

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0491

Affirmed
Ineligible

PROCEDURAL HISTORY: On January 16, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work during the weeks of December 29, 2013 through January 4, 2014 (decision # 94143). Claimant filed a timely request for hearing. On March 6, 2014, ALJ Hatfield conducted a hearing, and on March 12, 2014 issued Hearing Decision 14-UI-12224, concluding claimant was not able to work during the weeks of December 29, 2013 through March 1, 2014. On March 27, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) In 1977, claimant was involved in a serious automobile collision in which he sustained a severe concussion and spinal cord injuries. Following the accident, claimant experienced organic brain syndrome. When claimant was under stress, this condition caused him to experience agitation, confused thinking, and impaired memory, and impaired information processing and decision-making capacities. Despite this limitation, claimant was able to work for most of his adult life.

(2) Beginning in 2004, claimant was employed as a facilitator for multiple mobile home parks. Claimant's wife shared the facilitator position with claimant. On July 31, 2012, claimant fell at work and sustained another serious concussion. After this second concussion, claimant's left side and left arm became numb and partially paralyzed, claimant limped and had difficulty walking and claimant had

problems with his senses of smell and hearing. Claimant also had "a lot more episodes" of organic brain syndrome. Transcript at 14. Claimant had difficulty recovering and resuming his normal activities after the second concussion. Transcript at 13. Although these subsequent symptoms did not abate, claimant returned to work. In May 2013, claimant stepped on a small rock while at work and the entire left side of his body "seized up" and he "went unconscious." Transcript at 14-15. Claimant was taken to the hospital, but returned to work after this incident. After approximately October 22, 2013, claimant's employer stopped giving claimant any work. Claimant's wife learned that claimant was going to continue to receive a paycheck, even though he was not working, through December 31, 2013.

(3) On December 30, 2014, claimant filed an initial claim for unemployment insurance benefits stating that he had been discharged from his prior employment. The Department determined that claimant's claim was valid. Claimant claimed, but was not paid, benefits for the weeks of December 29, 2013 through March 1, 2014 (weeks 01-14 through 09-14), the weeks at issue. Claimant was seeking work as a property management facilitator. In claimant's labor market, the hours and days customary for this type of employment were all days, all hours. When claimant made his first weekly claim for benefits on January 10, 2014, claimant certified to the Department that he was not able to work.

(4) On January 13, 2014, a Department representative called claimant to determine the degree to which he was not able to work. Claimant told the representative multiple times during the call that he was not able to work due to a brain injury. Transcript at 42. Claimant complained that, after his workplace fall on July 31, 2012, the State Accident Insurance Fund (SAIF) had "blocked him" from medical care. Transcript at 42. Claimant also told the representative during that call that he thought he was able to work in a capacity that allowed him to work with his wife, but he also thought that he was "available but not able to work." Transcript at 6. Claimant also told the representative that he "might be able to work, but he did not know what he was able to do." Transcript at 7. Claimant told the representative that he was in the process of applying for Social Security disability benefits and that he "should be on disability." Transcript at 7. At some later time during the call, claimant became "distracted," and the representative was unable to continue the conversation with him. Transcript at 7, 16.

(5) On January 16, 2014, claimant sent a letter to the Department in which he stated that he was unable to work and explained why. Transcript at 42-43; *see also* Transcript at 8. Sometime shortly after January 16, 2014, claimant applied for Social Security disability benefits based on the disabling impacts of the organic brain syndrome he experienced. Claimant applied for those benefits because he decided he needed to "come to grips" with the symptoms of organic brain syndrome. Transcript at 41.

CONCLUSIONS AND REASONS: Claimant was not able to work during the weeks of December 29, 2013 through March 1, 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 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) (February 23, 2014). An individual who is 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). As described at hearing, claimant's conditions of organic brain syndrome, partial paralysis

and impaired senses appear to be a permanent or long term impairments. Accordingly, claimant is not considered unable to work during the weeks at issue if he was available for at least some work in the fields in which he was seeking work.

The burden was on claimant to demonstrate, more likely than not, that he was available for some work during the period of December 29, 2013 through March 1, 2014. In *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976), the court held that in cases where the Department has paid benefits to a claimant, the burden of persuasion is on that Department to show that claimant was ineligible for those benefits. By logical extension of this principle, the burden is on a claimant to show his or her eligibility for benefits in cases where the Department has not paid those benefits. Here, since the Department did not pay any benefits to claimant during the weeks at issue, claimant has the burden to show that he was eligible for benefits, including that he was able to work and available for some work despite his impairments.

The crux of this case is whether claimant presented sufficient evidence to rebut, more likely than not, the oral and written statements he made to the Department about his complete inability to work before he understood the impacts of those statements on his eligibility to receive benefits. Notably, claimant contended that there was no change in his ability to work after he made these statements and through the time of the hearing. Transcript at 37. At hearing, claimant explained that he stated to the authorized representative on January 13, 2014 that he was not able to work because he was "extremely distressed" and "not capable of speaking about the issues at that time" due to limitations attributable to organic brain syndrome. Transcript at 32, 33. In claimant's written argument, he argued that he made the contradictory statements he did to the authorized representative on January 13, 2014 as a result of confusion he experienced during that conversation due to organic brain syndrome exacerbated by stress as well as his despondency over his recent work separation. Claimant's Written Argument a 3, 4, 6. However, these explanations do not appear to be corroborated by claimant's behavior during the hearing. At the hearing, which was presumably a highly stressful event for claimant since his eligibility for benefits was at stake, claimant never appeared confused or unable to clearly communicate his thoughts or his positions on the relevant issues. Moreover, although claimant made oral statements about his ability to work in his conversation with the authorized representative that are difficult to reconcile, those statements do not explain why he also stated he was not able to work when he made his first weekly claim or why, after some apparent reflection, he sent a follow up written statement to the Department on January 16, 2014 still asserting that he was not able to work and was going to apply for disability benefits. Transcript at 8, 42-43¹. Claimant did not dispute that he made these written statements, and did not explain why they were not inaccurate statements of his inability to work. These other indications of claimant's inability to work suggest that some of the inconsistency during his conversation with the authorized representative may have been caused not by organic brain syndrome, but by an attempt to satisfy the authorized representative questions which were intended to elicit detailed information about claimant's ability to work. On this record, claimant did not meet his burden to establish that the statements he made to the authorized representative on January 13, 2014 about his inability to work should be disregarded as a product of his impairment. Based on claimant's other written indications of an inability to work, claimant did not present sufficient evidence to rebut the reliability of his statements that he was not able to work. That claimant was in fact not able to work during the weeks at issue is further corroborated by the application for Social Security disability benefits that he made shortly after January 16, 2014 to "come to grips" with his disability.

At hearing claimant stated over and over that he was able to work, and cited his work experience before October 22, 2013 to demonstrate that he was able to work. Transcript at 17, 19-25. However, claimant was unable to provide information about whether his impairment caused his separation from this employer or whether there was any other reason for this work separation. Transcript at 29. It appears on this record that claimant's physical and cognitive limitations were significantly aggravated after his second concussion in 2013 as evidenced by the consequences of his fall in May 2013. Transcript at 13, 15, 17. Although claimant generally testified at hearing that he was able to work after these events, when addressing these subsequent injuries in isolation, without reference to any alleged impacts on his ability to work, claimant stated, "I have a great difficulty with this injury since then" and "I've had a little of trouble getting back on my feet and healing myself." Transcript at 13, 17, 36, 37. While claimant appeared at the hearing to be trying to minimize the limitations he actually experienced from his impairments at around the time he filed his initial claim for benefits, it is only inferable that they were quite severe. Claimant did not present at hearing any evaluation of his condition from a medical professional, or other objective evidence, to buttress his claim that he was able to perform some work as a property management facilitator or in any other capacity during the weeks at issue, and it seems unlikely he would not have obtained some medical evaluation of his ability to work as part of the process of applying for Social Security disability benefits.

Given the undisputed magnitude of claimant's impairments, the three statements he gave to the Department in which he stated either that he was not able to do any work or, at best, was uncertain what work he could realistically perform or could only work in tandem with his wife, claimant had significant evidence to rebut in order to establish his eligibility for benefits. On this record, claimant did not meet his burden to establish, more likely than not, that less than full-time work was available for him as a property management facilitator during the weeks at issue or that he was able to perform at least some work in the fields for which he was making employment contacts during the weeks at issue. We are not unmoved by claimant's situation. However, unemployment insurance benefits are intended to provide payments for individuals, including disabled individual, who are able to work and temporarily unemployed. Disability benefits are the appropriate source of payments for individuals who are unable to work due to physical or mental impairments.

Claimant was not able to work during the weeks of December 29, 2013 through March 1, 2014 (weeks 01-14 through 09-14). Claimant is not eligible to receive benefits during those weeks.

DECISION: Hearing Decision 14-UI-12224 is affirmed.

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

DATE of Service: April 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.

ⁱ Although claimant contended at hearing that he first indicated in writing to the Department that he was not able to work when he filed his initial claim and after a staff member at a local employment office advised him to characterize his work separation as being caused by an inability to work, the Department's witness testified that claimant initially characterized the work separation leading to his claim as a discharge and that claimant stated his first stated his inability to work when he made his first weekly claim report on January 10, 2014. Transcript at 31-34, 42. Based on the Department's testimony, claimant did not establish that the first certification of his inability to work occurred when he filed his initial claim. Accordingly, claimant's testimony at hearing did not demonstrate that the certification that he was unable to work when he filed his first weekly claims report was due to erroneous advice from a staff member at a local employment office.