

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0369

Affirmed
Ineligible

PROCEDURAL HISTORY: On January 27, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work during the weeks of May 5, 2013 through October 26, 2013, November 3, 2013 through November 16, 2013 and November 24, 2013 through January 4, 2014 (decision # 145838). Claimant filed a timely request for hearing. On February 24, 2013, ALJ Frank conducted a hearing, and on February 26, 2014 issued Hearing Decision 14-UI-11182, affirming the Department's decision. On March 6, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Effective the week beginning April 4, 2013, claimant filed an initial claim for unemployment insurance benefits. The Department determined claimant's claim was valid. Claimant claimed and was paid benefits for the weeks of May 5, 2013 through October 26, 2013 (weeks 19-13 through 43-13), November 3, 2013 through November 16, 2013 (weeks 45-13 through 46-13) and November 24, 2013 through January 4, 2014 (weeks 48-13 through 01-14), the weeks at issue.

(2) During the weeks at issue, claimant sought work as a certified nursing assistant (CNA). Claimant's labor market was Vancouver, Washington and the surrounding areas. The days of the week and hours customary for work as a CNA in claimant's labor market were all days and all shifts.

(3) During the weeks at issue, claimant had five children for whom she needed to provide care, a 16 year old disabled son and children who were 13, 11, 8 and 3 years old. Sometime before May 5, 2013, claimant lost her childcare provider. After claimant no longer had child care, she was able to work only one shift per day on weekdays, from 2:30 p.m. to 10:30 p.m., and only able to work four hours per day on weekends. During the weeks at issue, claimant relied on her mother to provide care for her children.

(4) On January 17, 2014, claimant spoke by phone with a Department representative, who documented claimant's statements. Claimant told the representative that, since the time she lost her childcare provider before May 5, 2013, she was only able to work from 2:30 p.m. until 10:30 p.m. on weekdays and only four hours per day on weekends. Audio at ~24:56, ~27:55. Claimant also told the

representative that beginning in November 2013, her mother was no longer able to care for her “little boy.” Audio at ~27:55. Claimant did not mention that the hours she was able to work, despite her need to care for her children, had increased at any time since May 5, 2013.

CONCLUSIONS AND REASONS: Claimant was not available for work during the weeks of May 5, 2013 through October 26, 2013, November 3, 2013 through November 16, 2013, November 24, 2013 through January 4, 2014.

To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). An individual must meet certain minimum requirements to be considered “available for work” for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (January 8, 2006). Among those requirements are that the individual be willing to work and capable of reporting to full time, part time and temporary work opportunities throughout the labor market during all of the days and hours customary for the work the individual is seeking, and refrain from imposing conditions that limit the individual’s opportunities to return to work at the earliest possible time. *Id.* An individual who is responsible for the care of a disabled child under the age of 18 or for the care of children under the age of 13 and who is unwilling to work a particular shift because of a lack of child care shall be considered available for work if the work is customarily performed during other shifts and the individual is willing and capable of working during all the other shifts that the work is customarily performed. OAR 471-030-0036(4).

In light of claimant’s clear statement to the Department representative on January 17, 2014 that she had not been able to work more than swing shift since before May 5, 2013 and continuing through the date that she made that statement, the issue is whether her testimony at hearing undercut the accuracy of that initial statement. Claimant’s testimony at hearing was confusing and inconsistent. Although she contended that the daycare provider she lost in May 2013 only provided care for her 16 year-old disabled son, it was not clear how she had previously provided daycare for her other younger children, or whether claimant’s mother was able to provide care for the disabled son as well as her other children. Audio at ~34:05, ~42:55. The only child that claimant specifically referred to as needing care was her “little boy,” from which we infer she was referring to her youngest child. Audio at ~42:11, ~27:55. While claimant contended at hearing that her ability to work was “the same” after she lost the daycare provider and that it was “no problem” for her to work any shifts after that, if that were her situation, it was not logical for claimant to refer in her statement to the Department representative to the loss of daycare or to identify specifically the hours or shifts she was able to work. Audio at ~34:55. Claimant finally conceded at hearing that she was at least not able to work a graveyard shift after May 2013, but still contended she would nonetheless have accepted a graveyard shift job and her mother could have provided care for her children for the first three or four months of that job. Audio at ~ 39:14. Overall, claimant appeared at hearing to be trying to evade the ALJ’s questions about the hours she was able to work after she lost the daycare provider or whether those hours were limited after the daycare provider stopped providing services. Claimant also appeared to be trying assiduously to minimize her need to provide care for her children. *See e.g.* Audio at ~34:05, ~34:55, ~35:18. On balance, it is more likely than not that claimant’s initial statement to the Department about the hours she was able to work after May 5, 2013, made before she was aware of its impact on her receipt of benefits, was accurate.

Based on claimant’s ability to work on weekdays only between the hours of 2:30 p.m. and 10:30 p.m., she was limiting herself only to working swing shifts. Because the work claimant was seeking was also

performed during day and graveyard shifts, she was unwilling to work all of the days and hours customary for that work. Although OAR 471-030-0036(4) provides an exception to the usual availability requirements for parents who need to provide care for children, it applies only when the parent is able to work all but one of the customary shifts the work is performed. This exception is not applicable in claimant's situation since she was unwilling to work two of the three shifts that the work she was seeking was performed. Because the exception is unavailable to claimant, on these facts, claimant was not willing or able to work during all of the usual hours and days of the week customary for the work being sought. *See* OAR 471-030-0036(3)(a). Based on her statement to the Department, claimant was not available for work during the weeks of May 5, 2013 through October 26, 2013, November 3, 2013 through November 16, 2013 and November 24, 2013 through January 4, 2014.

DECISION: Hearing Decision 14-UI-11182 is affirmed.

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

DATE of Service: March 24, 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>.

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