

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0395

Reversed
Eligible

PROCEDURAL HISTORY: On November 14, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work from October 20 through November 9, 2013 (decision # 153109). Claimant filed a timely request for hearing. On January 29, 2014, ALJ Vincent conducted a hearing, and on February 21, 2014 issued Hearing Decision 14-UI-10858, concluding that claimant was not available for work from October 20, 2013 through January 25, 2014. On March 13, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument. However, claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Claimant claimed benefits for the weeks from October 20, 2013 through January 25, 2014 (weeks 43-13 through 04-14), the weeks at issue.

(2) Claimant last worked for Seterus, Inc. as a financial and customer services representative, servicing mortgages and specializing in late stage collections. In mid-June 2013, claimant was injured in an automobile accident. Claimant was physically and mentally incapable of any work.

(3) On September 11, 2013, a doctor determined that claimant no longer was totally impaired for work, and released claimant to sedentary work that required no prolonged standing without frequent breaks, and that he could perform although his ability to concentrate was impaired. On October 23, 2013, a psychologist determined that claimant's short-term memory also was impaired.

(4) On October 24, 2013, claimant filed an initial claim for unemployment insurance benefits and began searching for front desk, customer service and light computer work that he could perform despite his

mental and physical impairments, which slowly improved over time. Claimant's labor market was the Salem-Keizer, Oregon area.

(5) As of November 19, 2013, claimant was limited to sitting, standing or walking for up to three hours with two minute breaks every 30 minutes. He was prohibited from climbing, twisting, bending or stooping. He was limited to intermittently reaching above shoulder level for up to two hours, and intermittently reaching front and side at desk level for as long as he could sit. There was no limit on claimant's ability to perform fine finger, eye and hand movements. Claimant was limited to intermittently lifting, pushing or pulling up to ten pounds for up to two hours.

(6) Claimant continued seeking front desk, customer service and light computer work that he could perform despite his mental and physical impairments, which continued to slowly improve.

(7) On December 19, 2013, it was determined that claimant still was physically and mentally incapable of working as a financial and customer services representative, servicing mortgages and specializing in late stage collections, or in a similar capacity. During the remaining weeks at issue, claimant continued seeking front desk, customer service and light computer work that he could perform despite his mental and physical impairments, which continued to slowly improve.

CONCLUSIONS AND REASONS: We disagree with the ALJ. We conclude that claimant is eligible for benefits for the weeks at issue.

To be eligible to receive benefits, unemployed individuals must be able to work and available for 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 must meet certain minimum requirements to be considered "available for work" for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3). Among those requirements is that the individual be capable of accepting and reporting for any suitable work opportunities within the labor market in which the work is being sought. OAR 471-030-0036(3)(b).

In Hearing Decision 14-UI-10858, the ALJ found that claimant's "medical providers have opined that he was unable to perform work due to his medical restrictions."¹ Based on that finding, the ALJ concluded that claimant was not capable of accepting and reporting for any suitable work opportunity within his labor market, and therefore was not available for work, during the weeks at issue.² However, the issue in this case is not whether claimant was available for work during the weeks at issue, but whether he was able to work during those weeks. The underlying issue therefore is not whether claimant was capable of "accepting and reporting" for "any" suitable work opportunities in his labor market, but whether he was physically and mentally capable of "performing" the work he was "actually" seeking.

The record also fails to support the ALJ's finding that claimant's medical providers determined that he was unable to perform work due to his mental and physical impairments. The record instead shows that claimant was unable perform work as a financial and customer services representative, servicing

¹ Hearing Decision 14-UI-10858 at 2.

² *Id.*

mortgages and specializing in late stage collections, or in a similar capacity. Exhibit 1. At hearing, claimant testified that he therefore limited his work search to front desk, customer service and light computer work that he could perform despite his mental and physical impairments. Transcript at 22-29, 31-32. Claimant's testimony was sufficient to show that he was physically and mentally capable of performing the work he was actually seeking during the weeks at issue. Claimant therefore is eligible for benefits for those weeks.

DECISION: Hearing Decision 14-UI-10858 is set aside, as outlined above.

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

DATE of Service: March 28, 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.