

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

CATHY B. SMITH
(Claimant)

SRI INTERNATIONAL
(Self-Insurer)

PRECEDENT
DISABILITY DECISION
No. P-D-426
Case No. D-81-319

EMPLOYMENT DEVELOPMENT DEPARTMENT

Office of Appeals No. SJ-DC-17285

The Department appealed from the decision of the administrative law judge which held that the claimant was entitled to unemployment disability benefits from the Disability Fund rather than from the voluntary plan under the Unemployment Insurance Code.

STATEMENT OF FACTS

The claimant was employed as an information officer. She was pregnant and expected the birth of her child at the end of May 1981. The position of the unborn child on her sciatic nerve caused her leg to become numb. She discussed this problem with her physician and he advised her to leave her work in the early part of April. Because of the necessity to train someone to do her job, she decided to try to work until the end of April. Accordingly, the claimant gave notice on March 31, 1981 that she was quitting her job effective April 30, 1981.

Due to pressure on the sciatic nerve, the claimant was required to take sick leave several times during April. Her physician also advised her to walk around for 15 minutes out of every hour in order to increase circulation. The nature of her work prevented her from consistently doing this. Had she not given one-month notice of quitting she would have left work two weeks earlier because of her physical problem. As a result of her physical impairment, she left two hours early on April 30, 1981, her last day of work.

The terms of the voluntary plan provide in part:

"An employee's coverage will terminate:

"A. On the date of termination of employment by termination of the employer-employee relationship"

In the claim form submitted to the voluntary plan, the claimant's physician stated that the "patient was continuously totally disabled (unable to work) from 5/1/81." On the same form the claimant stated that her "First day you were unable to work because of this disability [was] May 1, 1981."

The claimant testified that the reason for the above May 1, 1981 entries was that was the date she and her physician knew she stopped working.

It is the position of the voluntary plan that since the claimant's physician certified that her disability commenced on May 1, 1981, the voluntary plan was not on the risk because coverage ceased on April 30, 1981 when the employer-employee relationship terminated.

The position of the Employment Development Department is that the voluntary plan should be on the risk since the claimant was disabled while she was covered under the voluntary plan.

REASONS FOR DECISION

Section 2626 of the Unemployment Insurance Code provides that an individual shall be deemed disabled in any day in which because of his physical or mental condition, he is unable to perform his regular or customary work.

Section 2712 of the code provides that where a claimant is entitled to disability benefits but there is a dispute whether such benefits are payable from the Disability Fund or a voluntary plan, benefits shall be paid from the source against which the claim was first filed pending determination of the coverage question. If it is finally determined that the benefits should have been paid from a source other than the one which paid the benefits,

reimbursement shall be promptly made from the Disability Fund or from the voluntary plan, as the case may be, and the claimant promptly paid the accumulated excess, if any, to which he is entitled.

Section 2627 of the code provides in part:

"A disabled individual is eligible to receive disability benefits equal to one-seventh of his or her weekly benefit amount for each full day during which he or she is unemployed due to a disability only if the director finds that:

* * *

"(d) . . . he or she has filed a certificate as required by Section 2708"

Section 2708 of the code provides in part:

"The director shall require for each uninterrupted period of disability that the first claim for disability benefits be supported by the certificate of a physician as defined in Section 3209.3 of the Labor Code, . . . acting within the scope of his practice. The certificate shall contain a statement of the medical facts within his knowledge, his conclusion with respect to the disability of the claimant and his opinion with respect to probable duration of the disability. . . ."

In view of sections 2627 and 2708, above quoted, it is necessary to support a first claim for benefits with a certificate of a physician. The quoted language requires nothing more, nor are other requirements or restrictions imposed or created thereby. The quoted language does not require a certificate of a physician (or other medical evidence) to establish the beginning date of a disability or what disability insurance coverage exists on a specific date or during a particular period of time. All pertinent evidence, whether it be lay, medical, or otherwise, can be examined and evaluated to answer such questions.

Subdivision (d) of section 3254-2, Title 22, California Administrative Code provides in part:

". . . An employee covered by a voluntary plan shall be eligible for benefits under the plan with respect to any uninterrupted period of disability which commences while he is covered by the plan. For the purpose of this subdivision, a period of disability shall be deemed to commence while an employee is covered by a voluntary plan if at the time coverage attaches such employee is, or thereafter during coverage becomes, unable to perform the regular or customary duties of his employment under the voluntary plan because of his physical or mental condition. . . ."

There is ample lay evidence in this case to show that sometime in April 1981 the claimant became unable to perform her regular or customary work. The claimant was required to take sick leave several times during that month, including the last day of her employment. She had to get up and walk around 15 minutes out of every hour of work, when possible. Had she not given notice of one month, she would have quit her job two weeks sooner than she did because of her physical condition. The claimant was therefore, in fact, disabled during the month of April 1981. Her ability to do work lighter than her regular or customary work does not negate this conclusion (see Appeals Board Decisions Nos. P-D-385 and P-D-390).

Although the claimant herein worked beyond the date her physician advised, she did so because of her will to work and train a replacement, and her ability to endure pain. This did not negate the existence of her disability during the month of April 1981. In this regard, the following appears in Wright v. Prudential Insurance Company of America (1938), 27 C.A. 2d 195, 80 Pac. 2d 752:

". . . the test of disability is not what the insured actually did in the effort to perform his duties, but what, in the exercise of due prudence he was reasonably able to do. . . ."

The probative evidence in this case is therefore to the effect that the claimant was disabled in April 1981 at a time that she was covered by the voluntary plan. The voluntary plan is therefore on the risk in this case pursuant to section 3254-2(d), Title 22, California Administrative Code, above quoted.

The matter herein is resolved, in light of our decision, according to section 2712 of the code.

DECISION

The decision of the administrative law judge is reversed. Benefits are payable from the voluntary plan, if the claimant is otherwise eligible, pursuant to section 2712 of the code.

Sacramento, California, August 17, 1982.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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