

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0424

Affirmed
Eligible in Part: Ineligible in Part

PROCEDURAL HISTORY: On November 25, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 120223) concluding claimant was not able to work during the weeks of September 14, 2014 through November 22, 2014 (weeks 38-14 through 47-14). Claimant filed a timely request for hearing. On January 5, 2015, ALJ Triana conducted a hearing, and on January 13, 2015 issued Hearing Decision 15-UI-131757, modifying the Department's decision and concluding that claimant was not available for work during the weeks of September 14 through September 27, 2014 (week 38-14 and 39-14), and during the weeks of October 12 through November 22, 2014 (weeks 42-14 through 47-14), but was available for or able to work during the weeks of September 28 through October 11, 2014 (weeks 40-14 and 41-14). On January 20, 2015, claimant filed an application for review with the Employment Appeals Board (EAB). On February 27, 2015, EAB issued Appeals Board Decision 2015-EAB-0053, reversing and remanding this matter for further development of the record. On March 18, 2015, ALJ Triana conducted a hearing on remand and on March 26, 2015 issued Hearing Decision 15-UI-35821, modifying the previous hearing decision and concluding that claimant was not available for or able to work during the week of September 21 through September 27, 2014 (week 39-14) and during the weeks of October 12 through November 22, 2014 (weeks 42-14 through 47-14), and was available for and able to work during the weeks of September 14 through 20, 2014 and September 28 through October 11, 2014 (weeks 38-14, 40-14, and 41-14). On April 13, 2015, claimant filed an application for review with EAB.

Claimant submitted a written argument in which she contended that she reopened her unemployment insurance claim in early September 2014 because the employer had reduced her hours and rate of pay and not because of the September 11, 2014 automobile accident that led to medically imposed restrictions on her ability to work during some of the weeks at issue. Claimant's Written Argument at 1-2. The reason that claimant reopened her claim is not relevant to this matter. The issue before us and the ALJ was not whether claimant reopened her claim for legitimate reasons, but whether claimant was available to work and able to work during each of the weeks at issue, which is necessary to show that she was eligible to receive benefits during those weeks. *See* ORS 657.155(1)(c); OAR 471-030-0036(2)(3) (February 23, 2014). The balance of claimant's written argument repeated much of her

hearing testimony to support her claim that, although she received a medical note restricting her ability work to only four hours per day on October 16, 2014, she was subject to that medical restriction only from October 24 through October 28, 2014, and not from October 16 through at least November 22, 2014. Claimant's Written Argument at 1- 2. We agree with the ALJ's implicit conclusion that the medical note imposing this restriction was ambiguous about when the restriction commenced and its duration. *See Exhibit 1 at 4.* We also agree with the ALJ's conclusion that based on the circumstances surrounding the note, the duration of the medical restriction it imposed was, most likely, from October 16 through at least November 22, 2014, the ending date of the weeks at issue. This circumstantial evidence included the testimony of the employer's witness that he thought claimant was medically restricted from full time work immediately after the September 11, 2014 accident, and that he first learned that claimant's restriction ended when claimant told him so on November 28, 2014. In addition, the Department's witness testified that claimant represented to her on November 24, 2014 that she was still restricted by the October 16, 2014 medical note to only four hours of work per day and expected to be released from this restriction on November 28, 2014. Because claimant was restricted from working full time during these weeks, we further agree with the ALJ that she was not available or medically able to work at all suitable jobs during them. Finally, while claimant argued that, regardless of her medical restrictions, she was looking for and applying for all suitable work during the weeks at issue, we also agree with the ALJ's implicit conclusion that she would not have been available or able to work at those jobs full time if they had been offered during the period that the medical restriction was in place or if the reasonable requirements of any offered work exceeded her work restrictions. Claimant's Written Argument at 2. For this reason, claimant was not available or able to work as those terms are defined in OAR 471-030-0036(2) and OAR 471-030-0052(3).

We further agree with the ALJ that, because claimant had no medical restrictions limiting her to less than a full-time work day during the weeks of September 14 through September 20, 2014 (week 38-14) and September 28 through October 11, 2014 (weeks 40-14 through 41-14), she was presumably available and able to work full time during those weeks. For the week of September 21 through September 28, 2014, we also agree with the ALJ's conclusion that claimant's testimony at the initial hearing, that she was unable to work on three workdays during that week, September 23 through September 25, 2014, due to pain from her injuries, established that she was not available or able to work during that week despite her subsequent testimony at the hearing on remand that she did not work on those days because the employer canceled her shifts. For the reasons cited by the ALJ, claimant's later attempt to explain away and modify her initial testimony was not persuasive.

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the hearing decision under review is **adopted**.

DECISION: Hearing Decision 15-UI-35821 is affirmed.

Susan Rossiter and D. P. Hettle, *pro tempore*;
J. S. Cromwell, not participating.

DATE of Service: June 3, 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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