

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1762

*Affirmed*  
*Ineligible*

**PROCEDURAL HISTORY:** On August 28, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work from August 10 through 23, 2014 (decision # 125225). Claimant filed a timely request for hearing. On September 5, 2014 the Office of Administrative Hearings (OAH) scheduled a hearing for September 19, 2014. On September 19, 2014, ALJ L. Lee issued Hearing Decision 14-UI-25569, dismissing claimant's request for hearing for failure to appear. On September 23, 2014, claimant filed a timely request to reopen the hearing. On October 17, 2014 ALJ S. Lee conducted a hearing, and on November 3, 2014 issued Hearing Decision 14-UI-28077, granting claimant's request to reopen the hearing, and concluding that claimant was not able to work and did not actively seek work from August 10 through 23, and August 31 through October 11, 2014. On November 12, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

No adversely affected party applied for review of that portion of Hearing Decision 14-UI-28077 granting claimant's request to reopen the hearing, and we therefore limit our review to whether claimant is eligible for benefits for the weeks at issue.

**FINDINGS OF FACT:** (1) Claimant claimed benefits for the weeks from August 10 through 23, and August 31 through October 11, 2014 (weeks 33-14 and 34-14, and 36-14 through 41-14), the weeks at issue. The Department did not pay claimant benefits for those weeks.

(2) Claimant last worked for a rental car company cleaning vehicles and equipment, topping off fluids, and checking tire air pressure. In early August 2014, claimant quit her job because of the pain she experienced during and after work due to degenerative disc disease in her lower back, and carpal tunnel syndrome in her hands. Claimant was physically incapable of performing the work she had performed for the car rental company.

(3) On August 27, 2014, a Department employee contacted claimant and explained that they needed to identify a type of work that claimant was physically capable of performing. The employee asked

claimant what work restrictions her doctor had imposed, and claimant stated that she was not given work restrictions other than to “take it easy.” Transcript at 14. However, claimant told the employee that she could not bend over, and that she could not lift up to 50 pounds. The employee asked claimant what type of work she could do, and claimant admitted that she did not know.

(4) During the weeks at issue, claimant searched for various types of work she thought she might be physically capable of performing. However, claimant did not obtain specific work restrictions from her doctor, or contact the Department for further assistance in determining what types of work she was physically capable of performing.

**CONCLUSIONS AND REASONS:** Claimant failed to establish that she was able to work during the weeks at issue.

To be eligible to receive benefits, unemployed individuals must 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 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).<sup>1</sup> Where, as here, the Department did not pay a claimant benefits, the claimant has the burden to establish by a preponderance of evidence that she is eligible for those benefits. See *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

At hearing, claimant repeatedly asserted that she believed she was physically capable of performing the types of work she sought during the weeks at issue. Transcript at 17-18, 30-32. However, absent evidence of claimant’s specific work restrictions due to her degenerative disc disease and carpal tunnel syndrome, and the types of work that comply with those restrictions, the record fails to support claimant’s mere speculation that she was physically capable of performing the work she sought. Nor does the record show that claimant’s degenerative disc disease and carpal tunnel syndrome merely prevented her from working full time or during particular shifts. Claimant therefore failed to establish that she was able to work during the weeks at issue, and is ineligible for benefits for those weeks.

**DECISION:** Hearing Decision 14-UI-28077 is affirmed.

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

**DATE of Service:** December 17, 2014

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<sup>1</sup> 29 C.F.R. §1630.2(h)(1) defines “physical impairment” as any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.

**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](http://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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