

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0152

Reversed & Remanded

PROCEDURAL HISTORY: On October 21, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work from October 6 through 12, 2013 (decision # 85648). Claimant filed a timely request for hearing. On December 31, 2013, ALJ Holmes-Swanson conducted a hearing, and on January 13, 2014 issued Hearing Decision 14-UI-08407, concluding that claimant was not able to work from October 6 through November 9, 2013. On January 23, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 14-UI-08407 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further proceedings.

To be eligible to receive benefits, unemployed individuals must be able to work during each week claimed. ORS 657.155(1)(c). An individual is considered able to work for purposes of ORS 657.155(1)(c) only if physically and mentally capable of performing the work the individual is actually seeking during all of the week. OAR 471-030-0036(2) (January 8, 2006). An individual occasionally and temporarily disabled for less than half of the week is not considered unable to work. OAR 471-030-0036(2)(a). An individual prevented from working full time or during particular shifts due to a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h) shall not be deemed unable to work solely on that basis so long as the individual remains available for some work. OAR 471-030-0036(2)(b).

In Hearing Decision 14-UI-08407, the ALJ concluded that claimant was not able to work during the weeks at issue, October 6 through November 9, 2013 (weeks 41-13 through 45-13), because he was injured in a motorcycle accident on October 5, 2013, and was not cleared to return to work until November 9, 2013. At hearing, however, claimant testified that he was released to return to work on October 9, 2013, and that he needed to be on limited duty for at least two weeks. Audio Record at 19:30 – 22:00. The ALJ apparently misheard claimant,¹ and therefore did not conduct an inquiry into how

¹ See Audio Record at 21:30.

long he was on limited duty and whether he was physically capable of performing the work he was actually seeking during that time. Nor did the ALJ conduct an inquiry into whether claimant should be considered able to work under OAR 471-030-0036(2)(a), or deemed able to work under OAR 471-030-0036(2)(b). Absent such inquiries, we cannot determine whether claimant was able to work during the weeks at issue.

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 was able to work during the weeks at issue, Hearing Decision 14-UI-08407 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 14-UI-08407 is set aside, and this matter remanded for further proceedings consistent with this order.

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating.

DATE of Service: February 26, 2014

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310, or visit the website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.