

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0238**

*Affirmed*  
*Ineligible*

**PROCEDURAL HISTORY:** On December 10, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work during the weeks of November 16, 2014 until December 6, 2014 (decision # 84153). The decision stated that a request for hearing must be filed on or before December 30, 2014 to be timely. On January 16, 2015, claimant filed by telephone an untimely request for hearing. ALJ Kangas reviewed claimant's request for hearing and on January 29, 2015 issued Decision 15-UI-32578, dismissing claimant's request as untimely subject to claimant's right to "renew" the request by submitting a response to the "Appellant Questionnaire" included with the decision within 14 days of the mailing of the decision. On February 4, 2015, ALJ Kangas issued a letter order vacating Decision 125-UI-32578 and stating that a hearing would be held on whether to allow claimant's request for hearing. On February 5, 2015, the Office of Administrative Hearings (OAH) received claimant's response to the Appellant Questionnaire. On February 23, 2015, ALJ Seideman conducted a hearing, and issued Hearing Decision 15-UI-33919, allowing claimant's request for hearing and concluding that claimant was not able to work during the weeks of November 16, 2014 through December 13, 2014. On March 6, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

While Hearing Decision 15-UI-33919 stated that the ALJ had marked Exhibits 1 through 12 and entered them into the hearing record, they do not appear in the record as exhibits. Audio at ~9:00. Because the documents were readily identifiable, EAB has corrected this apparent oversight and marked them with the appropriate exhibit numbers. *Id.*

Because no adversely affected party requested review of that part of Hearing Decision 15-UI-33919 that allowed claimant's request for hearing, EAB confined its review to the issue of claimant's ability to work.

**FINDINGS OF FACT:** (1) In February 2014, claimant injured her ankle, leg and tailbone at work. Claimant's injuries were expected to heal and, after a period of convalescence, it was anticipated she would be able to return to her normal physical activities. Claimant filed a claim with the State Accident Insurance Fund (SAIF) and her injuries were found to be "non-disabling." After claimant was injured,

her employer allowed her to work remotely from her home. She was able to work full-time while at home. If claimant was required to remain in a stationary, without frequent changes of position, she was experienced such swelling and pain that she was unable to work.

(2) By June 2014, claimant's physical recovery had progressed sufficiently that she was able to work some hours in her employer's office. In mid-July 2014, the injury to claimant's tailbone was aggravated, and she needed to decrease the hours that she was spending in the office. In August 2014, claimant was assigned to a new supervisor and that supervisor told her that he was not going to continue allowing her to work remotely from her home. On August 25, 2014, claimant obtained a note from her physician restricting her to working only from her home and not at the employer's office. On August 28, 2014, claimant obtained a note from her physician excusing her from work for the next week or until she received a release to work from the physician. On September 5, 2014 and September 22, 2014, claimant received notes from her physician stating that due to her aggravation of her injury she needed to reduce her hours working at the office and could work there only "as tolerated." Exhibit 7, 8, 9. Claimant understood from the physician that to "tolerate" working from her employer's office without pain, she needed to have frequent changes of position and walking breaks.

(3) In October 2014, claimant consulted with a new physician. On November 6, 2014, claimant's physician completed a "work ability form" which stated that claimant was restricted from working more than four hours per day, and which required that, during each hour of those four hours, she be allowed to walk or change the physical position of her body for several minutes. Exhibit 11. Sometime after November 6, 2014, claimant stopped working for her employer.

(4) On November 16, 2014, claimant filed an initial claim for unemployment benefits. The claim was determined valid. Claimant claimed benefits for the weeks of November 16, 2014 through December 13, 2014 (weeks 47-14 through 50-14), the weeks at issue. Claimant was not paid benefits during the weeks at issue.<sup>1</sup>

(5) During the weeks at issue, claimant sought work as an office clerk, bookkeeper and administrative assistant. The days and hours customary for that work in claimant's labor market was Mondays through Fridays, day shifts.

**CONCLUSIONS AND REASONS:** Claimant was not able to work during the weeks of November 26, 2014 through December 16, 2014. She 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 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

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<sup>1</sup> We take notice of this fact, which is 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 at EAB.

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). Because the Department did not pay benefits to claimant during the weeks at issue, claimant had the burden to demonstrate that, by a preponderance of the evidence, she was able to work during those weeks. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (Department carries the burden of persuasion when claimant was paid benefit; by necessary inference from this holding, claimant has the burden when benefits were not paid).

There is no evidence in the record that claimant's injuries were permanent or long-term, and claimant did not challenge the testimony of the Department's witness that she understood they were not. Audio at ~18:47. Accordingly, there is insufficient evidence in the record to support a conclusion that the exception modifying the standard for determining whether for an individual with a long-term impairment is "able" to work is applicable to claimant's situation. Claimant asserted at hearing that the type of office work she sought typically required the frequent changes of position that she needed to allow her to perform full-time work and, for that reason, her physical limitations did not render her unable to work during the week at issue. Audio at ~23:00, ~27:30. However, office work is generally thought of as sedentary and taking place at a desk, rather than entailing very frequent changes in physical position or very frequent walking about. While some positions as an office clerk, bookkeeper or an administrative assistant may require physical activity of the type and frequency that claimant needed to allow her to perform full-time or part-time office work, claimant did not demonstrate, more likely than not, that such positions customarily required it or that most (or even many) employers would allow it as a matter of course. Since claimant was seeking work in a regular office setting, it appears likely that claimant was, by her own admission, not able to work full-time or part-time unless her physical condition was accommodated or the physical activity in that office was unusual. Because claimant did not demonstrate that the type of work she sought fell within her physical restrictions, and she did not demonstrate that she had a long-term physical impairment, claimant did not meet her burden to show that she was able to perform that work during the weeks at issue.

Claimant was not able to work during the weeks of November 16, 2014 through December 13, 2014. Claimant was not eligible to receive benefits during those weeks.

**DECISION:** Hearing Decision 15-UI-33919 is affirmed.

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

**DATE of Service:** April 28, 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](http://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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