

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1182

Affirmed
Ineligible

PROCEDURAL HISTORY: On March 18, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work during the weeks of February 23, 2013 through March 8, 2014 (decision # 71757). Claimant filed a timely request for hearing. On May 6, 2014, ALJ K. Monroe convened a hearing at which claimant did not appear and issued Hearing Decision 14-UI-26890, dismissing claimant's request for hearing. On May 9, 2014, claimant filed a request to reopen the hearing. On June 19, 2014, ALJ Seideman conducted a hearing, and on June 20, 2014 issued Hearing Decision 14-UI-20092, allowing claimant's request to reopen but concluding that claimant was not able to work during the weeks of February 23, 2014 through May 31, 2014. On July 10, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

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

Because no adversely affected party sought review of that portion of Hearing Decision 14-UI-20092 that allowed claimant's request to reopen, EAB confined its review to the issue of whether claimant was able to work during the weeks at issue.

FINDINGS OF FACT: (1) On approximately, December 3, 2013, claimant was hospitalized and diagnosed with heart failure. Exhibit 3. At that that time, claimant's health conditions included severe obesity, a hernia, atrial flutter, a heart muscle disorder and high blood pressure. Exhibit 3. At some later point, claimant was released from his employment because his health did not allow him to return to work. Transcript at 22.

(2) On February 26, 2014, claimant's physician diagnosed claimant to have an ulcer of the esophagus and an anxiety disorder in addition to his other health conditions. Exhibit 2. On that same day, claimant filed an initial claim for unemployment benefits based on his inability to work for health reasons.

Claimant's claim was determined valid with a weekly benefit amount of \$317. Claimant claimed but was not paid benefits during the weeks of February 23, 2014 through March 8, 2014 (weeks 9-14 through 11-14), April 13, 2014 through April 19, 2014 (week 16-14) and April 27, 2014 through May 31, 2014 (weeks 18-14 through 22-14), the weeks at issue.¹ During the weeks at issue, claimant sought work as a door-to-door salesperson, a compliance officer, a loan officer, a real estate broker, a real estate property manager and a security guard.

(3) Sometime after claimant applied for benefits on February 26, 2014, claimant provided to the Department a note from a physician, dated December 31, 2013, allowing him to try to work up to maximum of four hours per day, and only in "sedentary" jobs. Transcript at 15. When claiming benefits for week 9-14, claimant reported to the Department that his job search activities during that week included applying for work to count inventory in a store and as a telemarketer, as well as visiting miscellaneous online job sites and considering a self-employment opportunity. For week 10-14, claimant reported to the Department, that he had applied for work as a store detective and as a telephone salesperson as well as made miscellaneous online job searches. For week 11-14, claimant reported to the Department that he had applied for work online as a telemarketer and a loan modification officer as well as made various telephone and online job searches. Beginning week 12-14, which started on March 16, 2014, claimant temporarily stopped claiming benefits.

(4) On approximately April 8, 2014, during week 14-14, claimant was admitted to a hospital, diagnosed with a subdural hematoma and underwent brain surgery to relieve intracranial bleeding. The surgery entailed opening claimant's skull and entering his brain. As a result of the surgery, claimant developed a speech impediment. Claimant was under the care of a neurologist and a neuropsychologist. For week 16-14, while claimant was still in the hospital recovering from surgery, claimant claimed benefits and reported to the Department that his job search activities included submitting two applications for jobs in sales, updating his resume and making some unspecified telephone contacts. On April 24, 2014, during week 17-14, claimant was released from the hospital and transferred into a skilled nursing facility for recovery.

(5) For week 18-14, while claimant was a patient in the skilled nursing facility, claimant claimed benefits and reported to the Department that his work search activities included applying for a mortgage loan officer position, a pawn loan position and visiting miscellaneous online job sites. On May 2, 2014, near the end of week 18-14, claimant was discharged from the skilled nursing facility. For week 19-14, claimant claimed benefits and reported to the Department that he had applied for two jobs, one as a loan processor and another as a home lending coordinator, and he had visited various online job posting sites. For week 20-14, claimant claimed benefits and reported that he had applied for jobs in wholesale sales and technology sales and that he had visited various online job posting sites. For week 21-14, claimant claimed benefits and reported that he had applied for work in a call center and as a front desk person at a condominium property and had visited various online job posting sites. For week 22-14, which began on May 25, 2014, claimant claimed benefits and reported that he had applied for two positions in mortgage loans and visited a few online job posting sites. Sometime after the end of week 22-14, claimant sent to the Department a note from a physician dated May 29, 2014 stating that, effective

¹ We take notice of these facts, which are contained in Employment Department records. Any party who objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

immediately, claimant was released to work at "sedentary work only, maximum 8 hours per day." Exhibit 1. Beginning week 23-14, the Department paid claimant the benefits that he claimed.

CONCLUSIONS AND REASONS: Claimant was not able to work during the weeks of February 23, 2014 through March 8, 2014 (weeks 9-14 through 11-14), April 13, 2014 through April 19, 2014 (week 16-14) and April 27, 2014 through May 31, 2014 (weeks 18-14 through 22-14) and was not eligible to receive benefits during those weeks.

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 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). We assume for purposes of this decision that claimant's health conditions during the weeks at issue constituted permanent or long-term impairments that made the regulatory exception applicable to him when evaluating his ability to work. Because the Department did not pay claimant the benefits that he claimed, the burden is on claimant to show that, more likely than not, he was able to perform at least some work on the jobs that he sought during the weeks at issue. *See generally Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

Although it appeared at hearing that claimant tried to minimize the seriousness of his health conditions in order not to completely disqualify himself from benefits, those conditions appeared to have been quite serious at the beginning of the weeks at issue, and their gravity was compounded by his hospitalization and surgery for a subdural hematoma during the later weeks at issue. *See* Transcript at 15, 16. While claimant testified that a December 31, 2013 doctor's note allowed him to try to work up to four hours per day in sedentary positions during the earliest of the weeks at issue, it was not clear from the date of the note that it applied to claimant's condition or his ability to work two months later when he applied for benefits or when he first claimed any benefits. Transcript at 15. This uncertainty is compounded by the inference we draw from the record that claimant applied for benefits because his most recent employer had let him go due to his inability to report for work, which likely occurred after December 31, 2013 and nearer in time to his application for benefits on February 26, 2014. Transcript at 22. Claimant presented no evidence as to how his health conditions might have improved after he was released from his employment to allow him return to work even part-time beginning on February 26, 2014. While claimant testified that he had "recovered fairly well" after the December 3, 2013 event of heart failure, it was not clear that the jobs that claimant applied for during the weeks at issue before the subdural hematoma were within the reasonable physical capacities of a person who had so recently experienced such a health event and, assuming the December 31, 2013 doctor's release applied to his condition at the time, many of the jobs that claimant applied for are not generally considered "sedentary" jobs, including the jobs as a store security officer and as an inventory counter. Transcript at 15. In light of the apparent seriousness of claimant's health conditions, their likely limiting effects and the uncertainty in the record about claimant's actual physical abilities, claimant did not meet his burden to show that he was able to perform at least some work at the jobs that he sought during weeks 9-14 through 11-14.

Claimant conceded that he was not able to work when he was confined to the hospital from April 8, 2014 through April 24, 2014 for intracranial surgery and, by implication, that he was ineligible to receive the benefits that he applied for from the hospital during week of 16-14. Transcript at 17. Claimant contended, however, that while he was a patient in the skilled nursing facility, he was able to work, could have left the facility for work and that the management at the facility "encouraged" patients to have jobs while they were in the facility. Transcript at 18, 19. While claimant was in the skilled nursing facility to convalesce from his recent brain surgery, we reasonably assume he was receiving care from a neurologist, rehabilitative therapy to recover his lost speech functions, monitoring of his physical condition and assistance with activities of daily living. *See* Transcript at 5. In light of our understandings of the purposes and nature of a convalescence in a skilled nursing facility, claimant did not present sufficient specific evidence to establish, more likely than not, that he was reasonably able to perform any work while he was admitted to the facility. Claimant did not show that he was eligible to receive benefits during weeks 16-14 and 18-14.

During weeks 19-14 through 22-14, immediately after claimant was discharged from the skilled nursing facility, claimant testified that he was able to work at full-time or part-time jobs and "feeling good about my health." Transcript at 24. During this time, claimant was presumably under a physician's care. The plausibility of claimant's contention that he was able to work is seriously undercut by the fact that the physician providing his care did not release him for any work after he had experienced the subdural hematoma until May 29, 2014. Exhibit 1. Most likely, the physician released claimant to work as soon as he had determined that claimant was able to return to work. While claimant contended that he thought the December 31, 2013 physician's note releasing him to part time work before he had experienced the subdural hematoma was still a reasonable assessment of his condition and his ability to work after he sustained the subdural hematoma, this is simply not plausible given the seriousness of the intervening events of the hematoma, brain surgery and the time he needed to convalesce. Transcript at 27. On this record, claimant did not establish, more likely than not, that he was able to work, after he experienced the subdural hematoma on April 8, 2014 until his doctor released him to certain types of work on May 29, 2014. Accordingly, claimant did not show that he was eligible to receive benefits, based on his ability to work, during the weeks 19-14 through 22-14.

Claimant was not able to work during the weeks of February 23, 2014 through March 8, 2014 (weeks 9-14 through 11-14), April 13, 2014 through April 19, 2014 (week 16-14) and April 27, 2014 through May 31, 2014). Claimant was not eligible to receive benefits during those weeks.

DECISION: Hearing Decision 14-UI-20092 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: August 13, 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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On

the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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