

EO: 200
BYE: 201844

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

176
236
VQ 005.00
AAA 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0380

Order No. 18-UI-106145 - Reversed & Remanded
Order No. 18-UI-106143 - Reversed & Remanded

PROCEDURAL HISTORY: On February 13, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 81413). On February 23, 2018, the Department served notice of an administrative decision concluding claimant was not available for work from January 14 through 27, 2018 (decision # 144717). Claimant filed timely requests for hearing on both decisions. On March 27, 2018, ALJ M. Davis conducted a hearing regarding both decisions, and on March 28, 2018 issued Order No. 18-UI-106145 affirming decision # 81413 and Order No. 18-UI-106143 affirming decision # 144717. On April 16, 2018, claimant filed applications for review with the Employment Appeals Board (EAB) of Order Nos. 18-UI-106145 and 18-UI-106143.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order Nos. 18-UI-106145 and 18-UI-106143. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2018-EAB-0380 and 2018-EAB-0379).

EVIDENTIARY MATTER: Claimant submitted new information to EAB with her application for review. Claimant sent EAB photographs of her work environment at Steeler, Inc., and asserted, “Throughout this case [she] had repeatedly requested to have these photographs of [her] working conditions examined . . . [and] with no reason, this request has been ignored.” The hearing notice that the parties received for the March 27 hearing stated that the documents enclosed with the notice would be the only ones considered at the hearing, and instructed the parties that “[i]f you have other documents that you wish to have considered, you must provide copies of your documents to all parties and to [the Office of Administrative Hearings (OAH)] . . . prior to the date of the scheduled hearing.” Although claimant stated during the hearing that she had photographs and had not been able to show them to the Department (Audio Record at 21:41 to 22:25), the record does not show that she provided them to OAH or the other parties before the hearing. OAH did not err in failing to admit photographs it and the other parties did not receive before the hearing.

However, because the both cases before EAB shall be remanded to OAH for further information, claimant may offer the photographs that she sought to present by way of her written argument at the

hearing on remand. If claimant wishes to have the administrative law judge (ALJ) consider her photographs, she must provide copies of them to OAH and the other parties (the employer and the Department) before the hearing, even if she has already done so in the past. Claimant can contact OAH if she needs assistance with submitting the photographs for hearing. At the time of hearing, the ALJ will decide if the photographs are relevant to the issues on remand and should be admitted into evidence, and the other parties will have the opportunity to respond to the photographs.

CONCLUSIONS AND REASONS: Order Nos. 18-UI-106145 and 18-UI-106143 should be reversed, and remanded for additional information.

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. Where the record shows a claimant had a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h), a modified standard is used. A claimant with a permanent or long-term physical or mental impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment(s) would have continued to work for her employer for an additional period of time.

Claimant described health concerns that began only after she began working for the employer that may not be permanent or long-term. However, claimant also described her asthma as having been “triggered” by her working conditions, as though it was a preexisting permanent or long-term condition. Audio Record at 23:05 to 23:11. On remand, the ALJ must ask claimant questions to discern whether claimant’s asthma and other medical conditions were permanent or long-term physical or mental impairments and use the appropriate standard for determining if claimant quit work with good cause.

In Order No. 18-UI-106145, the ALJ concluded that, although claimant faced a grave situation at work due to health problems she experienced as a result of her working conditions, she failed to show she pursued all reasonable alternatives because she did not ask to be transferred to another location or contact the employer’s human resources regarding her working conditions.¹ We disagree that the record shows asking to be transferred was a reasonable alternative because the record does not show the employer had another suitable job available in claimant’s labor market. *See* Audio Record at 27:47 to 27:58, 36:18 to 36:35. However, on remand, the ALJ must ask the parties questions to determine what the employer knew about the working conditions, when the employer learned of the conditions, and what the employer did in response to that information.

It is undisputed in the record that claimant did not contact human resources regarding her working conditions. Audio Record at 26:54 to 27:29. The ALJ should ask claimant for more detail about why claimant did not contact human resources regarding her work conditions. Did claimant know the

¹ Order No. 18-UI-106143 at 3.

employer had a human resources department? Did claimant know if human resources could address a complaint about working conditions? Why or why not? Did the employer provide a handbook or postings at the workplace about how to contact the employer if a workplace issue arose? How often, if ever, did claimant have contact with employer representatives other than her onsite manager and assistant manager? The employer's witness stated at hearing that employees "go through [human resources] for hire." Audio Record at 33:15 to 33:21. The ALJ should ask the employer's witness who the employer would expect an employee to contact regarding workplace health and safety issues, and how the employee would know that.

Claimant testified that the unclean conditions at work were "visible" and that "there were discussions about 'it'," and testified that the manager was not permitted to purchase a vacuum cleaner for the workplace. Audio Record at 25:31 to 26:27. However, the record does not show if claimant complained to the manager or the assistant about each of the health-related concerns, including the rats, rat feces, air quality, dust and leaking water. The ALJ should ask claimant what was stated during the "discussions" she referenced and what the manager told her about the vacuum cleaner request. The ALJ should ask claimant if the manager and assistant manager stated anything to show they were aware of the different health and safety problems at the work site, including the rats, rat feces, poor air filtration, dust and leaking water. Did claimant witness them when they saw rats, rat feces or other poor working conditions at work? The ALJ should ask the claimant about the vacuum request and what the managers discussed regarding the need for a vacuum, and if the witnesses know what the manager told the employer when requesting the vacuum. Claimant testified that the manager told claimant he was "trying, but they're not doing anything." Audio Record at 27:31 to 27:43. Did the managers ever indicate they had notified their superiors about any of the working conditions? The ALJ must ask claimant if she complained about her working conditions to the employer, who she complained to, when she complained, what she stated, what the manager stated in response, if a manager did anything in response, and what the results of those efforts were.

The record is not sufficient to determine if the employer knew claimant's health problems were related to the problems in the working environment. The ALJ should ask claimant, and the employer's witness if possible, whether the manager and assistant manager knew the nature of claimant's health problems, and how they knew. The ALJ should ask claimant what environmental condition at work she believed caused each of her symptoms, and why. The ALJ must also ask the parties if the manager and assistant manager knew claimant believed her health problems were due to the working conditions, and if yes, how they knew. Claimant testified that her manager and assistant manager witnessed her have panic attacks at work. Audio Record at 20:28 to 20:37. The ALJ should ask claimant if claimant discussed what she believed triggered her panic attacks at work with her managers.

In addition, claimant testified that she did not want to drink, eat or use the restroom or eat at work due to the unsanitary conditions. Audio Record at 21:33 to 21:40. The ALJ should ask claimant what she did during her rest and meal breaks and what she did if she needed to consume a beverage or use a restroom during work. The ALJ should ask claimant if the managers knew she felt it was unhealthy to eat, drink or use the restroom at work, and if yes, how they knew. The ALJ should have the claimant describe what her photographs show if the ALJ admits them at hearing. The record is not sufficient to show when the employer first had a pest control company go to claimant's workplace and what measures were taken to remedy the problem. The ALJ should ask the employer's witness when it first knew at the human resources level and at the manager's level that there were potential health or safety problems at

claimant's work site. The ALJ should ask the employer when it contacted a pest control company and what it did to address the rat and rat feces problem. The ALJ should also ask if the employer addressed the issues with the air quality and leaking water in the workplace.

Availability. This matter also comes before EAB to determine, in part, if claimant was eligible for unemployment insurance benefits pursuant to ORS 657.155 during the weeks from January 14 through 27, 2018 (weeks 3-18 and 4-18). To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seeking and unable to obtain suitable work during each week claimed. ORS 657.155(1)(c). An individual must meet certain minimum requirements to be considered "available for work" for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (February 23, 2014). OAR 471-030-0036(f) provides that an individual is not available for work for purposes of ORS 657.155(1)(c) if the individual "has an opportunity to perform *suitable* work during the week and fails to accept or report for such work due to illness, injury or other temporary physical or mental capacity." Emphasis added. Under ORS 657.190, factors to consider to determine whether any work is suitable for an individual include, among other factors, the degree of risk involved to the health and safety of the individual.

There is no dispute in the record that claimant failed to accept work opportunities during weeks 3-18 and 4-18 because she "called in sick." 14:50 to 15:23. In Order No. 18-UI-106143, the ALJ concluded that claimant was not available for work because she called in absent during each of the weeks at issue.² However, the ALJ did not fully and fairly inquire into the facts necessary for consideration of whether claimant was able and available to work. Claimant testified that she could have worked from home, indicating that she did not report to work to avoid becoming ill rather than due to illness. Audio Record at 15:00 to 15:26. The ALJ must ask claimant if she missed work due to illness resulting from her working conditions, or if she "called in sick" to avoid becoming sick from the working conditions. Moreover, the record is incomplete because the ALJ failed to inquire with claimant and the Department witness as to whether the employer's job was suitable based on the degree of risk the job posed to claimant's health and safety.

The intent of this decision is not to constrain the ALJ to asking only the questions specified herein. Therefore, in addition to asking the questions suggested, the ALJ should ask any follow-up questions she deems necessary or relevant to the nature of claimant's work separation and whether or not it should be disqualifying, and the suitability of her job with the employer. The ALJ should also allow the parties to provide any additional relevant and material information about the work separation, and to cross-examine each other as necessary.

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 voluntarily quit work for good cause and was able and available for suitable work during the weeks at issue, Order No. 18-UI-106145 and Order No. 18-UI-106143 are reversed, and this matter is remanded for development of the record.

² Order No. 18-UI-106143 at 3.

DECISION: Order No. 18-UI-106145 and Order No. 18-UI-106143 are set aside, and this matter remanded to OAH for further proceedings consistent with this order.

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

DATE of Service: May 22, 2018

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.