

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1450

Reversed & Remanded

PROCEDURAL HISTORY: On October 31, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 131803). Claimant filed a timely request for hearing. On November 28, 2017, ALJ Janzen conducted a hearing, and on November 29, 2017 issued Hearing Decision 17-UI-97776, affirming the Department's decision. On December 19, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-97776 is reversed and this matter is remanded for further proceedings.

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 had anxiety and hypertension, 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 her employer for an additional period of time.

In Hearing Decision 17-UI-97776, the ALJ concluded claimant did not show good cause for leaving work when she did. Although the ALJ recognized that claimant had the long-term impairments of anxiety and hypertension, he disregarded the impact on claimant of the two events that occurred most near in time to her decision to leave work and that appeared to have exacerbated her anxiety symptoms because those events were based on employer decisions that were "directly within the ordinary discretion of the employer in the operation of its business." Hearing Decision 17-UI-97776 at 3. For purposes of determining if claimant had good cause to leave work, however, the salient issue is whether a reasonable and prudent person with claimant's impairments would have considered his or her

circumstances to be grave ones to which there were no reasonable alternatives other than to leave work, and not whether the employer had arguably neutral business reasons for making the decisions or creating the circumstances that claimant perceived as being grave. The ALJ erred in not considering the effects of those recent events on claimant and in evaluating whether or not a reasonable and prudent person like claimant, who had anxiety and hypertension, would have concluded that alone, or considered in combination with other events, they constituted grave circumstances and were good cause for leaving work.

In finding that claimant did not show good cause for leaving work, the ALJ further reasoned in Hearing Decision 17-UI-97776 that claimant did not show that the other events about which she testified at hearing were such that a reasonable and prudent person who experienced anxiety and high blood pressure would have quit work. Hearing Decision 17-UI-97776. However, the record as it currently exists is insufficient to enable EAB to determine whether or not the two most recent events and the other events that claimant cited at hearing gave rise to grave circumstances and were good cause for a reasonable and prudent person with anxiety and high blood pressure to leave work at the time that claimant did. For this reason, this case is remanded for further inquiry and development of the record.

In particular, the ALJ should inquire into why claimant took the six week FMLA leave from which she returned to work on July 4, 2017, when claimant testified that she had “absolutely” no problems with her supervisor until she returned from that leave. Audio at ~27:00. As appropriate, the ALJ should flesh out the reason(s) that claimant offers for having taken the leave, including the events or conditions that precipitated the leave, if claimant received any treatment for them while on leave, if a physician authorized the leave, what the employer was informed about the leave, its expected duration and why claimant needed it and the employer’s reactions to claimant taking that leave, including that of the employer’s co-owner and claimant’s supervisor. The ALJ also should ask claimant if she thinks anything happened during the leave which would have caused her supervisor’s attitude toward her to change and if so, what it was and how the supervisor’s attitude changed.

As well, the ALJ should more fully inquire into claimant’s interaction with her supervisor on July 10, 2017, which claimant contended “started the ball rolling” toward her departure from work. Audio at ~9:30. Because claimant stated that the supervisor would not give her any “specifics” when he “essentially blamed [her] for all of the things that happened during [her] [FMLA] leave,” the ALJ should ask claimant what led the supervisor to speak with her that day, and to recount as comprehensively and in as much detail as she can all that the supervisor said to her and all that she said to him on that day. Audio at ~9:02, ~9:30. The ALJ should also attempt again to elicit specific information about what exactly the supervisor was “blaming” claimant for, what, if anything, claimant may have feared that “blaming” would lead to, claimant’s response to that “blaming,” the impact of that “blaming” on claimant, including on her symptoms of anxiety and high blood pressure, and if claimant took any steps to determine what the supervisor was holding her responsible for and to correct what she was being “blamed” for. The ALJ should further ask claimant what she knows or thinks led to her supervisor asking her in that conversation to identify what medications she was taking and telling her that he “want[ed] [her] to go to the doctor today and get some meds.” Audio ~20:53. The ALJ should inquire of claimant if she was behaving unusually that day, was particularly anxious or whatever else might have motivated that comment from the supervisor. The ALJ also should explore the reasons that the supervisor instructed claimant that day to immediately go on another two weeks of leave, or that claimant infers may have motivated him to do so, and why the supervisor continued to insist that

claimant go on leave again immediately despite her resistance. In addition, the ALJ should ask claimant if she saw her physician as the supervisor instructed her to do, when, what she told the physician was the reason for the consultation, whether the physician concurred in claimant taking an additional two weeks of leave, what treatment the physician undertook and what the physician might have advised claimant in connection with her continued employment or otherwise. The ALJ should also inquire if claimant's physician released her to return to work as of July 24, 2017, whether that release was with or without restrictions and if with restrictions, what those restrictions were, and any other matters relevant to claimant's emotional and physical health as of July 24, 2017. At hearing, claimant mentioned that she visited her physician sometime between July 10 and July 24, 2017, and if this visit was not made pursuant to the supervisor's instructions on July 10, 2017, the ALJ should explore the same outline of issues set forth above. In addition, the ALJ should inquire into claimant's understanding of why the physician referred claimant to a therapist, whether claimant ever saw the therapist, the substance of the visits claimant had with the therapist related to claimant's work, whether claimant ever raised with the therapist or her physician or they ever addressed whether claimant should leave work and the substance of what they advised.

At hearing, claimant testified that she quit work due to her supervisor's treatment of her, its anxiety provoking effects and its effect on her blood pressure. However, most of the incidents that claimant cited at hearing do not, without more specifics, appear likely to have exacerbated claimant's diagnosed conditions or otherwise to have constituted grave circumstances, including the supervisor's allegedly blaming claimant for what had gone wrong during the time she was on leave, his appointment of a regional manager to whom claimant was expected to report without informing claimant, which claimant thought was "odd," and the apparent plan to give claimant's assistant a \$29,000 raise in 2018, which claimant thought was not "normal." Audio at ~13:00. ~17:06. On remand, the ALJ should again try to elicit more specific, concrete and detailed examples of the supervisor's ill treatment of claimant or other offensive workplace behaviors that exacerbated her conditions. The ALJ should also ask claimant to specify in concrete detail the exact concerns that any of these cited behaviors evoked in her, and the concrete impacts those behaviors had on her and in exacerbating her symptoms from anxiety and high blood pressure, e.g., agitation, sleeplessness, nervousness, trembling, rapid heart rate, hyperventilation, inability to concentrate, etc. With respect to any identified impacts, the ALJ should ask claimant if she ever sought professional treatment for any of them and what the result was.

Also with respect to the supervisor's treatment of claimant or the allegedly adverse effects of the work environment on claimant, the ALJ should ask claimant to identify in specific and concrete detail the complaints that claimant's attorney raised with the employer on claimant's behalf in the September 12, 2017 letter or otherwise about the supervisor or any aspect of the work environment, the factual allegations supporting those complaints, what exactly claimant wanted from the employer as appropriate relief, the employer's response to the complaints that claimant's attorney raised and all actions it took in reaction, the state of the negotiations when claimant left work, why claimant left work before the negotiations had been concluded and the relief that claimant ultimately received from the employer. Absent the further inquiries detailed above, EAB cannot determine whether or not claimant voluntarily left work with good cause.

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 did or did not have good cause to leave work when she did, Hearing Decision 17-UI-97776 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 17-UI-97776 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: January 26, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-97776 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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