

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0345

Modified
Eligible Weeks 47-15 to 7-16

PROCEDURAL HISTORY: On February 19, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work or available for work from November 22, 2015 to February 13, 2016 (decision # 92244). Claimant filed a timely request for hearing. On March 15, 2016, ALJ Murdock conducted a hearing, and on March 17, 2016 issued Hearing Decision 16-UI-55293, concluding claimant was not available for work from November 22, 2015 to February 6, 2016 and was eligible for benefits from February 7, 2016 to February 20, 2016. On March 24, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

No adversely affected party requested review of the portion of Hearing Decision 16-UI-55293 in which the ALJ concluded that claimant was eligible for benefits from February 7, 2016 to February 20, 2016 (weeks 6-16 and 7-16). We therefore confined our review in this matter to the remaining weeks at issue, November 22, 2015 to February 6, 2016 (weeks 47-15 to 5-16).

EAB considered claimant's argument when reaching this decision to the extent it was relevant and based on the hearing record.

FINDINGS OF FACT: (1) At all relevant times hereto, University of Portland employed claimant. Claimant's last position with the employer was as a public safety officer.

(2) In August 2015, claimant began a medical leave of absence from her job. Claimant's medical provider restricted claimant from working the night shift or working as a public safety officer, leaving claimant medically incapable of returning to her last position with the employer.

(3) On October 1, 2015, claimant filed an initial claim for unemployment insurance benefits.

(4) On November 5, 2015, claimant's medical leave of absence ended and the employer extended the leave period. Claimant and the employer began discussing claimant's options for returning to work in a

different capacity. Claimant expressed a preference for positions that did not pay less than 90% of the wage she had earned as a public safety officer, and included benefits.

(5) From November 22, 2015 to February 6, 2016, (weeks 47-15 to 5-16, the weeks at issue), claimant filed weekly claims for unemployment insurance benefits. She sought clerical work. Her labor market included Portland, Gresham, Oregon City and surrounding areas. In that labor market, clerical work was customarily performed weekdays from 7:00 a.m. to 6:00 p.m.

(6) The employer subsequently asked claimant if she wanted to be considered for openings as a custodian or a part-time administrative position. Claimant told the employer that she was interested in the positions. Claimant did not place any wage or benefit conditions on her interest in either position.

(7) The employer required information from claimant's medical provider about claimant's capacity to work in either position. On January 14, 2016, the medical provider responded that claimant could only take the custodial position if it was a day shift because of the negative effects of a night shift on claimant's health. The medical provider also replied that she "discourage[d]" claimant from taking the part-time position because the position was without benefits and she "believe[d]" that claimant "needs access to medical resources." *See* Exhibit 1, email from claimant's medical provider.

(8) Neither claimant nor the employer initiated further contact about claimant's willingness to be considered for either position. On February 5, 2015, the employer ended claimant's employment.

CONCLUSIONS AND REASONS: We disagree with the ALJ as to weeks 47-15 to 5-16, and conclude that claimant was able to work and available for work during all the weeks at issue.

To be eligible to receive benefits, unemployed individuals must be able to work during each week claimed. ORS 657.155(1)(c). An individual is considered able to work if she is physically and mentally capable of performing the work she is actually seeking. OAR 471-030-0036(2).

Although claimant was on a medical leave of absence throughout the weeks at issue, she was only restricted from working night shifts, or as a public safety officer. Claimant was not seeking that type of work. Claimant sought clerical work, the customary hours and days of which did not include night shift work. There is no evidence in this record suggesting that claimant was physically or mentally incapable of performing day shift clerical work during the weeks at issue. She was, therefore, able to work.

To be eligible for benefits individuals must also be available for work during each week claimed. ORS 657.155(1)(c). An individual is considered available for work if, in pertinent part, she is willing to work and capable of reporting for suitable work opportunities, does not miss any opportunities to work, and does not impose "conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time." *See* OAR 471-030-0036(3). Suitability is defined to include, among other things, the degree of risk involved to her health. ORS 657.190.

As a preliminary matter, claimant cannot be considered unavailable for work during the weeks at issue based on her conduct with respect to the night shift custodial job. Claimant was not seeking or required to seek custodial work as a condition of maintaining her eligibility for unemployment insurance benefits. The record also fails to show that the custodial work was suitable for claimant because she was

medically restricted from working during the night shift. We therefore focus the remainder of our analysis on whether claimant's conduct with respect to the part-time administrative position or desire for benefits made her unavailable for work during the weeks at issue.

The ALJ concluded that claimant was not available for work because, although she "asserted that she was willing to accept such work and was simply awaiting further communications with the employer about the final two available positions," "[t]he record is persuasive that claimant imposed a condition which substantially interfered with her opportunities to return to work as soon as possible with her employer," the condition being claimant's unwillingness "to accept non-benefited positions."¹ See Hearing Decision 16-UI-55293 at 3. In so concluding, the ALJ held that claimant was not credible because her "testimony, overall, was inconsistent and the assertion that she was willing to accept non-benefited positions was inconsistent with the communications that the employer had received from her and her professional health care provider." *Id.* We disagree.

Although the ALJ characterized claimant's testimony as inconsistent, the ALJ did not identify any internal inconsistencies within claimant's own testimony, for example, instances during the hearing where claimant said both that she was and was not willing to accept non-benefited work, nor are any such internal inconsistencies apparent on review of the hearing record. The ALJ also characterized claimant's testimony as inconsistent with her own prior statements to the employer, but the record shows only that claimant stated a preference to the employer for work that paid at least 90% of what she had earned and included benefits. There is nothing in this record indicating that claimant ever said her preferences were requirements, thus, there is nothing in this record indicating that claimant was inconsistent when communicating with the employer about them. The fact that claimant expressed unconditional interest in positions like the part-time administrative job that, logically, paid far less than her previous full-time position and did not include benefits, supports claimant's assertion that her request for a certain wage and benefits were merely preferences, and not conditions on her availability for work.

The ALJ next characterized claimant's testimony as inconsistent with her medical provider's statements to the employer. We disagree. It is undisputed that claimant's medical provider told the employer that she had "discourage[d]" claimant from accepting a position that did not include benefits, but there is no evidence in the record suggesting that either claimant or her medical provider ever told the employer or the Department that claimant was medically restricted from, incapable of, or unwilling to working in a position that did not include benefits. There is no evidence suggesting that claimant or her medical provider explicitly rejected the employer's offer to consider claimant for the part-time clerical position because it did not include benefits. Claimant's testimony that she held a preference for a position that included benefits, but was willing to consider positions without benefits, was not inconsistent with the fact that her medical provider had discouraged her from taking non-benefited positions.

Finally, the ALJ suggested that claimant was not available for work because she did not contact the employer about getting a new position between the date of her medical provider's letter and the date she was discharged. The ALJ wrote that, had claimant disagreed with her medical provider's statement, "she did have control to follow up with the employer to change the restriction on non-benefited positions, if

¹ Notably, nothing in ORS 657.155(1)(c) or OAR 471-030-0036 requires that claimant "return to work as soon as possible with her employer" or any particular employer. Claimant was not required to return to work or pursue returning to work with her employer as a condition of maintaining her eligibility for unemployment insurance benefits.

she had, indeed, changed her mind about that restriction." *See* Hearing Decision 16-UI-55293 at 3. We disagree with the ALJ that there ever was a "restriction on non-benefited positions," much less that claimant ever "changed her mind" about it, and the fact that she could have but did not follow up with the employer after the medical provider's email did not make her unwilling or incapable of working.

In sum, claimant's desire for a benefited position that paid at least 90% of her previous wage was merely the expression of a preference. She did not tell the employer it was required, and her unconditional willingness to consider the positions the employer asked her about demonstrated that she would not reject positions that did not meet her preferences. Although claimant's medical provider discouraged her from taking a non-benefited position, she did not put any restrictions in place that prohibited claimant from working in a non-benefited position or that paid less than 90% of her previous wage, either. On this record, claimant expressed preferences, but did not impose any conditions that substantially reduced her opportunities to return to work at the earliest possible time. We therefore conclude that claimant was available for work during all the weeks at issue, including November 22, 2015 to February 6, 2016 (weeks 47-15 to 5-16).²

DECISION: Hearing Decision 16-UI-55293 is modified, as outlined above.³

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

DATE of Service: April 21, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

² As previously noted, Hearing Decision 16-UI-55293 allowed benefits for weeks 6-16 and 7-16, and the decision as to those weeks remains undisturbed.

³ This decision reverses a hearing decision that, in part, denied benefits. Please note that payment of benefits owed, if any, may take from several days to two weeks for the Department to complete.