

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-0491-R

EAB Decision 2014-EAB-0491 Reversed on Reconsideration
Eligible

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). On April 28, 2014, EAB issued Appeals Board Decision 2014-EAB-0491, affirming Hearing Decision 14-UI-12224.

On May 22, 2014, claimant filed a petition for judicial review with the Oregon Court of Appeals. On September 15, 2015, the Court of Appeals issued an opinion, *Sanger v. Employment Department*, 273 Or App 714 (2015). In that decision, the Court held that EAB erred in holding that claimant “was required ‘to rebut’ the presumption that written and oral statements that he had made to the Employment Department regarding his inability to work were reliable,” and that rather than applying a presumption, “the EAB’s task on review . . . in a case such as this one is to review the record *de novo* and determine whether or not the claimant has persuaded it that he or she meets the criteria for benefits under ORS 657.155.” The Court reversed and remanded the case to EAB for further consideration. On November 4, 2015, the Court of Appeals issued the appellate judgment. See ORAP 14.05(2)(b).

In argument to EAB on remand, claimant requested that EAB take notice of certain generally cognizable facts and admit additional evidence. As we have decided the case in claimant’s favor based on the existing record, however, we need not and do not make any ruling on the admissibility of the generally cognizable facts and additional evidence.

FINDINGS OF FACT: (1) In 1977, claimant was involved in a serious automobile accident in which he sustained a severe concussion and spinal cord injuries. As a result, he experienced organic brain syndrome, which caused him to experience agitation, confused thinking, impaired memory, impaired information processing, and impaired decision-making when he was under extreme stress.

(2) Between 1977 and 2004, claimant mostly overcame the effects of his injury and maintained employment during this period. During those years, and despite having organic brain syndrome, claimant held “a lot of very important jobs,” including a high level position with a clothing manufacturer and as the supervising accounts manager for a radiology office. Transcript at 13, 17.

(3) In 2004, Eugene Mobile Village hired claimant to work as a mobile home park management facilitator. In that position, he was responsible for managing multiple mobile home parks. Claimant and his wife shared the job. However, claimant was responsible for supervising managers and work crews. He handled purchasing for the parks and coordinated maintenance. He handled eviction proceedings, including filing legal documents and making court appearances on the employer’s behalf. He installed homes at the employer’s parks and performed plumbing repairs. Claimant communicated with a real estate agent about business matters and advised the employer’s owner on the potential purchase of new parks to expand the business. Claimant also managed the employer’s website and did bookkeeping.

(4) On July 31, 2012, claimant experienced an on-the-job injury. His injuries included a concussion and some broken ribs. As a result of the injury, claimant experienced some paralysis on his left side, a limp, difficulty hearing, smelling and walking, and had some numbness, but he “get[s] around fine.” Transcript at 14. He did not take any time off work for his injury and continued to perform his regular duties. In May 2013, claimant experienced another on-the-job injury that left him unconscious and in need of emergency medical treatment. The emergency room physician treated claimant and released him to return to work the same day.

(5) Claimant continued to work for the same employer after being injured both times. The employer did not voice any concerns to claimant about his work or ability to do his job and seemed to claimant to be “totally thrilled with my work.” Transcript at 36. Claimant continued to communicate regularly with the owner without difficulty, and consulted with the employer about issues like rent increases, hiring a camp host, and running an advertisement.

(6) Claimant worked for the employer until mid-October, 2013, after which time his employment was terminated for reasons unknown to claimant. The employer continued to pay claimant through December 2013. Claimant felt that his physical and mental condition improved between October 2013 and January 2014.

(7) On December 30, 2013, claimant filed an initial claim for unemployment insurance benefits. Claimant was confused about how to report his work separation and, based on advice from a Department employee, indicated on the form that he was not able to work and that he had a brain injury. Claimant filed a weekly claim for benefits for the week of December 29, 2013 to January 4, 2014 (week 1-14). When he filed that weekly claim, he reported that he was not able to work. The Department denied claimant benefits for that week based on his report that he was not capable of working.

(8) On January 13, 2014, a Department employee interviewed claimant on the phone about his claim. Claimant equated questions about his ability to work with a worker's compensation claim denial he believed was unfair and his confusion over the way his employment with Eugene Motor Village had ended, and, as a result, he felt extreme stress. The extreme stress triggered an episode of organic brain syndrome. Claimant felt distressed, babbled and rambled, and was unable to think during the call. Claimant made inconsistent statements to the Department employee about his ability to work, including that he was not able to work, he could work as part of a team with his wife, he might be able to do some work, he was not certain what work he could do, he would need to see a doctor to find out what he was able to do, and he should be on disability. At some point during the call, claimant felt unable to continue conversing. The Department employee concluded claimant was incapable of working, and denied benefits. Claimant subsequently sent the Department a written statement, again indicating that he was not able to work, and stating that he was going to apply for disability benefits.

(9) Claimant subsequently filed weekly claims for benefits for weeks 1-14 through 8-14 (December 29, 2013 through February 22, 2014). The Department denied claimant benefits for these weeks, based on claimant's alleged inability to work.

(10) During the weeks at issue, claimant's labor market was Newport, Oregon. During the weeks at issue, claimant sought work as a property manager facilitator, among other things. In claimant's labor market, that type of work was customarily performed all days and shifts.

(11) Claimant had a contractor's license and a mobile home installer's license. He believed he was capable of functioning as a county inspector based on his knowledge, experience and physical ability. He also believed he was capable of performing the required functions of a city manager or mobile park manager. Claimant applied for jobs jointly with his wife and independently, and, since his December 2013 work separation, underwent an evictions training course offered by his county courthouse.

CONCLUSIONS AND REASONS: On reconsideration, we conclude that claimant was able to work during the weeks at issue, and Hearing Decision 14-UI-12224 should be reversed.

To be eligible to receive benefits, unemployed individuals must, among other things, 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) (February 23, 2014). 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) (February 23, 2014). 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-12224, the ALJ concluded that claimant was not able to work, reasoning,

Claimant has difficulty hearing, smelling, walking, and using his left arm, and experiences paralysis and numbness on his left side. Stress can cause an organic brain syndrome episode during which he is cognitively impaired. During the period at issue, claimant sought work only as property manager/facilitator. Working as a property manager or facilitator is physically and

mentally demanding and the persuasive evidence shows that claimant could not have performed such work during the period from December 29, 2013 through March 1, 2014.¹

The record does not support the ALJ's conclusion, however. Claimant's initial brain injury occurred in 1977; after this injury, claimant maintained regular employment in jobs requiring physical activity and mental acuity. Despite claimant's subsequent injuries in May and July 2013, which caused his difficulties hearing, smelling, walking, and using his left side, claimant continued to work for Eugene Mobile Village in a job that required physical activity, mental acuity and communication for three additional months, and, thereafter, before the weeks at issue, claimant's physical condition improved.

The ALJ viewed claimant's inconsistent statements to the Department about his ability to work to "confirm[] his inability to perform" work as a property manager/facilitator, and found it notable that "[a] simple interview regarding his unemployment claim was sufficiently stressful to impair claimant's ability to function and necessitate his wife's assistance."² On reconsideration, we disagree with the ALJ about the significance of those events. The reliable record evidence shows that claimant's statements about his ability to work were likely made while suffering an episode of organic brain injury. Moreover, there is no evidence that the organic brain syndrome episode that occurred during claimant's call with the Department employee was the result of a "simple interview." Rather, the interview felt particularly stressful for claimant because he related the discussion to what he considered the unfair denial of a worker's compensation claim and his confusion about his work separation, and it was the extreme nature of the stress caused by the interview that triggered his episode. Given those factors, we conclude that the statements claimant made about his ability to work were not a reliable indicator of claimant's actual ability to work.

In addition, the objective facts in this record and claimant's work history immediately preceding this claim for benefits prove claimant's statements that he was incapable of working false. Claimant had worked as a property manager or facilitator after and despite his organic brain syndrome, injuries and physical ailments, and his physical condition improved between the time of his separation from his most recent job and the weeks at issue. Although extreme stress caused claimant to experience episodes of cognitive impairment during a call with the Department employee, there is no evidence in the record that claimant ever experienced an episode of cognitive impairment while working for Eugene Mobile Village or another employer, or that work-related stress countered in the course of claimant's jobs had ever triggered an organic brain syndrome episode. It appears more likely than not that, at all relevant times hereto, claimant was physically and mentally capable of performing the types of work he actually sought during all of the weeks at issue.

Claimant was able to work from December 29, 2013 to March 1, 2014 (weeks 1-14 to 9-14). He is, therefore, eligible to receive unemployment insurance benefits, if otherwise eligible and qualified.

DECISION: On reconsideration, Appeals Board Decision 2014-EAB-0491 is vacated, and Hearing Decision 14-UI-12224 is set aside, as outlined above.³

¹ Hearing Decision 14-UI-12224 at 2.

² See Hearing Decision 14-UI-12224 at 2.

Susan Rossiter and J. S. Cromwell

DATE of Service: November 30, 2015

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 Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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³ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.