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

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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1215

Reversed & Remanded

PROCEDURAL HISTORY: On August 30, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 165305). Claimant filed a timely request for hearing. On October 3 and October 6, 2017, ALJ Seideman conducted a hearing, and on October 6, 2017 issued Hearing Decision 17-UI-94037, affirming the Department's decision. On October 17, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-94037 is reversed and this matter remanded.

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). A claimant who quits work must show that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

In February and March 2017, claimant experienced non-work-related injuries and illness that caused her to miss a significant amount of work. Although she recovered and resumed working, the employer discharged her on April 6, 2017 because of her attendance. Claimant filed a grievance through her union, and, on April 22, 2017, was injured again and was again unable to work due to her injuries. On June 6, 2017, the employer and claimant entered into a settlement agreement whereby claimant's discharge was rescinded, she was reinstated, received back pay, and would be allowed to return to work. As part of the settlement, the employer and claimant placed claimant "on a level II stage of the progressive discipline. And any further . . . absences would result in termination." Transcript at 13. Claimant and the employer discussed claimant's availability for work; claimant provided the employer

with a doctor's note excusing her from work through June 11, 2017. On June 12, 2017, the employer issued a new work schedule and scheduled claimant to return to work beginning June 24, 2017. Claimant did not feel ready to return to work and was still experiencing a lot of pain because of her injuries. Claimant hoped she would heal enough to return to work as scheduled, and did not contact the employer about her work schedule or condition. On June 24, 2017, claimant called her supervisor and notified the employer that she quit work. As of July 11, 2017, claimant reported to her physician that she had ridden her bike to the medical appointment, an approximately 18 mile round-trip, had returned to work and worked in her vegetable garden, but would have pain if she did not rest.[1] Claimant's physician noted that he "expect[ed] her symptoms to be totally resolved with no residuals in another 2 weeks."

In Hearing Decision 17-UI-97037, the ALJ concluded that claimant quit work without good because the employer "would have placed her in other work which was compatible with her ability and pain," and she therefore "could have obtained another doctor's note" or "communicated prior to June 24, 20[1]7 with the employer to try to work something out." Hearing Decision 17-UI-97037 at 2-3. We disagree that the record was developed sufficiently to support that decision.

First, the record fails to support the ALJ's finding that if claimant had not quit, the employer would have placed her in other work that was compatible with her ability and pain. In support of that finding, the ALJ asserted that the employer's witness testified that the employer "had other positions available which would accommodate her needs." Hearing Decision 17-UI-97037 at 3. However, the employer's witness stated only that "there was work opportunity available for [claimant] if she had stayed on board." That testimony does not support a finding that the employer would have placed claimant in other work that was compatible with her ability and pain, especially given that the employer previously had discharged her for missing work due to injuries and illness, and notified her when she was reinstated that any further absences would result in termination. Nor did the ALJ conduct a sufficient inquiry into the facts necessary for a determination of whether the employer would have accommodated claimant's needs and placed her in other work that was compatible with her ability and pain.

Although claimant testified that she was not ready to return to work on June 24th because of pain, the ALJ did not ask claimant what hurt, what motions caused her pain, and what duties at work she thought might cause her to feel pain. Within a couple of weeks of June 24th claimant was sufficiently healed to the point that she was physically capable of riding her bike for almost 20 miles at a time and was performing physical labor in her garden, but the ALJ did not ask claimant to explain when she had recovered enough to begin doing those activities, what she was and was not capable of doing, and why, at the time she quit work. Claimant also appears to have reported to her physician on July 11th that she had already returned to work, but the ALJ did not ask claimant what work she had returned to, or when, given that she had quit her job with the employer a couple of weeks earlier.

[1] We take notice of the generally cognizable fact that the medical offices on SW Stark Street are located 8.9 miles from claimant's residence. *See* https://www.mapquest.com/directions/from/us/oregon/portland/97204-2631/426-sw-stark-st-45.520651,-122.675947/to/us/oregon/portland/97203-1134/8620-n-swift-way-45.602061,-122.748921. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

Assuming the record on remand shows that claimant was not physically capable of returning to work on June 24th, the record fails to show why she did not contact the employer to request additional time off or to request a leave of absence other than that she "hoped" she would feel better by then. The ALJ did not ask claimant how she felt on June 12th, why she thought she might feel well enough to work within 12 days, or whether she consulted with her physician about returning to work. The ALJ did not ask claimant whether, or when, she asked for another doctor's note excusing her from work past June 11th, and, if so, how her doctor responded. The ALJ did not ask why, as time passed, June 24th grew closer, and she still felt too much pain to work, she did not contact the employer to ask for time off work. The ALJ did not ask claimant why she waited until the day she was supposed to return to work to quit work, or why she quit work without first speaking with anyone at the employer's business about whether or not she had options that would allow her to remain employed while she continued to heal from her injuries. Nor did the ALJ ask claimant why she did not consult with a union representative, such as the representative that had worked with her handling her grievance, to ask about what options she had other than quitting work.

Claimant also testified that she quit work because she thought she might be discharged if she missed more work. The ALJ did not ask claimant why she thought she might be discharged if she was medically incapable of working and properly informed the employer of her condition and requested time off work. Nor did the ALJ ask claimant when she thought she would be discharged if she had not quit work on June 24th, what she thought the consequences of being discharged would have been, or why she thought being discharged was worse than quitting.

On this record, claimant seems to have understood that she could request a leave of absence from work. The ALJ did not ask claimant why she did not discuss that option with the employer instead of just quitting work because she could not work on June 24th. To any extent claimant might have thought she was on a leave of absence at the time she was put on the schedule to return to work, the ALJ did not ask claimant why she did not contact the employer to ask why she was put on the work schedule during her leave of absence.

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). The ALJ must therefore, on remand, ask claimant about the issues set forth herein, and any follow-up questions necessary to ensure development of a complete record. Because the ALJ failed to develop the record necessary for a determination of whether claimant quit with or without good cause, Hearing Decision 17-UI-94037 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 17-UI-94037 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: <u>November 16, 2017</u>

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-94037 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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