

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0717

Reversed & Remanded

PROCEDURAL HISTORY: On June 1, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 95310). Claimant filed a timely request for hearing. On June 25, 2018, ALJ Amesbury conducted a hearing at which the employer did not appear, and on June 29, 2018 issued Order No. 18-UI-112362, affirming the Department's decision. On July 17, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she offered new information about the condition of her health during her employment and at the time she left work. EAB ordinarily does not consider new information presented for the first time on review unless the party offering it shows that the party was prevented from presenting it at hearing by factors or circumstances beyond its reasonable control, which claimant did not do. *See* OAR 471-041-0090(2) (October 29, 2006). However, given that EAB has remanded this matter for further development of the record as to claimant's health, claimant may offer this new information at the hearing on remand and the ALJ should consider it if it is relevant to the issues on which this matter has been remanded. Claimant is advised that if she intends to offer medical records relating to the status of her health, she must comply with the instructions set out in the notice of hearing for the remand proceeding about offering documents into evidence, which include that the documents must be provided to the ALJ and the other parties before the hearing, or the ALJ will not consider them.

CONCLUSIONS AND REASONS: Order No. 18-UI-112362 is reversed and this matter is remanded for further development of the record.

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) (January 11, 2018). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). For an individual with a permanent or long-term

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

In Order No. 18-UI-112362, the ALJ concluded that claimant voluntarily left work without good cause. The ALJ did not take into account the health conditions claimant contended at hearing that she experienced in considering whether claimant had good cause for leaving work, reasoning that “[t]he evidence was not persuasive that claimant’s medical conditions constituted permanent or long term impairments.” Order No. 18-UI-112632 at 4 n1. However, the evidence in this record was not sufficiently developed to determine whether claimant’s health conditions constituted permanent or long-term impairments and, if they were, the gravity they presented to a reasonable and prudent person with those conditions.

At hearing, claimant testified that a major reason she left work when she did was that the workplace was making her sick and she needed to protect her health. Audio at ~7:42, ~40:12. While claimant identified the health conditions that allegedly caused her to quit work as a rapid heart rate, high blood pressure, loss of sleep and drastic weight loss due to workplace stress, the ALJ did not make a detailed inquiry into them. Audio at ~15:03. On remand, the ALJ should ask claimant when she was first diagnosed with each condition, and what led her to seek the medical intervention that resulted in the diagnoses. Since the description claimant gave of her health conditions to the ALJ at hearing was more in the nature of reciting symptoms rather than providing diagnoses, the ALJ should determine from claimant whether the diagnosing or treating physician(s) indicated the underlying disease process(es) giving rise to these varied symptoms. The ALJ should further make a sufficient inquiry of claimant to determine how elevated her heart rate was, how high her blood pressure was, how much weight she lost over what period of time, and the extent of her sleep deprivation over particular relevant time periods. The ALJ should ask claimant if her symptoms worsened over the course of her employment and, if so, how. The ALJ should seek information from claimant about how, by what process and when her physician determined that these symptoms were the result of workplace stress. The ALJ should seek from claimant detailed descriptions of the impacts that the symptoms she was experiencing had on her personal and professional life, on her ability to perform usual activities, and all deleterious effects that the symptoms had on claimant.

The ALJ should also explore with claimant how often she was seeking medical evaluations or making appointments with a physician or other health care providers for those symptoms during her employment and what treatments she was provided. The ALJ should inquire into all treatments that claimant received for her health conditions or the symptoms arising from them, when she received particular treatment(s) and if the treatment(s) were successful. As well, the ALJ should ask claimant the basis for her belief that her blood pressure and heart rate were not well controlled during the work weeks, although they apparently were in the normal range on the weekends, including whether claimant regularly monitored them and by what means she did so. Audio at ~35:10. The ALJ should make a similar inquiry of claimant about her weight loss and inability to sleep and if she contends that they were not well controlled during her employment. The ALJ should ask claimant what, if anything, her physician told her about what would happen if her health symptoms were not brought under control and when her physician told her this. The ALJ should ask claimant if her physician ever made a recommendation about her continued employment, and, if so, what it was and when, and the circumstances under which that recommendation was given. The ALJ should also ask claimant if her physician ever advised her that

she should take a leave of absence or time off from work to determine whether her health conditions or symptoms could be controlled and, if so, why she did not do so. The ALJ also should ask claimant why she decided to tell her manager and the employer's human resources department in October 2017 that she was experiencing health symptoms that she attributed to workplace stress, what exactly she told them, what she wanted the employer to do with this information and, what, if anything, the employer said or did in response to this information.

The intent of this decision is not to constrain the ALJ only to making the inquiries set out above. In addition to asking the questions suggested, the ALJ should ask any follow-up questions he deems necessary or relevant to the whether or not claimant had good cause for leaving work and whether or not the circumstances under which she did so should be disqualifying. Should the employer appear on remand, the ALJ should also allow it and claimant to provide any additional relevant and material information about the issues on which this matter has been remanded, and to cross-examine each other as necessary.

As well, EAB encourages claimant to offer into evidence the medical records referred to in her written argument since those records may corroborate or tend to corroborate her contentions about her health conditions and their impacts and she carries the burden of persuasion this case involving a voluntary leaving. *See Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000).

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 had good cause for leaving work, Order No. 18-UI-112362 is reversed, and this matter remanded for further development of the record.

DECISION: Order No. 18-UI-112362 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: August 15, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-112362 or return this matter to EAB. Only a timely application for review of the subsequent Order will cause this matter to return to EAB.

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