

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0091

Weeks 35-15 Through 38-15 -Eligible
Weeks 39-15 Through 41-15 - Ineligible
Weeks 42-15 Through 44-15 Reversed & Remanded

PROCEDURAL HISTORY: On October 15, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 151628) concluding claimant was not able to work during the weeks of August 30, 2015 through October 10, 2015 (weeks 35-15 through 40-15)). Claimant filed a timely request for hearing. On January 12, 2016, ALJ Seideman conducted a hearing and issued Hearing Decision 16-UI-50892, concluding claimant was not available or able to work during the period of August 30, 2015 through November 7, 2015(weeks 35-15 through 44-15). On January 22, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) By 2015, claimant had worked several years as a dental hygienist for Oregon Family Dental Clinic.

(2) Beginning sometime around mid-July 2015, claimant began to miss days of work due to anxiety she experienced when working. She disclosed her anxiety to the employer. The employer allowed claimant to take three days off from work during the week beginning on Sunday, July 23, 2015 and during the week beginning Sunday, August 2, 2015. Claimant was away from work on an authorized vacation from August 10, 2015 through August 14, 2015. Exhibit 1 at 2, 3.

(3) On August 14, 2015, the employer's office manager asked claimant to come to the workplace to discuss her work schedule. During this meeting, the office manager gave claimant a letter signed by the dentist that required claimant to take a medical leave beginning that day and continuing until September 22, 2015.

(4) On August 17, 2015, claimant filed an initial claim for unemployment insurance benefits. That claim was determined valid. Claimant claimed benefits during the weeks of August 30, 2015 through November 7, 2015 (weeks 35-15 through 44-15), the weeks at issue.

(5) During the weeks at issue, claimant did not think she could return to work for the employer as a result of the anxiety she experienced and the hostility she perceived in the workplace. However, during the weeks at issue, beginning in week 35-15 and continuing, claimant applied for work with other employers, including as a dental hygienist and other capacities in other dental offices and for non-dental positions such as with Costco, Royal Caribbean and PacificSource. Claimant thought she was able to work in environments that were different from the employer's workplace.

(6) During the period of claimant's five week leave (during week 33-15 through week 37-15), claimant sought treatment from her regular physician and the physician increased her blood pressure medicine and prescribed anti-anxiety medicine. Claimant also was treated by a psychologist. Neither health professional restricted claimant from working.

(7) Sometime shortly before September 22, 2015, claimant called the employer's office manager and told the manager that she "needed more time" before returning to work. Audio at ~17:15. Claimant thought she was not ready to return to the situation in the employer's workplace, and the hostility she thought she would face. The office manager extended claimant's medical leave until October 20, 2015.

(8) On October 1, 2015, during week 39-15, claimant broke her ankle and was restricted from work. On October 14, 2015 (during week 41-15), claimant was still restricted from work, but was scheduled to meet with her physician on October 15, 2015 to learn when she would be released to work.

(9) On October 19, 2015, claimant submitted her resignation to the employer.

CONCLUSIONS AND REASONS: Claimant was available and able to work at suitable jobs during weeks 35-15 through 38-15. Claimant was not able to work during weeks 39-15 through 41-15. Further proceedings are necessary to determine whether claimant was available and able to work during weeks 42-15 through 44-15.

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 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 all suitable full time, part time and temporary work opportunities throughout the labor market, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.* 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 16-UI-50892, the ALJ concluded that claimant was not available or able to work during all of the weeks at issue. We agree with his conclusions about weeks 39-15 through 41-15. We disagree with his conclusions about weeks 35-15 through 38-15, and find there is insufficient evidence in the record to draw any reliable conclusions about weeks 42-44 through 44-15.

Weeks 35-15 Through 38-15. The ALJ based his finding that claimant was not able or available to work during these weeks based on the content of her communications with the employer's office manager and his reasoning that if claimant had been able to work, she would have returned to work with

the employer, presumably after her leave was over. Hearing Decision 16-UI-50892 at 4. Although claimant was clear that she felt she was unable to return to work for the employer during the weeks at issue, she was insistent that the problems which gave rise to her anxiety in that workplace were peculiar to it, would not extend to other jobs with different employer and did not inhibit her search for other work during the weeks at issue. While claimant's work attendance until the time of her August 14, 2015 leave appeared to have been impacted by her anxiety, it did not prevent her from being able to work for entire weeks at a time, and there is insufficient evidence to infer that her absences before the leave indicated an inability to work for other employer then or during any of the weeks at issue. That the employer imposed a leave on her during weeks 35-15 through 38-15 did not establish that she was unable to work for other employers during that period.

As well, claimant's testimony that she sought work during the weeks at issue with new employers was not challenged at the hearing, and corroborated her testimony that she was willing and able to work for employers other than the employer. While claimant might have been unwilling to return to work for the employer due to the unique pressures of that job and her reactions to it, whether an individual is available for work is determined by the individual's willingness and ability to report for all *suitable* work opportunities in the labor market. See ORS 657.155(1)(c); OAR 471-030-0036(3)(b) (emphasis added). The determination whether a work opportunity is suitable for an individual is based on many factors, including risks to the individual's health. ORS 657.190. Here, based on claimant's unrebutted testimony about the adverse effects to her health of working for the employer, it was not a suitable work opportunity for her, but the fact that she was unwilling to work for that single employer did not render her unavailable for work or unable to work. Because claimant was able to work at all suitable jobs with other employers, was willing to report for that work, and actively looked for such work, it appears likely she was available and able to work at suitable work opportunities during weeks 35-15 through 38-15.

Weeks 39-15 Through 41-15. Claimant broke her ankle on October 1, 2015 (during week 39-15) and it was not disputed that her physician restricted her from working through at least October 15, 2015 (during week 41-15). Audio at ~12:55; Exhibit 1 at 4. It appears claimant's ankle was in a cast during that time. It is likely she was unable to bear weight on the broken ankle and unlikely she was able perform work as a dental hygienist or the other types of work she was seeking during this period. Claimant was not physically able to work during weeks 39-15 through 41-15, and is ineligible to receive benefit during those weeks.

Weeks 42-15 Through 44-15. Having determined claimant was available for work despite her unwillingness to return to work for the employer during the weeks at issue, the principal issue about weeks 42-15 through 44-15 is the extent to which her broken ankle did not prevent her from being physically able or capable of reporting for suitable work opportunities or the work she was seeking. The ALJ did not inquire into these issues at hearing. On remand, the ALJ should inquire into how, the extent to which and the duration claimant's broken ankle impacted her ability to work, the nature of any physician-imposed work restrictions, whether, when and to what extent, if at all, they were modified over time, when claimant was released to work without any restrictions and how claimant would have accommodated her broken ankle to allow her to work. Absent such inquiries, it cannot be determined whether claimant was available and able to work during weeks 42-15 through 44-15.

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 and able to work during weeks 42-15 through 44-15, Hearing Decision 16-UI-50892 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 16-UI-50892 is set aside, and this matter remanded for further proceedings consistent with this order.

Susan Rossiter and J. S. Cromwell

DATE of Service: February 17, 2016

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-50892 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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