

IOWA DEPARTMENT OF INSPECTIONS & APPEALS
Division of Administrative Hearings
Wallace State Office Building
Des Moines, Iowa 50319

Appeal Numbers: 10IWDUI343-344
OC: 6/27/10
Claimant: Appellant (2)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

REBECCA SORTER
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DES MOINES, IA 50317-5410

IOWA WORKFORCE DEVELOPMENT
INVESTIGATIONS AND RECOVERY
150 DES MOINES STREET
DES MOINES, IA 50309

JOSEPH WALSH, IWD

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the *Employment Appeal Board, 4th Floor Lucas Building, Des Moines, Iowa 50319.*

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to the Department. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.



(Administrative Law Judge)

February 25, 2011

(Dated and Mailed)

Iowa Code section 96.4-3 – Eligibility for Benefits

Iowa Code section 96.6-2 – Recovery of Overpayment Benefits

Iowa Code section 96.16-4 – Misrepresentation

STATEMENT OF THE CASE

Claimant Rebecca Sorter filed an appeal from two decisions issued by Iowa Workforce Development ("IWD") dated November 16, 2010, reference 03, and November 17, 2010, reference 04. In reference 03, IWD found Sorter was ineligible to receive unemployment insurance benefits because according to her physician, she was unable to work. IWD denied benefits as of June 27, 2010. In reference 04, IWD found Sorter was overpaid \$7,106 for the weeks between June 27, 2010 and November 6, 2010 because of the November 16, 2010 decision, reference 03, finding she was disqualified for not being able and available for work. IWD found the overpayment was due to misrepresentation. Sorter appealed.

IWD transmitted the cases to the Department of Inspections and Appeals to schedule a contested case hearing. When IWD transmitted the cases, it mailed copies of the administrative files to Sorter. A contested case hearing was scheduled for February 16, 2011. Prior to the hearing IWD's representative, Irma Lewis sent additional proposed exhibits to Sorter. Sorter also sent copies of proposed exhibits to Lewis.

A contested case hearing was held on February 16, 2011. Sorter appeared and testified. Lewis appeared and testified on behalf of IWD. Exhibits 1 through 13 were admitted into the record. I went through the complete administrative appeal file. Both parties submitted proposed exhibits that were not relevant to the issues to be decided in this contested case hearing, and involved prior unemployment decisions and alleged acts occurring after the issuance of the decisions at issue, references 03 and 04. Both sides withdrew the proposed exhibits that were deemed irrelevant. Sorter requested the opportunity to leave the record open to produce an additional exhibit. Lewis did not object. Sorter submitted the additional evidence, which was marked as Exhibit 14 and admitted into the record. Lewis also submitted written legal authority from 871 IAC chapter 24, which was considered, but not admitted as a separate exhibit.

ISSUES

Whether IWD correctly determined the claimant is ineligible to receive unemployment insurance benefits.

Whether IWD correctly determined that the Claimant was overpaid unemployment benefits, and, if so, whether the overpayment was correctly calculated.

Whether IWD correctly determined the overpayment was a result of misrepresentation.

FINDINGS OF FACT

Sorter developed a back impairment while working for her former employer. Sorter returned to work and was later fired. Following her termination, Sorter received unemployment insurance benefits from June 2010 through November 2010. Sorter's employer contacted IWD and expressed concern that Sorter was not able and available to work.

Sorter uses a cane and walker for ambulation, as needed. She has used her walker when she has gone into IWD at times.

On November 5, 2010 Lewis sent Sorter a Notice to Report stating IWD needed medical information from her physician to resolve issues on her claim for unemployment insurance benefits. Lewis stated the information needed to be produced by November 15, 2010.

Sorter's physician prepared the Request for Medical Report, stating the nature of Sorter's medical condition was "low back pain, post surgery [with] persistent pain and decreased ability to walk due to pain." (Exhibit 2-2). Sorter's physician noted the nature of the medical condition was "back problems September of 2009 to March 2010." (Exhibit 2-2). The physician found the condition was not employment related and that he had not advised Sorter to quit her job. The Request for Medical Report asked, "[i]s there a PERIOD when the individual COULD NOT perform occupation." (Exhibit 2-2). Sorter's physician checked "yes" and provided "pain/weakness" as the reason. (Exhibit 2-2). Sorter's physician did not identify the period when Sorter could not perform her occupation.

The Request for Medical Report also asked "[i]f the individual has been released, are there any restrictions such as: environmental conditions, weight lifting factors, or general restrictions that would prevent the individual from returning to the former occupation? WHAT ARE THESE RESTRICTIONS?" (Exhibit 2-2). Sorter's physician responded "unable to sit/stand/walk for extended periods of time." (Exhibit 2-2).

Sorter also produced a document from the Social Security Administration ("SSA") dated November 5, 2010, finding she was ineligible for Social Security Disability Insurance ("SSDI") benefits. Lewis noted the report stated "[y]ou say that you are unable to work due to a Back Injury, COPD, Depression, and Back-removed lower discs." (Exhibit 2-3). The SSA found that while Sorter's symptoms may still cause her problems she has "the capacity to do work similar to [her] past job as a payroll specialist as it is usually performed." (Exhibit 2-3).

Lewis considered the information Sorter produced and determined she was ineligible for unemployment insurance benefits because she was not able to work. Lewis prepared a Statement of Fact/Decision Worksheet noting "[s]ee medical report; also information claimant provided ssdi; Asterisk shows that the claimant told SSDI that she was unable to work. SSDI has indicated that she has appealed their decision, and still is saying she is unable to work." (Exhibit 2-1).

At hearing Lewis testified that to be able to work, an individual must be able to work full-time and accept full-time employment. Lewis reported Sorter's physicians opined she could not work full-time.

Sorter testified that after she lost her employment she did not have health insurance. The physician who prepared the Request for Medical Report last treated her in June 2010. Sorter applied for medical assistance through the Department of Human Services

(“DHS”). DHS later approved Sorter for Iowa Care. Sorter receives medical treatment at Broadlawns Medical Center from Marcia Nelsen, M.D. At hearing Sorter presented a statement from Dr. Nelsen finding,

Although she is much improved after her back surgery, she still is unable to ambulate very far without having pain. At this time I do think she would benefit by a job that would allow her to sit part-time and to change positions frequently as needed. I do not think she will do well at a job where she needs to stand for prolonged period of time, or a job where she is walking for prolonged periods of time.

(Exhibit 12).

REASONING AND CONCLUSIONS OF LAW

To be eligible to receive unemployment benefits, an unemployed individual must be able and available for work, and is earnestly and actively seeking work.¹ The issue in this case is whether Sorter is able to work. An individual must be physically and mentally able to work in some gainful employment.² When an individual has an illness or injury IWD decides each case based upon its individual facts, “recognizing that various work opportunities present different physical requirements.”³ IWD’s rules provide that a statement from a medical practitioner “is considered prima facie evidence of the physical ability of the individual to perform the work required.”⁴ The ability to work “means the individual must be physically able to work, not necessarily in the individual’s customary occupation, but able to work in some reasonably suitable, comparable, gainful, full-time endeavor other than self-employment, which is generally available in the labor market in which the individual resides.”⁵

Lewis found Sorter could not work full-time and was not able to work, disqualifying her from receiving unemployment insurance benefits. In support of her contention, Lewis cited to the SSA decision denying Sorter’s application for SSDI, and the statements in the Request for Medical Report.

Lewis believes Sorter’s statements during her application for SSDI make her ineligible to receive unemployment insurance benefits. While the Iowa Supreme Court has not addressed the issue of whether applying for SSDI precludes an individual from being able to work, the United States Supreme Court has addressed the effect of applying for and receiving SSDI on a later claim of disability discrimination under the Americans with Disabilities Act (“ADA”).⁶ In *Cleveland*, an employee applied for and was approved for SSDI after suffering a stroke and losing her job.⁷ When she applied for SSDI, she

¹ *Id.* § 96.4(3).

² 441 IAC 24.22(1).

³ *Id.* 24.22(1)a.

⁴ *Id.*

⁵ *Id.* 24.22(1)b.

⁶ *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999).

⁷ *Id.* at 799.

represented she could not work. The employer argued the individual was not a qualified person with a disability as a matter of law. The Supreme Court disagreed, noting differences between the two statutes, including a disability determination by the SSA does not take into account whether the individual can be reasonably accommodated. I conclude merely applying for SSDI does not support IWD's claim that Sorter is not able to work. In this case the SSA denied Sorter's application, finding Sorter can perform work similar to her past job as a payroll specialist.

Lewis next contends Sorter's physician reported she could not work full-time, and thus she is not able to work. While Sorter's physician stated Sorter has restrictions, he did not state she is unable to work on a full-time basis. Rather, Sorter's physician stated she is "unable to sit/stand/walk for extended periods of time." (Exhibit 2-2). The Department's rules do not require that the individual be able to perform the individual's former occupation, rather the rules require she "be able to work in some reasonably suitable, comparable, gainful, full-time endeavor."⁸ Sorter testified she is able to work. Neither Dr. Nelsen, nor the physician who prepared the Request for Medical Report stated that Sorter was unable to work full-time in a reasonably suitable, comparable, gainful, full-time endeavor. I conclude Sorter is able to work. IWD's decision must be reversed.

When IWD determines an individual who received unemployment benefits was ineligible to receive benefits, IWD must recoup the benefits received irrespective of whether the individual acts in good faith and is not otherwise at fault.⁹ Because I conclude Sorter was not ineligible to receive unemployment insurance benefits during the period in question, IWD's decision finding she was overpaid unemployment benefits due to misrepresentation must also be reversed.

DECISION

IWD's decisions, reference 03 and 04 are REVERSED.

hlp

⁸ 441 IAC 24.22(1)b.

⁹ Iowa Code § 96.3(7) (2009).

