

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1415

Reversed
Eligible

PROCEDURAL HISTORY: On October 22, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work and not eligible to receive benefits during the weeks of September 13, 2015 through October 17, 2015 (decision # 123308). Claimant filed a timely request for hearing. On November 18, 2015, ALJ Seideman conducted a hearing, and on November 25, 2015 issued Hearing Decision 15-UI-48360, concluding claimant was not able to work during the weeks of September 13, 2015 through November 14, 2015. On December 1, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he offered new facts and documents that he did not present at the hearing. Claimant did not explain why he did not offer these new facts and documents during the hearing and did not otherwise show that factors or circumstances beyond his reasonable control prevented him from doing so as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider the additional facts and documents that claimant sought to offer in his written argument. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Claimant worked in the trucking industry for over 25 years, principally as a truck driver. In his last employment at Reddaway Trucking, claimant was a warehouse worker. Claimant had worked for over four years as a lead worker in Reddaway's warehouse with some supervisory authority over other workers. Claimant had also supervised people when he was in the military.

(2) Sometime before September 14, 2015, claimant injured his left shoulder while working for Reddaway. Claimant filed a worker's compensation claim. Sometime later, claimant's physician allowed him to return to light duty work, with the restrictions that he not lift, push or pull more than five pounds using his left side and not reach above shoulder level with his left arm. Claimant returned to Reddaway and performed light duty work. Sometime after, claimant settled his worker's compensation

claim with Reddaway. Reddaway let claimant go because it could no longer accommodate his injury with light duty work.

(3) On September 14, 2015, claimant filed an initial claim for unemployment benefits. Claimant claimed benefits for the weeks of September 13, 2015 through November 14, 2015 (weeks 37-15 through 45-15), the weeks at issue.

(4) During the weeks at issue, claimant sought work in a supervisory capacity in the trucking industry. The days and hours customary for that type of work were all days, all hours. Claimant's labor market was Happy Valley, Clackamas, Oregon City, Gresham and northeast and southeast Portland, Oregon.

(5) On September 28, 2015, a representative from the Department called claimant and spoke with him about the type of work he was seeking. Claimant told the representative that he unable to perform the warehouse work he had done at Reddaway due to his medical restrictions. Claimant told the representative that he was looking for work as a supervisor in the trucking industry. Claimant stated that his experience in supervisory roles was limited working as a lead worker at Reddaway and from overseeing the work of others when he was in the military.

(6) Claimant thought that due to his experience in trucking and in trucking warehouses, he was qualified for supervisory roles in trucking warehouses. Claimant had observed when working in trucking warehouses that supervisors did not usually perform lifting, pushing, pulling or reaching that exceeded his medical restrictions but stood on the loading dock giving instructions to workers and ensuring that they followed safety protocols.

CONCLUSIONS AND REASONS: Claimant was available for work during the weeks of September 13, 2015 through November 14, 2015

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).

In Hearing Decision 15-UI-48360, the ALJ concluded that claimant was not able to perform the supervisory work he was seeking during the weeks at issue due to his "shoulder problems" and because he had only limited experience supervising other employees. Hearing Decision 15-UI-48360 at 2. We disagree.

Little evidence was presented at hearing about whether claimant's background would or would not qualify him for supervisory work, at least in the trucking industry or in trucking warehouses. Whether claimant was qualified for particular work is distinct from the inquiry of whether he was physically able to perform that work, which was the actual issue before the ALJ. As well, given claimant's many years of experience in trucking and several years of experience as a lead worker in a trucking warehouse, there was little basis on which to conclude that he was not qualified for at least some supervisory jobs. On this record, there was insufficient evidence to conclude that claimant was not qualified for the supervisory work he was seeking during the weeks at issue.

The issue in this case is whether, despite his medical restrictions, claimant was physically able to perform the supervisory work he was seeking. The Department's representative at hearing testified that, based on her "search" of supervisory positions in the areas of logistics and warehouses, she observed that the "overwhelming majority" of those positions set forth requirements for lifting, pushing, pulling and reaching that exceeded claimant's medical restrictions. Audio at ~17:44. However, claimant and his witness were experienced in and familiar with the requirements of supervisory positions in the trucking industry. They presented first-hand observations and knowledge, rather than the Department's paper review of job announcements, to support what appeared to be a firm conviction that claimant's medical restrictions would not preclude him from working in at least some supervisory roles in trucking warehouses or in trucking dispatcher positions. Audio at ~12:38, ~16:50. It is difficult to conclude that an injury preventing claimant from lifting, pushing and pulling more than five pounds on the left side of his body or reaching above his shoulder level with his left arm rendered him incapable of performing any type of supervisory work, as would be required to find him ineligible for benefits under OAR 471-030-0036(2).

Claimant was able to work during the weeks of September 13, 2015 through November 14, 2015. Claimant is not ineligible to receive benefits during this weeks based on an inability to perform the work he was seeking.

DECISION: Hearing Decision 15-UI-48360 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: January 12, 2016

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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