDURAL HISTORY: On July 18, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 133809). Claimant filed a timely request for hearing. On August 18, 2017, ALJ Shoemake conducted a hearing, and on August 22, 2017 issued Hearing Decision 17-UI-90852, affirming the Department's decision. On September 5, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant sent several submissions to EAB, which included documents that she did not offer into evidence during the hearing as well as new information indicating that one of the reasons she left work was due to the employer requiring her to work overtime. Generally, EAB does not in the first instance consider new information or documentary exhibits unless the party offering them shows that the party was prevented from presenting them during the hearing as a result of factors or circumstances beyond the party's reasonable control. *See* OAR 471-041-0090(2) (October 29, 2006). Claimant did not make such a showing in any of the submissions. However, given EAB's disposition of this matter, claimant may offer this additional information and these documents into evidence at the hearing on remand, and the ALJ should, as appropriate, admit them into evidence if the ALJ determines they are relevant to the issues on which EAB has remanded this matter, and that claimant has complied with all prerequisites for their admission into evidence. When claimant receives the notice scheduling the remand hearing, claimant should comply with the instructions that are set out in that notice regarding any documents she wants the ALJ to consider at the remand hearing, including that the documents must be provided to the ALJ and all parties prior to the hearing or they will not be considered.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-90852 is reversed and this matter is remanded for further development of the record.

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 P3d 722 (2010). Claimant appears to have had asthma, a permanent or long-term “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.

In Hearing Decision 17-UI-90852, while the ALJ found that claimant’s desire to secure Section 8 housing was understandable, she still concluded that claimant voluntarily left work without good cause even though the employer failed to comply with claimant’s requests for a set work schedule, preferably a morning schedule, which she considered necessary to effectively look for Section 8 housing. Hearing Decision 17-UI-90852 at 2. The ALJ reasoned that she was “not persuaded that a reasonable and prudent person in similar circumstances would have left a full time job due to a preference as to what part of the day they wanted to seek housing.” Hearing Decision 17-UI-90852 at 2. However, the record is insufficient to support the ALJ’s conclusion as to what a reasonable and prudent person would have done, and the ALJ insufficiently developed to allow EAB to determine whether claimant voluntarily left work with or without good cause.

At the outset, it appears to us that claimant showed her housing situation at the time she left work was arguably grave in light the condition of the fifth wheel in which she was living, its effects on her asthma and her likely need for Section 8 financial assistance if she was to secure a different residence. The ALJ should ask claimant how long she had been living in the fifth wheel at the time she left work and inquire further into the consequences of claimant’s living situation on her health, including whether the condition of the fifth wheel ever caused claimant to experience asthma attacks or other significant respiratory events, whether such attacks or events ever caused claimant to miss work, whether claimant took any steps to relieve the attacks or respiratory events and, if so, to describe them, whether claimant ever needed to take prescriptions or over-the-counter medications to control her asthma and, if so, the names of the medications. The ALJ should follow up on claimant’s responses, as needed, to determine the seriousness of the manner in which claimant’s living situation aggravated her asthma and a description of the extent to which claimant’s asthma symptoms debilitated her, if at all. The ALJ should also develop the evidence as to the reasons, if any, that claimant had not previously moved from the fifth wheel if it was injurious to her health and, if the principal reason was financial, to explore what claimant paid to rent the fifth wheel and, if applicable, why claimant thought she could not afford to move from the fifth wheel unless she had Section 8 assistance. As well, the ALJ should also ask claimant if she still qualified for and was eligible to receive Section 8 housing assistance when she became unemployed after having left work. If she was not, the ALJ should inquire of claimant how she thought she was improving her circumstances by leaving work. The ALJ should further ask claimant if she is still living in the fifth wheel at the time of the remand hearing and, if not, when she moved away from it and whether her new residence was obtained with Section 8 financial assistance.

In addition, claimant testified that if she was to effectively look for Section 8 housing, she needed to have a set work schedule, rather than one that was ever-changing, in order to schedule housing-related appointments and that, for various reasons, a morning work schedule was better suited to a search for housing. However, the ALJ should inquire further into the immediacy and gravity of claimant’s situation at the time she quit work. The ALJ should directly inquire of claimant if she would have quit

work if the employer had given her a set work schedule, but that schedule was for afternoon work. The ALJ should ask claimant how many Section 8 housing opportunities she made appointments for after she qualified for Section 8 housing in April 2017 and, if there were not many, to explain why she made only a few appointments. The ALJ should inquire of claimant how much time remained of the 120 day period in which she had to locate Section 8 housing when she quit work. The ALJ also should ask claimant to estimate the usual length of time between when she first became aware of a Section 8 housing opportunity and when she was able to schedule appointments to view that housing and have it inspected, and to meet with the landlord and to apply for it. To allow a determination of the effects of unanticipated changes in claimant's work schedule on her search for housing, the ALJ should further inquire of claimant how many times in and after April 2017 that her shifts changed after they were initially scheduled and how much notice she generally had of those changes. As well, the ALJ should ask claimant if any shift changes ever caused her to miss an appointment she had scheduled relating to her search for housing and, if so, how many times. In addition, the ALJ should ask claimant why she quit on June 28, 2017, rather than waiting for the supervisor, "Dannell," to return in a week, and discussing with her the need for a set work schedule, and if and when such a set schedule would be implemented.

Claimant also briefly mentioned at hearing that she was previously "denied" Section 8 assistance because she had overtime pay and she had asked the employer not to require her to work anymore overtime to enable her to maintain Section 8 eligibility by staying within the income limitations for that program. Audio at ~21:23. The ALJ should inquire of claimant what she meant by a Section 8 "denial," when that denial occurred, whether claimant was denied the Section 8 eligibility she had qualified for in April 2017 and whether she still qualified for and was eligible to receive Section 8 assistance at the time she quit. The ALJ should ask claimant whether one of the reasons she quit was because the employer was still requiring her to work overtime and, if so, whether she had asked the employer not to give her overtime, when she asked, what the employer's response was to that request, whether the employer required her to work overtime after she made the request, and how much overtime per week she was working after making the request. If the employer required claimant to work overtime after she requested not to, the ALJ should ask claimant why she could not have turned down any overtime that the employer offered to her if it would jeopardize her Section 8 eligibility and, if not, what the consequences of doing so would have been for her.

The ALJ should allow the employer an opportunity to respond to claimant's additional testimony on these issues.

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 voluntarily left work with or without good cause, Hearing Decision 17-UI-90852 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 17-UI-90852 is set aside, and this matter remanded for further proceedings consistent with this order.

J. S. Cromwell and D. P. Hettle.

DATE of Service: October 5, 2017

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-90852 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.

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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