EO: 200
BYE: 201828

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

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1131

Reversed & Remanded

PROCEDURAL HISTORY: On August 9, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 110225). Claimant filed a timely request for hearing. On September 12, 2017, ALJ Shoemake conducted a hearing, and on September 15, 2107 issued Hearing Decision 17-UI-92616, affirming the Department's decision. On September 19, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-92616 should be set aside as not supported by a complete record, and this matter remanded for further proceedings.

The ALJ concluded that claimant voluntarily left work on July 24, 2017, but the record fails to support that conclusion. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

Although the ALJ asked the employer's witness if continuing work was available to claimant when he walked off the job on July 16th, and the employer said it was, the record does not show when claimant ceased to be employed. The ALJ must ask claimant if he was willing to continue working for the employer for an additional period after he left mid-shift on July 16th. The ALJ must also ask the employer whether or not claimant would have been allowed to continue working after he left that day.

On July 19th, after claimant left work mid-shift a few days earlier, claimant's manager offered to "transfer" him to Vancouver. It appears that although claimant left work on July 16th he might still have been willing to continue working for the employer as of July 19th if he was transferred to Vancouver. The employer's witness testified that, on July 19th, the store manager offered to transfer claimant, agreed to facilitate the transfer, and would notify him of his start date. Transcript at 37-38. The ALJ should ask the parties if claimant was willing and would have been allowed to continue working after his

discussion with the store manager on July 19th. The ALJ should ask the employer whether claimant was, in fact, eligible to be transferred on July 19th.

The ALJ should ask the parties if claimant was willing and would have been allowed to continue working for the employer on July 24th, both before and after he spoke with Jim. The ALJ should ask claimant why he chose to request his 401K and submit the note about quitting and moving to Costa Rica on July 24th when he had just recently agreed with the store manager that he would be transferred to Vancouver. Claimant testified that "Jim" "made me sign" the July 24th note stating, "Quitting moving to Costa Rica just need to ship belongings"; the employer suggested that claimant dealt with the store manager that day, not Jim. *Compare* Exhibit 1, Transcript at 35. The ALJ should ask claimant who he spoke with on July 24th, who Jim is and what authority claimant believed Jim had over him, whether he brought the note with him, whether he was provided with paper and pen by the employer, who provided it, whether he chose what he wrote on the page, whether someone else told him what to write, what on the page did he write because it was true and what on the page did he write because he was told to write it. The ALJ should ask the employer to clarify whether or not the store manager was present or spoke with claimant on July 24th, whether someone named "Jim" spoke to claimant on that occasion, what "Jim" or another person told claimant to do, whether "Jim" or another person asked or told claimant to write the note, if so, why claimant was asked to provide a note, and whether "Jim" or another person told claimant what to write on the note. The ALJ should ask claimant what he intended by asking for his 401K information and submitting that note. If claimant did not intend to quit by submitting a note that said "I'm quitting," the ALJ should ask claimant what his intent was in submitting the note and what he thought would happen if he did it, or if he did not do it. The ALJ should ask claimant why he decided not to pursue the transfer. The ALJ should ask the employer what happened with the transfer after July 24th, and whether anyone asked claimant on or after July 24th what he meant to do when he requested his 401K and submitted that note. The ALJ should also ask any follow up questions necessary to determine the nature and date of the work separation.

Assuming claimant quit work, 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). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). Since at least 2015 claimant had spine and neck injuries, a history of heart attack and stroke, a concussion, hearing impairment, and brain damage, all of which may be considered permanent or long-term "physical or mental impairments" as defined at 29 CFR §1630.2(h). A claimant with those impairments who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairments would have continued to work for his employer for an additional period of time.

In Hearing Decision 17-UI-92616, the ALJ concluded that claimant quit "for unknown reasons" and without good cause. We disagree that the record supports that conclusion. Claimant testified, in essence, that he quit because he was fed up with being treated poorly at work. Transcript at 18-19. His testimony suggested he was particularly concerned that although he had light duty restrictions he was required to perform full duty, was not allowed to use his cane at work, and when he struggled with his duties due to his disabilities, both the lead supervisor and store manager repeatedly told him to work

harder and faster, or, on one occasion, to quit. Transcript at 6-7, 18. Additional information is required to determine whether or not those circumstances amounted to good cause for leaving work.

It appears at all relevant times that claimant was disabled with a number of physical and mental impairments including spine and neck injuries, recent history of stroke and heart attack, brain damage and a hearing impairment. It also appears undisputed that at all relevant times claimant was released only to work modified duty. Claimant testified that the lead supervisor, dock manager and store manager all knew claimant was disabled and he repeatedly asked for and was denied light duty work. The employer did not dispute that claimant was restricted in some of his duties, but alleged that claimant had not "specifically made a request for light-duty work." Transcript at 31. The ALJ should follow up with the employer about what claimant did to request light duty work, what he had to do to "specifically" request light duty work, how he was supposed to have known what to do, and what he was told. The ALJ should follow up with claimant about how he requested light duty work, to whom, what did they tell him, did they instruct him to do something other than what he had already done, and whether, if he was told he was not allowed to have light duty, he considered contacting human resources or a different manager to ask someone else about being put on light duty.

Claimant testified that he was restricted from lifting or carrying over 15 pounds. The ALJ should ask when claimant received those restrictions and instructions, when he notified the employer of them, and how he notified the employer of them, specifically, whether he provided the employer with notes from his doctor(s) or if he told the employer orally. The ALJ should ask claimant whether he refused to lift 60 pound objects, whether he ever complained about having to lift them, what he did when he was asked to lift things that were heavier than his medical restrictions allowed, what he thought might happen if he refused, and why he thought as he did. The ALJ should ask the employer whether the employer received notification of claimant's restrictions and how the employer responded.

Claimant testified he was given exercises to do five times a day, and although he was supposed to do them, the lead supervisor "always says, work harder, work faster, I said I'm supposed to be on light duty, and he goes since when. And he goes get the 'f' to work. And he goes quit 'fing' around, and I go I have to talk to – [] I'm – I'm on light duty." Transcript at 12. The ALJ should ask claimant about the comments, whether claimant specifically told the lead supervisor that he needed to stop to do exercises, and how the supervisor responded. The ALJ should ask whether claimant told the dock manager or store manager specifically that he needed to stop working to do exercises and how they responded.

When asked whether the employer offered claimant light duty, the employer's witness was evasive, stating only that "[w]e fairly routinely modify people's work as the need arises, or the need is expressed, yes." Transcript at 31. The ALJ should ask the employer again whether or not the employer offered claimant light duty, and the employer should answer that question by stating "yes" or "no." If the employer did offer claimant light or some sort of modified duty, the ALJ should ask the employer to explain what the light duty offer was, how it was enforced or effectuated, and what claimant was supposed to do if asked to violate it. If the employer did not offer claimant light duty, the ALJ should ask the employer to explain why. The ALJ should also allow claimant to testify about what his duties were before and after he requested light duty work.

The employer's witness acknowledged both claimant's restrictions and his testimony that he was not offered or allowed to have light duty work, but testified, "It's hard for me to fathom that this situation is

as he presented it" because there were "a variety of mechanisms to reduce the impact" of claimant's workload and establishing his duties "would fall to his immediate supervisors." Transcript at 32. The ALJ should ask the employer's witness about his knowledge of claimant's situation, and, if the situation was not actually as claimant presented it, to explain what claimant's situation was. The ALJ should also ask the employer if it has evidence rebutting claimant's testimony that when he told the lead supervisor and store manager that he was disabled and needed light duty work they told him to work harder and faster, and that the dock manager denied him the use of his walking cane at work.

Claimant alleged that after he informed the dock manger about his restrictions, the dock manager and store manager "just looked at each other and said, yeah, that's what we need." Transcript at 13-14. The ALJ should ask claimant to explain that allegation. The ALJ should ask the employer's witness whether that occurred, and whether having an employee on light duty would negatively impact the workplace. The employer's witness testified that matters related to light duty "would fall to his immediate supervisors." Transcript at 32. The ALJ should ask the employer's witness to explain what that means, what the process was, and whether claimant had any recourse if his immediate supervisors were not responsive enough or assigned him regular duty instead of restricted duty. The ALJ should also ask the employer what would happen if claimant refused to perform work that exceeded his restrictions, or if he disagreed with his immediate supervisors about the kinds of work he could do while restricted to light duty, and ask whether such a refusal to work would be considered insubordinate.

Claimant alleged that one reason he quit work was that he felt harassed, in part because two employees a year apart had kicked and or choked him at work, and when he wanted to complain to the employer's corporate office and police he was told he would be fired if he did. Claimant testified he was told, well if you care about your job you won't say anything to anybody about this." Transcript at 19-20. The ALJ should ask claimant for additional details about the matter, such as what happened, who choked and kicked him, when was he choked, who saw him being choked, who did he complain to about being choked, what did they say, and who told claimant not to complain about having been choked at work. The employer's witness testified that the choking allegations were brought to his attention "in May or June" of 2017, prior to claimant quitting work. Transcript at 33. The ALJ did not ask the employer what was reported, or what action the employer took upon being notified that one of its employees had been choked at work on two occasions. On remand, the ALJ should inquire with the employer. The ALJ should also ask claimant why he continued working after those incidents, and whether or to what extent the choking incidents were factors he considered when he decided to leave work in July 2017. The ALJ should ask claimant and the employer if claimant was required to continue working with the individuals who had kicked and or choked him, and if he feared that he might be kicked and choked again in the future. The ALJ should ask these and any follow-up questions she deems necessary to development of a full record.

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 did not develop the record necessary for a determination of the nature of claimant's work separation or whether claimant had good cause to voluntarily leaving work, Hearing Decision 17-UI-92616 is reversed, and this matter is remanded for development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-92616 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.

DECISION: Hearing Decision 17-UI-92616 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 17, 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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