

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0077

Reversed & Remanded

PROCEDURAL HISTORY: On November 28, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 82821). Claimant filed a timely request for hearing. On January 4, 2018, ALJ Seideman conducted a hearing, and on January 5, 2018 issued Hearing Decision 18-UI-100310, affirming the Department’s decision. On January 19, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that included information not offered into evidence during the hearing. Because we are reversing and remanding this matter for additional evidence, we need not and do not rule on the admissibility of the new information. Claimant may offer this new information at the remind hearing, at which time the ALJ will determine whether it is relevant and material to the issues in this matter and should be admitted into evidence. Instructions for submitting written information into evidence for the remand hearing will be included with the notice of hearing the Office of Administrative Hearings (OAH) will send to the parties to schedule the hearing, and claimant should direct any questions about that process to OAH.

CONCLUSIONS AND REASONS: Hearing Decision 18-UI-100310 is reversed and this matter remanded for further proceedings before a different ALJ.

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). For a claimant with a permanent or long-term “physical or impairment” as defined at 29 CFR §1630.2(h), good cause is such that a reasonable and prudent person with the characteristics and qualities of an individual with such impairment would not have continued to work for her employer for an additional period of time, but would have left work.

In Hearing Decision 18-UI-100310, the ALJ concluded that claimant did not show good cause for leaving work when she did. The ALJ found that claimant abruptly quit on November 7, 2017 during a meeting with the director of operations that addressed certain alleged performance issues. Hearing Decision 18-UI-100310 at 2. While the ALJ accepted that claimant thought the director was “prejudiced” against her based on her race at the time she quit, he noted that claimant “tends to talk much and was very critical about many matters [during the hearing]” and, apparently based on this odd assessment of claimant’s personality, concluded that “[i]t appears that the problem was more of a personality relationship issue than the specific allegations” about racial bias, and did not present a situation of gravity. Hearing Decision 18-UI-100310 at 2. However, the evidence at hearing as developed by the ALJ was insufficient to allow EAB to determine whether or not claimant had good cause to leave work when she did.

The ALJ did not focus the testimony of the parties at hearing on the issues relevant to a voluntary leaving, or attempt to develop specific factual information on those issues. For example, after briefly eliciting identifying information from claimant, the ALJ asked claimant the general question of why she had quit work. Audio at ~6:17. In response, claimant testified without direction, inquiry or interruption from the ALJ for over eleven minutes about various employment-related dissatisfactions until the ALJ interjected that claimant’s articulation was such that he was having difficulty understanding what she was saying. Audio at ~19:36. After that interjection, claimant testified, again without guidance or direction from the ALJ, for an additional approximately two minutes, at which time the ALJ briefly inquired into claimant’s race, after which claimant continued her self-directed testimony for an additional four minutes, until the ALJ briefly inquired into the employer’s form of business operation and whether claimant had ever raised any of her dissatisfactions with anyone in the employer’s management before turning to the employer for cross examination of claimant as well as direct testimony. Audio at ~19:43 to ~23:19; ~23:29 to ~24:51. With respect to the testimony of the employer’s witness, the director of operations, the ALJ similarly let the witness direct his own testimony and self-determine what information he thought was relevant to this matter. The ALJ asked the single question of the director, “What do you want to say about this?”, to which the director responded without interruption, follow-up or further inquiry for five minutes until the director’s testimony concluded and the ALJ invited claimant’s cross examination of the director. Audio at ~26:30 to ~31:44. Given the ALJ’s failure to direct the parties’ testimony at hearing to relevant issues, failure to elicit specific factual information to determine if there existed reliable evidence in support of either’s position and failure to exercise control over the inquiry of the parties, the record was not adequately developed. Furthermore, it appears that it would not be prudent to have the remand hearing conducted by same ALJ who conducted the initial hearing and we recommend that a new ALJ should be assigned to preside over the hearing on remand.

On remand, the hearing should be conducted as if this were a matter of first impression. The ALJ should inquire into what specific events precipitated claimant’s decision to leave work and whether that occurred on November 7, 2017 or some other date. The ALJ should inquire what it was about those events that caused claimant to quit and what harms she wished to avoid by quitting, with attention to the substance of any meetings at which claimant announced she was leaving work. The ALJ should also develop the record about any events that might have preceded claimant’s decision to leave work and contributed to the decision to leave. From claimant’s testimony at hearing, it appears that some of those prior occurrences were the alleged racism of the director operations, the extent to which the director of

operations allegedly disliked claimant, claimant's belief that the director of operations or other employer representatives planned to fire her, the way the director of operations treated claimant, the additional workload that was assigned to claimant sometime before she left and the stress that claimant experienced. Audio at ~6:17, ~6:40, ~6:56, ~7:40, ~8:36, ~10:59, ~12:42, ~16:06. The ALJ should also ask claimant about the ulcer for which she was hospitalized, including when she developed it, its severity, whether it likely was attributable to workplace anxiety, and what, if anything, claimant's physician said about or recommended in relation to it or ameliorating it. Audio at ~19:33. The ALJ should further ask claimant about the meeting she and her former manager had with the owner to discuss their respective complaints about the director of operations, including when it occurred, what precipitated it, what the complaints were, the substance of the meeting and whether the owner took any action as a result of it and, if so, what, and the response of the director of operations to that meeting or any actions taken as a consequence of it. Although we have outlined some areas of potential inquiry, the evidence at the first hearing was not adequately developed for us to state with certainty that these areas are exhaustive. On remand, the ALJ should not limit his inquiry to the matters we have outlined, but elicit information from claimant and the employer's witnesses and follow-up that information, as appropriate, to allow a determination of whether claimant did or did not leave work for 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); *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 or not claimant voluntarily left work for good cause, Hearing Decision 18-UI-100310 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 18-UI-100310 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: February 23, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 18-UI-100310 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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