

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1358

Reversed & Remanded

PROCEDURAL HISTORY: On October 17, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able or available to work during the weeks of August 7, 2016 through October 8, 2016 (decision # 124818). Claimant filed a timely request for hearing. On November 22, 2016, ALJ Holmes-Swanson conducted a hearing, and on November 29, 2016 issued Hearing Decision 16-UI-71835, concluding claimant was not available to work during the weeks of August 7, 2016 through November 12, 2016. On December 2, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-71835 is reversed and this matter is remanded for further development of the record.

In Hearing Decision 16-UI-71835, the ALJ concluded claimant was not available to work during the weeks of August 7, 2016 through November 12, 2016. The ALJ reasoned that by limiting the work she was seeking to work that was “less strenuous than her prior position [as a cashier], claimant was imposing a condition that reduced her ability to return to work at the soonest opportunity.” The ALJ also found that although claimant’s physician had restricted her in the work she could perform during the weeks at issue due to “facet’s syndrome,” the evidence did not establish that claimant’s facet’s syndrome was a permanent or long-term impairment for which she would be considered available for work, despite her medical restrictions, if she was able to perform “some work” during the weeks at issue. Hearing Decision 16-UI-71835 at 3; *see* OAR 471-030-0036(3)(a), OAR 471-030-0036(3)(e). However, the current state of this record shows that the ALJ did not develop the evidence sufficient to allow us to make a determination on either of these issues.

Although claimant testified that her physician limited the work she could perform because she had developed “facet’s syndrome,” the ALJ did not make a sufficient inquiry to support a conclusion as to whether or not claimant’s facet’s syndrome was a permanent or long term physical impairment.

Transcript at 13. When claimant explained that facet's syndrome was caused by an "irritation" in the space between her neck and spinal vertebrae, and consequent swelling and tightening, the ALJ should have followed up by asking what the underlying cause for that irritation was and what, if anything, might have led to the flare of facet's syndrome and its symptoms that claimant experienced on May 12, 2016, which caused her physician to restrict her work activities. Transcript at 13. The ALJ also should have asked claimant if her physician or other health care providers recommended or suggested any treatment to improve her facet's syndrome other than physical therapy and, if so, what that was. The ALJ should have further asked claimant to describe in detail the effects of facet's syndrome on her physical abilities, including any specific limitations on neck, back and arm movements, limitations on twisting and bending, limitations on standing, limitations on weights she could lift, any other limitations on her functionality, what happened if claimant exceeded these limitations and how long these limitations lasted after the May 12, 2016 flare. The ALJ also should have asked claimant for an approximate timeline describing how, when and to what extent the limitations she experienced from facet's syndrome improved over time after the May 12, 2016 flare. Furthermore, although claimant testified that she understood that the prognosis for her facet's syndrome was that she "will get better" and that physical therapy had "definitely improved my symptoms," the ALJ should have inquired about what specifically claimant's health care providers told her about the expected future course of her facet's syndrome, if she might have long term physical limitations from it and, if so, what, what specifically claimant meant by "better," if that term meant a complete recovery of function she had before May 12, 2016 or something less and what degree of "improvement" in movement and functionality claimant or her health care providers reasonably expected her to regain. Transcript at 14. Claimant also commented at the hearing that, when her physical therapist wanted her to "self-manage" her symptoms of facet's syndrome, those symptoms flared. Transcript at 29. The ALJ should have inquired of claimant what attempted physical activities caused this flare, when the flare occurred, how severe the flare was, if claimant recovered the function she had before this most recent flare and how long that recovery took or, if not, what function was not recovered. The ALJ further should have inquired of claimant what if anything, the physical therapist or any other of claimant's health providers told claimant about this flare and its causes, how long she would need to curb her physical activities to avoid another flare and what, if anything, they told claimant that might have indicated that she needed to be careful about the physical activities she undertook in the long-term and, if so, what activities she needed to avoid to prevent another flare and how long she needed to exercise this caution.

As well, claimant stated that she was medically restricted from performing repetitive work, and that she was not physically able to perform cashier work for the employer because of its physical demands, yet testified she thought she was capable of working as a cashier or clerk in a bank or at Nordstrom's or Macy's or in chocolate store or as a sales associate at furniture store or at desk job at the school district or at a utility. Transcript 6, 12, 13, 15. The ALJ should have inquired specifically into the basis of claimant's thinking, why claimant thought these jobs would not require repetitive movements that were beyond her physical abilities or her restrictions, and how they required head, neck and back movements, the lifting of weight or other physical efforts that were different from those involved in the cashier work for the employer that she thought she could not perform, and why they likely would not entail physical activities that were beyond her physical abilities or her medical restrictions. The ALJ should further inquire whether claimant discussed her ability to perform those types of work with her physician or her physical therapist and what those providers told her. Absent the development of the record in the areas set out above, EAB cannot determine whether claimant was available for work during the weeks at issue.

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, Hearing Decision 16-UI-7835 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 16-UI-71835 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: January 13, 2017

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-71835 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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