

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

GITANA N SIERRA-SNYDER

Claimant

APPEAL NO. 08A-UI-05218-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARDIOVASCULAR MEDICINE PC

Employer

**OC: 04/27/08 R: 04
Claimant: Respondent (2)**

Iowa Code § 96.4(3) - Able and Available
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 2, 2008, reference 04, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on June 18, 2008. Claimant responded to the hearing notice instructions but was not available when the hearing was called and did not participate. Employer participated through Michelle Hetrick, Kris Zeller, Pat Ragan and Vickie Paulsen. The administrative law judge took judicial notice of the administrative record.

ISSUE:

The issue is whether claimant is able to and available for work effective April 27, 2008 and if so, whether she is overpaid benefits as a result.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a full time chart preparation clerk from April 20, 2006 until May 2, 2008 when she was discharged. Claimant began taking Family Medical Leave Act (FMLA) leave sporadically in January and February 2008 and continuously from March 4, 2008. On or about March 4, 2008 after making a physical threat against coworkers, employer referred her to Geeta Makadevia, M.D. at Genesis Occupational Health for evaluation. On March 10 Dr. Makadevia requested medical records from all of claimant's treating physicians. On March 14, Dr. Makadevia found claimant to be a "direct threat" and "NOT medically qualified to do the essential functions of the job." She had exhausted FMLA on May 2, 2008 and was discharged at that time because she was not able to return to work. Her treating physician for fibromyalgia and memory loss/sleeplessness, Michael Miniter, M.D., opined in letters dated May 22 and 28, 2008 that claimant was able to work from February 25 through May 28 and forward. She was also treated by Drs. Deab, Jauron, Aaseuaw for other ailments including bipolar disorder (self-described in the fact-finding interview notes) and rheumatoid arthritis, for which there are no medical records or releases to return to work.

The claimant has received unemployment benefits since filing a claim with an effective date of April 27, 2008.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work effective April 27, 2008.

Iowa Code § 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

871 IAC 24.23(35) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(35) Where the claimant is not able to work and is under the care of a physician and has not been released as being able to work.

Inasmuch as claimant was referred to Dr. Makadevia, the occupational health physician, because of a threat of physical violence toward another employee, the claimant's self-described bi-polar medical condition is not work-related, and the treating physician for that condition has not released the claimant to return to work with or without restriction, the claimant has not established her ability to work in spite of the release by Dr. Minitier related to the fibromyalgia

condition. Benefits are withheld until such time as the claimant obtains a medical release to return to some type of work of which she is capable of performing given any medical restrictions related to her bi-polar disorder. That release, if and when it is provided, may cover any applicable range of dates in 2008. Since employer separated claimant, she is not obligated to return to Dr. Makadevia for a release.

The administrative law judge further concludes claimant has been overpaid benefits.

Iowa Code § 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because the claimant is not considered able to work as of April 27, 2008, unless she provides a medical release as outlined above, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision dated June 2, 2008, reference 04, is reversed. The claimant is not able to work and available for work effective April 27, 2008. Benefits are withheld until such time as the claimant obtains a release to return to work by her mental health treating physician. The claimant is overpaid benefits in the amount of \$1,442.00.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs