

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0428

Affirmed
Ineligible Weeks 52-15 to 12-16

PROCEDURAL HISTORY: On February 4, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from December 27, 2015 to January 23, 2016 (decision # 151113). Claimant filed a timely request for hearing. On March 31, 2016, ALJ S. Lee conducted a hearing, and on April 20, 2016 issued Hearing Decision 16-UI-56944, concluding claimant was not available for work from December 27, 2015 to March 26 2016.¹ On April 12, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On December 14, 2015, claimant filed an initial claim for unemployment insurance benefits. He filed weekly claims December 27, 2015 through March 26, 2016 (weeks 52-15 through 12-16), the weeks at issue. The Department did not pay claimant for any of the weeks at issue.

(2) In 2014, claimant began experiencing anxiety and had panic attacks. He experienced symptoms of those conditions while operating his motorcycle in inclement weather, on dangerous roads, or during high volume traffic times.

(3) In June 2015, claimant injured himself in a motorcycle accident. He had difficulty operating his motorcycle as a result, particularly in cold weather. He also did not like using the motorcycle in inclement weather because his gear did not dry between uses, and he felt that operating the motorcycle when it was too cold endangered his health.

(4) During the weeks at issue, claimant sought work as a bartender and bar manager. Claimant's labor market included Portland and Sellwood. The customary days and hours for that type of work included all days and hours.

¹ The Department's witness testified, and the ALJ's decision stated, that claimant was ineligible through March 28, 2016 and labeled that week 12-16; however, week 12-16 ended on March 26, 2016. Therefore, this decision is applicable through March 26, 2016.

(5) Claimant used a motorcycle for his primary mode of motorized transportation during the weeks at issue. He could not afford to purchase another vehicle. Public transportation did not run during all the customary days and hours for bartender work in claimant's labor market. Claimant concluded that operating his motorcycle at night was, statistically, more dangerous than at other times, and doing so caused claimant anxiety. Claimant typically sought work located within walking distance of his residence.

(6) Claimant previously worked for a business that had two bar locations within close proximity to his residence. The employer opened a third location in the Sellwood area, approximately eight miles from claimant's residence, and expected claimant to work part of the time at the Sellwood location. Claimant worked 40 or more hours a week, but had difficulty commuting to work at that location because it was not within walking distance of his residence. He also experienced anxiety from working in several different environments. Claimant left work with that employer rather than continue working at its Sellwood location.

(7) Prior to January 2016, claimant had a leased residence and was not free to move if he obtained work that was not in close proximity to his residence at the time. He sought work close to his residence. In January 2016, claimant's lease expired and claimant began renting on a monthly basis. After that, claimant expanded the boundaries of his job search and planned to change residences upon obtaining a new job so he could live in close proximity to his new job, but still confined his work search activities to centralized locations close to available housing.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant was not available for work from December 27, 2015 to March 26, 2016.

To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed. ORS 657.155(1)(c). An individual is considered "available for work" if he is capable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought, and not imposing conditions which substantially reduce his opportunities to return to work at the earliest possible time. OAR 471-030-0036(3).

Where, as here, the Department has not paid benefits for any of the weeks at issue, claimant has the burden to establish that the Department should have paid benefits to him. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). That means, in essence, that claimant has to produce sufficient evidence to establish that it is more likely than not that he was capable of accepting and reporting for work throughout his labor market without imposing conditions that substantially reduced his opportunities to return to work at the earliest possible time. Claimant did not satisfy his burden.

During the weeks at issue, claimant was not willing to work or capable of working for employers unless they were located within such close proximity to his residence that he could walk to work during inclement weather or late night shifts because he was not willing to operate his motorcycle under those conditions, did not own alternative means of transportation and did not have access to sufficient public transportation. The fact that claimant was, after January 2016, willing to relocate for the sake of living close to a new place of employment should he obtain one does not change the outcome. In order to be considered "available for work" for purposes of obtaining benefits, individuals must be capable of accepting and reporting to work throughout the labor market. In claimant's case, that included Portland

and Sellwood. However, he quit a job that required him to work in Sellwood, and confined his work search to areas of Portland that were central locations or located in areas in which he could find housing in close proximity. By confining his work search in that manner, claimant imposed a condition that substantially reduced his work opportunities and demonstrated that he was not capable of accepting or reporting to work throughout his labor market.

Claimant argued that he should nevertheless be considered eligible for benefits because his availability was limited due to his 2014 anxiety diagnosis and 2015 motorcycle accident injuries. OAR 471-030-0036(3)(e) provides an exception to the availability requirement for individuals with permanent or long-term physical or mental impairments. However, that exception is only for individuals who are prevented from working full time or during particular shifts. Even if claimant's anxiety and motorcycle injury constituted permanent or long-term physical or mental impairments, the record fails to show that claimant was limited by his anxiety or injuries from working full time. Rather, claimant had worked full time or more for his previous employer and did not show that his anxiety or injuries were exacerbated by full time work. Nor was claimant prevented from working particular shifts because of his anxiety, which he experienced operating the motorcycle late at night, during inclement weather, and when required to work in several different environments. Because claimant's anxiety and injuries affected claimant intermittently, and did not prevent claimant from working full time or during particular shifts, the exceptions to the availability requirement do not apply.

For the foregoing reasons, we conclude that claimant was not available for work during the weeks at issue. Claimant is, therefore, ineligible for benefits from December 27, 2015 to March 26, 2016 (weeks 52-15 to 12-16).

DECISION: Hearing Decision 16-UI-56944 is affirmed.

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

DATE of Service: May 6, 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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