

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0680

Reversed
Base Year Extension Allowed

PROCEDURAL HISTORY: On April 1, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision denying claimant's request for a base year extension. Claimant filed a timely request for hearing. On May 14, 2015, ALJ M. Davis conducted a hearing, and on May 15, 2015 issued Hearing Decision 15-UI-38558, affirming the Department's decision. On June 4, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB reviewed the entire hearing record and claimant's written argument to the extent it was based on information in the record. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Claimant is a registered psychiatric-mental health nurse. He has had moderate to severe episodes of bipolar disorder, anxiety disorder and major depression for more than 25 years.

(2) Claimant was employed by Cedar Hills Hospital during 2013 and 2014, but it did not schedule claimant to work from the end of April 2014 through September 2014. Lack of work had triggered episodes of bipolar disorder for claimant in the past.

(3) Claimant was unable to work from May 2014 through September 2014 due to a severe "flare up" of his mental health conditions. Exhibit 1, Letter of Valli E. Stager, NP, February 18, 2015. Claimant did not seek medical assistance from May 2014 through September 2014.

(4) From May 2014 through September 2014, claimant experienced symptoms including irritability, anger, impulsiveness, decreased sleep and appetite, difficulty concentrating, feelings of hopelessness and sadness, feelings of worthlessness, and inability to concentrate or make a decision. Claimant was unable to sleep, bathe, eat, leave his home, do laundry, communicate with others, or seek medical attention as necessary to care for himself during that period.

(5) On January 23, 2015, claimant filed an initial claim for unemployment insurance benefits. The base year for the claim was the four quarters from October 1, 2013 through September 30, 2014. The Department determined claimant had a valid claim with a weekly benefit amount of \$284. In February 2015, claimant filed a base year extension request.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude claimant was incapable of work during the greater part of the second and third calendar quarters of 2014. His base year must therefore be extended.

Claimant has a valid claim for unemployment benefits. The issue is whether the Department is required to use an extended base year to calculate claimant's weekly benefits. ORS 657.170(1) directs the Department to use an extended base year when an individual "has been incapable of work during the greater part of any calendar quarter." As used in ORS 657.170, "incapable of work" means inability to engage in any gainful occupation solely because of physical or mental defect, disease or injury as verified in writing by a licensed medical or therapeutic practitioner, or other evidence satisfactory to the Department. OAR 471-030-0023(1).

In Hearing Decision 15-UI-38558, the ALJ concluded claimant was not "unable to engage in any gainful occupation" during the greater part of any calendar quarter because he did not seek medical treatment and failed to provide verification in writing from a licensed medical or therapeutic practitioner stating he was incapable of working from May 2014 to September 2014.¹ The ALJ contended that the only evidence claimant submitted regarding May 2014 to September 2014 was his personal journal from that time period, and that the journal was insufficient to establish claimant was not able to engage in any gainful occupation during that time.² Accordingly, the ALJ declined to extend claimant's base year.

However, claimant's treating nurse practitioner of six years completed the pertinent sections of claimant's request for extension of base year, indicating claimant was unable to perform work from May 2014 through "present," presumably being the date she signed the form, February 17, 2015. The nurse practitioner submitted a separate letter on February 18, 2015, also signed, stating, "I understand that [claimant] has not worked since approximately May of 2014 due to [sic] severe flare up of his condition." Exhibit 1, Letter of Valli E. Stager, NP, February 18, 2015. The nurse practitioner's statements on the request for extension and accompanying letter are sufficient written verification by a licensed medical or therapeutic practitioner that claimant was unable to work because of his mental health conditions. The nurse practitioner's letter also states, "I have been unable to re-evaluate him recently, as he lost his Kaiser insurance. My last visit with him was April 25, 2014." *Id.* The Department and the ALJ implicitly presume that claimant's physician did not mean what she wrote for the Department, that claimant was unable to work due to his mental health conditions, because she did not see claimant during the period at issue. However, that presumption is without support in the hearing record.

Even, assuming, *arguendo*, that the medical verification claimant provided was insufficient, claimant argued correctly that ORS 657.170 does not require him to have sought medical treatment or to have provided evidence from a licensed medical practitioner in addition to "other evidence" he provided

¹ Hearing Decision 15-UI-38558 at 2.

² *Id.*

satisfactorily showing he was incapable of work during the relevant time period. *See* Claimant’s Written Argument at 7-8. The plain language of ORS 657.170(1) states claimant may provide written verification by a licensed medical or therapeutic practitioner, *or* other evidence satisfactory to the Department. (Emphasis added). Moreover, claimant asserted persuasively at hearing and in written argument to EAB that claimant did not seek medical treatment during the period at issue because he did not recognize he was ill, which is itself a symptom of his illness, and not because he was healthy. *See* Transcript at 15-16, Claimant’s Written Argument at 3-4.

In deciding that claimant’s other evidence, namely the literature regarding bipolar disorder and his personal journal, was insufficient to establish claimant was unable to engage in any gainful occupation, the ALJ found that, because claimant showed only “day-to-day concerns” about his bipolar disorder and had checked his mail, paid his bills, and taken his medication throughout the period at issue, he failed to show he was unable to engage in any gainful occupation.³ We disagree. We find claimant provided sufficient other evidence to show he was unable to perform any gainful occupation from May through September 2014. Lack of work like the period of unemployment that began in May 2014 had historically triggered bipolar episodes for claimant. During that time, claimant’s personal journal showed he experienced multiple symptoms associated with hypomania and depression. We find claimant’s assertion that he was unable to perform any gainful occupation during that time period credible because his personal journal during that time shows he was unable to consistently leave his home or care for himself by eating, sleeping, or maintaining personal hygiene. Moreover, claimant noted repeatedly in his personal journal that he was unable to work. Claimant attempted to work but was unable to do so on June 26, 2014, stating in his journal that he left work because he “couldn’t keep it together.” Exhibit 1, Journal. On July 30, 2014, claimant wrote he was “too sick” to work and needed to go to the hospital. *Id.* On August 16, 2014, he commented that he needed to “get better so I can work.” *Id.* When claimant tried to call potential employers, he would “wind up yelling at them.” Transcript at 16.

In sum, the certification from claimant’s nurse practitioner and claimant’s other evidence support claimant’s claim that he was incapable of work during May 2014 through September 2014, the greater part of a base year quarter from May 1, 2014 through September 30, 2014. Thus, claimant has shown his base year should be extended under ORS 657.170(1).

DECISION: Hearing Decision 15-UI-38558 is set aside, as outlined above.

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

DATE of Service: July 30, 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

³ Hearing Decision 15-UI-38558 at 1-3.

'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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