

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0296

Order No. 18-UI-104370, Reversed and Remanded
Order No. 18-UI-104371, Reversed – Eligible

PROCEDURAL HISTORY: On December 29, 2017, the Oregon Employment Department (the Department) served notices of two administrative decisions, one concluding claimant voluntarily left work without good cause (decision # 81305) and the other concluding claimant was not available for work during the weeks including December 10 through December 23, 2017 (weeks 50-17 through 51-17) (decision # 84119). Claimant filed timely requests for hearing. On February 22, 2018, ALJ Seideman conducted separate hearings, and on March 2, 2018, issued Order No. 18-UI-104370, affirming decision #81305, and Order No. 18-UI-104371, concluding claimant was not available for work during the weeks including December 10, 2017 through February 17, 2018 (weeks 50-17 through 07-18). On March 22, 2018, claimant filed applications for review of Order Nos. 18-UI-104370 and 18-UI-104371 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order Nos. 18-UI-104370 and 18-UI-104371. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2018-EAB-0296 and 2018-EAB-0297).

With her applications for review, claimant submitted written arguments. However, she failed to certify that she provided a copy of her arguments to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Claimant's arguments also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearings as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider claimant's arguments or any information not received into evidence at the hearings when reaching these decisions.

FINDINGS OF FACT: (1) In September 2016, Canby Clinic employed claimant as a naturopathic oncologist and business representative.

(2) By mid-2017, claimant became concerned about sustainability of the employer from a financial standpoint. At about that time, it had become apparent that actual revenues had not met projected revenues and the clinic administrators requested that claimant and other physicians take pay-cuts for that

reason. Claimant also regularly was working well over 40 hours per week and was having difficulty keeping up with the workload.

(3) In August 2017, claimant was approached by an investigator for the state board overseeing naturopathic physicians concerning questions it had about the employer's business practices during a time that preceded claimant's employment but which also may have continued up to August 2017. Claimant expressed reluctance about cooperating because she believed that some of the allegations about the employer's practices may have been true and also because she did not want to be part of an investigation the employer was unaware of while she remained working there. The investigator explained that if claimant did not cooperate she might be implicated placing her license to practice medicine at risk. After considering the dilemma for a couple of weeks, claimant reluctantly cooperated and was told she was required to keep the investigation confidential.

(4) In early September, a colleague of claimant's at another clinic offered her the opportunity to work at that clinic as a naturopathic oncologist but working as an independent contractor. Between September 15 and September 18, 2017, claimant resigned from the employer to take the offered position.

(5) Between the time claimant quit and mid December 2017, claimant worked approximately 20-25 hours per week in the new position. However, she decided to begin seeking work as a naturopathic physician working for an employer.

(6) On December 14, 2017, claimant filed an initial claim for benefits. Claimant's claim was determined valid with a weekly benefit amount of \$604. Claimant claimed but was not paid benefits for the weeks including December 10, 2017 through February 17, 2018 (weeks 50-17 through 07-18), the weeks at issue.

(7) During the weeks at issue, claimant sought work as a naturopathic physician. Claimant's labor market was the Portland metropolitan area. In claimant's labor market, work as a clinical naturopathic physician typically was performed Sunday through Saturday, dayshift, and work as a naturopathic physician with hospital privileges, all days and all hours.

(8) When claimant sought work with prospective employers, she indicated that she was willing to begin work immediately and if she had been offered work to begin immediately, she had physicians to whom she could have referred her current patients if they could not have gone with her to her new employer. She also could have been flexible and continued to work with them on evenings or weekends outside of her new employment hours if they could not have gone with her to her new position. Transcript at 12.

CONCLUSIONS AND REASONS: Order No.18-UI-104370 is reversed and this matter remanded for further development of the record. Order No.18-UI-104371 is reversed as claimant available for work during the weeks at issue.

Voluntary Leaving. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she (or he) 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 the employer for an additional period of time.

In Order No. 18-UI-104370, after concluding that claimant quit her job with the employer “so she would not be involved in the investigation” being conducted by the state board at around the same time that she learned that a naturopathic physician was leaving another group of self-employed physicians which she could then join, the ALJ concluded that claimant left work without good cause, reasoning,

Claimant’s situation was not so grave that she didn’t have any reasonable alternative but to quit. The fact that the governing board was investigating the employer didn’t force that. I would observe that even if she quit, some of the items being investigated might include her. Also, she quit a job in which she was an employee to go to one in which she is an independent contractor and would not make any more money unless things changed in the future.

Order No. 18-UI-104370 at 2. We disagree because the record, as developed, does not support the ALJ’s conclusion.

The record fails to show exactly when or why claimant chose to quit her job when she did. To begin, the record shows that claimant did not quit in order to avoid being “involved in the investigation” because she had already involved herself in the investigation by interviewing with the investigator the month before she quit. Did she quit on September 15 or September 18, 2017, which occurred in separate weeks, and affects the effective date of any potential disqualification from benefits? Was it to pursue self-employment, due to the state of the board’s investigation, or because of the difficulties, financial or otherwise, she was encountering as an employee for the employer? The ALJ should have inquired concerning why or how the prospect of working for the employer *after* interviewing with the investigator created such a grave situation for claimant that she concluded that she had to quit at that time. For example, what was the threat, if any, to her license at that point and what did that threat mean to claimant? What occurred during the intervening time between the interview and her resignation that created such gravity? Would she have quit when she did if not for the self-employment offer or if not for the financial difficulties the employer apparently was experiencing at that time?

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 had good cause for quitting work when she did, Order No. 18-UI-104370 is reversed, and this matter is remanded for development of the record.

Availability. To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed. ORS 657.155(1)(c). To be considered “available for work” for purposes of ORS 657.155(1)(c), an individual must be:

- (a) Willing to work full time, part time, and accept temporary work opportunities, during all of the usual hours and days of the week customary for the work being sought, unless such part time or temporary opportunities would substantially interfere with return to the individual's regular employment; and
- (b) Capable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought, including temporary and part time opportunities; and
- (c) Not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time; * * *

OAR 471-030-0036(3)(February 23, 2014).

The Department initially denied claimant benefits. Where the Department seeks to deny benefits it has already paid, the Department has the burden of persuasion. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). By extension of that principle, claimant has the burden of persuasion for weeks she claimed that the Department never paid. Consequently, claimant had the burden to show she was eligible for benefits.

During the weeks at issue, claimant sought work as a naturopathic physician. The Department's witness testified that the days and hours of the week customary for work as a naturopathic physician in claimant's labor market essentially included all days and all hours. Transcript at 5. The witness further asserted that because claimant initially explained to a Department representative that if she was ever offered and asked to begin a new job as a physician she would "need a couple of weeks to refer patients to the healthcare providers before she'd be...available to begin work", the Department concluded she was ineligible for benefits for that reason. Transcript at 6.

In Order No. 18-UI-104371, the ALJ similarly concluded that claimant was not available for work, reasoning,

Claimant is working part-time in her own self-employment naturopathic medical practice and has regular patients. However, she wants to increase to a full-time practice. If she was offered employment in that type of situation, she would have to process transferring her patients so some other doctor or adjust her schedule. She estimates that would take two or three weeks. In the hearing, she testified that she could do so immediately, but that is not credible. It would take a period of time to adjust the schedules and appointments and perhaps the medical practitioner.

Order No. 18-UI-104371 at 2. However, we disagree and conclude that the record as a whole does not support the ALJ's conclusion.

Claimant essentially explained that she left her prior employer only after she had been asked to be a witness against it in a state investigation, had been threatened with the loss of her license if she did not do so, and after complying, chose to return to private practice as a matter of survival rather than choice while seeking regular employment as naturopathic physician as the preferred alternative. Transcript at

15-20, 33-34. She also explained that she understood the Department's initial questioning to her differently, believing she been asked how much time, typically, it would take to close a practice down rather than how much time would be necessary for her to do so in the event she was offered regular part time or full time work to begin immediately. Transcript at 12-13. She then explained, plausibly, that if she had understood the latter, she would have replied that she would have been able to shut down her practice immediately, with the assistance of available associate naturopathic physicians to take over her pressing case load immediately, supplemented by some assistance from her on evenings, weekends, or other hours outside of her new employment. Transcript at 33.

The Department's rule, OAR 471-030-0036(3)(c), at issue here, contemplates that claimants may impose some conditions with regard to returning to work, so long as the conditions do not "substantially" reduce opportunities to do so. "Substantial" means "to a large degree or in the main." Webster's Third New Int'l Dictionary at 2280. Assuming, *arguendo*, that the "condition" of having to work some limited hours shutting down her practice on evenings, weekends or other hours outside of offered work *might* have limited claimant's opportunities to accept some part time or temporary work, and claimant's ability to immediately adapt to new employment by calling upon available associate physicians to cover her existing case load, we are not persuaded that any such limitation would have substantial.

Absent a basis for concluding that claimant lacked credibility, and we find none here, we conclude that claimant met her burden to show that she was willing and able to accept full time, part time and temporary work during the usual hours and days customary for the work she sought. Accordingly, claimant was available for work during the weeks at issue and is not ineligible to receive benefits for those weeks for that reason.

DECISION: Order No. 18-UI-104370 is set aside, and this matter remanded for additional evidence consistent with this order. Order No. 18-UI-104371 is set aside, as outlined above

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-104370 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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

DATE of Service: April 20, 2018

NOTE: You may appeal this decision concerning Order No. 18-UI-104371, 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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