

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1205

Reversed & Remanded

PROCEDURAL HISTORY: On September 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work from July 24 through September 10, 2016 (decision # 81343). Claimant filed a timely request for hearing. On October 17, 2016, ALJ Seideman conducted a hearing at which the employer failed to appear, and on October 19, 2016 issued Hearing Decision 16-UI-69492, affirming the Department's decision. On October 27, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-69492 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further proceedings.

This matter comes before EAB to determine if claimant was eligible for benefits from July 24 through September 10, 2016 (weeks 30-16 through 36-16). 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 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 prevented from working full time or during particular shifts due to a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h) shall not be deemed unable to work solely on that basis so long as the individual remains available for some work. OAR 471-030-0036(2)(b).

In Hearing Decision 16-UI-69492, the ALJ concluded that claimant was not able to work during the weeks at issue because, although her worker's compensation claim for her back injury closed before the weeks at issue, she "still [had] problems sitting or standing for a period of time," "[had] limitations," and "was not completely healed" and thus could not perform her "present job" with the employer. Hearing Decision 16-UI-69492 at 2. Claimant testified that, despite having ongoing physical limitations that prevented her from performing the job she did before she sustained her back injury, her doctor had released her for work, and she looked for and was still able to perform "other work" during the weeks at issue. 16:30 to 16:49, 17:29 to 17:35, 21:43 to 22:06. The ALJ did not conduct a sufficient inquiry into what work claimant was actually seeking during each week at issue and whether she was able to perform

that work. Without that information, EAB cannot determine if claimant met the requirements of OAR 471-030-0036(2) for each week at issue, *i.e.*, that she be physically and mentally capable of performing the work she was actually seeking during each week.

Moreover, the ALJ failed to elicit facts from the parties necessary to determine if claimant suffered from a long-term or permanent impairment. Claimant was diagnosed with a lumbar sprain from a January 3, 2015 work injury. Exhibit 1. What was the status of claimant's medical condition during the weeks at issue? Was the condition still ongoing at the time of hearing? Did claimant's doctor give her a prognosis for her condition? How did her condition affect her ability to work during the weeks at issue? The ALJ failed to ask questions to determine how much work claimant was physically able to perform each week. How did her condition interfere with her working during the weeks at issue? How long of a shift could claimant work? How many hours per week was she able to work?

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 for work during the weeks at issue, Hearing Decision 16-UI-69492 is reversed, and this matter is remanded for development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision Hearing Decision 16-UI-69492 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.

DECISION: Hearing Decision 16-UI-69492 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: November 9, 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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