

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0995

Affirmed
Ineligible

PROCEDURAL HISTORY: On July 11, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available or able to work during the weeks of May 8, 2016 through July 2, 2016 (decision # 94340). Claimant filed a timely request for hearing. On August 10, 2016, ALJ Vincent conducted a hearing at which the employer did not appear, and on August 12, 2016 issued Hearing Decision 16-UI-65336, affirming the Department's decision. On August 26, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Good Samaritan Health Symptoms, Inc. hired claimant as a financial analyst sometime in approximately 2013.

(2) In approximately 2015, the employer implemented productivity standards that required financial analysts to process 20 transactions per hour on average. These productivity standards were strictly enforced and the employer discharged employees who were unable to meet them.

(3) In January 2016, claimant was involved in an automobile accident and injured his back, legs and knees. Claimant returned to work after the accident. Claimant's physician did not impose any physical restrictions on the duties he was allowed to perform after returning to work. However, because of his injuries, claimant was unable to move from his desk as quickly as he had before the accident to perform miscellaneous job-related duties such as using the copy machine or retrieving documents from the printer. As a result, claimant was able to process only about 13 to 15 transactions per hour which did not meet the employer's productivity requirements.

(4) On May 9, 2016, claimant's supervisor and claimant's manager told claimant that he needed to take a leave of absence until he more fully recovered from his injuries or he would be discharged for consistently failing to achieve the employer's productivity requirements. Claimant chose to take the

leave and it began on May 10, 2016. Claimant later converted the personal leave to a leave under the Family Medical Leave Act in order to maintain his employer-sponsored health insurance benefits.

(5) After May 9, 2016 claimant was on leave from work. Claimant claimed benefits for the weeks of May 8, 2016 through August 6, 2016 (weeks 19-16 through 31-15), the weeks at issue.

(6) During the weeks at issue, claimant was physically able to perform the work customarily required of a financial analyst. Claimant's physician did not restrict his activities in any way. However, claimant did not return to work as a financial analyst for the employer since his injuries slowed his work and he thought he was not sufficiently recovered to achieve the employer's productivity standards and would be discharged. Claimant's physician thought he would be fully recovered from his injuries by November 2016.

CONCLUSIONS AND REASONS: Although claimant was able to work during the weeks at issue, he was not available for all suitable work during those weeks. Accordingly, claimant was not eligible to receive benefits for those weeks.

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). 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). Among those requirements are that the individual be willing to work and capable of reporting to full time, part time and temporary work opportunities throughout the labor market. *Id.* For purposes of ORS 657.155 (1)(c), an individual is not considered available for work in any week in which the individual has an opportunity to perform suitable work and fails to accept or report for such work due to illness, injury or temporary physical or mental incapacity. OAR 471-030-0036(3)(f). In considering whether work is suitable for an individual the following factors are considered, among others, the physical fitness and prior training, experience and prior earnings of the individual. ORS 657.190.

Claimant's testimony at hearing was unrebutted and persuasive that, regardless of the productivity standards put into place by his particular employer, he had the physical ability to perform the customary duties of a financial analyst despite his temporary injuries from the automobile accident. However, claimant agreed he was unwilling to return to work for his employer, at what was a suitable work opportunity for him, because he likely would not be able to meet the employer's productivity requirements due to the temporary effects of the injuries he had sustained. While ORS 657.190 provides that an individual's physical fitness may be considered in determining whether work is suitable, OAR 471-030-0036(3)(f) makes clear that the temporary physical limitations imposed by injuries of the sort claimant experienced should not be considered. Applying OAR 471-030-0036(3)(f) to claimant's situation, he was not available for work because he bypassed a suitable work opportunity with the employer in each of the weeks at issue due to a temporary physical incapacity. As such, claimant is not eligible to receive benefits during the weeks at issue.

DECISION: Hearing Decision 16-UI-65536 is affirmed.

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

DATE of Service: September 23, 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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