

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0649

Reversed & Remanded

PROCEDURAL HISTORY: On April 21, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from September 21, 2014 through January 10, 2015 (weeks 39-14 through 01-15) (decision # 105403). Claimant filed a timely request for hearing. On May 14, 2015, ALJ Seideman conducted a hearing, and on May 15, 2015 issued Hearing Decision 15-UI-38554, affirming the Department's decision. On May 28, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision. We considered the entire hearing record and claimant's argument to the extent it was based on the hearing record.

CONCLUSIONS AND REASONS: Hearing Decision 15-UI-38554 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further proceedings.

This matter comes before EAB to determine if claimant was eligible for benefits from September 21, 2014 through January 10, 2015 (weeks 39-14 through 01-15). To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seeking and unable to obtain suitable work during each week claimed. ORS 657.155(1)(c). There is no dispute on this record that claimant was able to work and actively seeking work during the weeks at issue. An individual must meet certain minimum requirements to be considered "available for work" for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (February 23, 2014). Among those requirements are that the individual be willing to work and capable of reporting to full time, part time and temporary work

opportunities throughout the labor market, and refrain from imposing conditions that substantially reduce the individual's opportunities to return to work at the earliest possible time. *Id.* Under ORS 657.190, factors to consider to determine whether any work is suitable for an individual include, among other factors, the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, and the length of unemployment and prospects for securing local work in the customary occupation of the individual.

Claimant became unemployed in September 2014, and began working part time as a youth treatment specialist with Chehalem Youth & Family Services (employer) while he actively sought work as a production supervisor. Claimant testified at hearing that he did not apply for full time work with the employer, and refused some hours offered to him, because the work was physically dangerous for him and would conflict with his work search for production supervisor work. Transcript at 11, 19.

In Hearing Decision 15-UI-38554, the ALJ found as fact that the employer "at various times" called claimant and offered him "either short-term or longer term positions, but claimant refused them,"¹ and concluded that claimant was not available for all suitable work because he refused the work offered to him based on his preference to work no more than 20 hours per week and to devote his time to a full-time work search.² However, the ALJ did not fully and fairly inquiry into the facts necessary for consideration of whether claimant's restriction to work part time imposed a condition that substantially limited his opportunities to work, or whether the work was suitable.

When claimant applied for work, he told the employer he could work approximately 20 hours, but the record fails to show if claimant's pre-hire statement substantially limited work opportunities with the employer for the weeks at issue. When the ALJ asked the employer's human resources director if the employer would have offered claimant full time work had claimant not imposed the 20-hour restriction, the employer's human resources director provided the vague response, "I believe it would have. Yes." Transcript at 28. Claimant, however, stated he was not offered full time work. In addition, an individual's eligibility to receive weekly benefits based on his or her availability for work is determined on a week-by-week basis. *See generally* ORS 657.150, 657.155, OAR 471-030-0036. Although claimant admitted he refused some hours of work, the ALJ did not inquire when claimant began to refuse shifts, and in which weeks he refused shifts. Moreover, there is evidence that claimant did not limit his hours during some weeks, such as during the holidays. Without information showing when claimant was unwilling to work certain shifts offered to him, the record is incomplete to determine on a week-by-week basis if and when claimant was unavailable for work.

Claimant is required to be available for suitable work. The record is incomplete because the ALJ failed to inquire as to the degree of risk the employer's job posed to claimant's health and safety. The employer's human resources director admitted at hearing that the youth treatment specialist position was a high risk job, and employees are told before hire that "at some point they may be injured" at work. Transcript at 27. Claimant indicated that, although he had worked for the employer as a counselor in the past, he was now 20 years older, and the youth in the program in 2014 were larger and had to be physically restrained more often than when claimant had worked for the employer in the past. Transcript at 11, 15-17. The ALJ did not inquire why claimant's physical condition or health made the

¹ Hearing Decision 15-UI-38554 at 2.

² *Id.* at 3.

risk of injury higher for claimant during the weeks at issue than it was 20 years ago or as compared to the general population. The record is also incomplete because the ALJ failed to inquire whether claimant had the physical fitness, experience and training to safely perform work as a youth treatment specialist for the employer, or under what circumstances or shifts he felt he could safely perform that work.

Finally, the record fails to show which party had the burden of persuasion in this case. If the Department initially determined that claimant was entitled to receive benefits, or paid him benefits during any of the weeks claimed, the Department has the burden of proving that those benefits should not have been paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). By extension of that principle, if the Department withheld payment of benefits, claimant has the burden of proving that benefits should have been paid. The Department did not explain, and the ALJ did not ask, whether the Department paid benefits to claimant during any of the weeks claimed.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant was available for work during the weeks at issue, Hearing Decision 15-UI-38554 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 15-UI-38554 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: July 21, 2015

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-38554 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

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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