

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1363

Affirmed
Ineligible Weeks 32-16 Through 41-16

PROCEDURAL HISTORY: On September 30, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work during the weeks of August 7, 2016 through September 24, 2016 (decision # 95455). Claimant filed a timely request for hearing. On November 10, 2016, ALJ Wyatt conducted a hearing, and on November 15, 2016 issued Hearing Decision 16-UI-71417, modifying the Department's decision and concluding claimant was not able to work during the weeks of August 7, 2016 through October 14, 2016. On December 6, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Although Hearing Decision 16-UI-71417 states that Exhibit 1 was admitted into evidence, the only document discussed as an exhibit during the hearing was a note from claimant's neurosurgeon releasing her to work as of October 14, 2016, which the ALJ neither marked nor received into evidence. However, the neurosurgeon's note was referred to and discussed during the hearing and the Department's witness accepted its authenticity and accuracy in her hearing testimony and did not object to it. Audio at ~19:51. It appears to us that the ALJ considered the note as having been offered into evidence but mistakenly failed to admit that note into evidence as a hearing exhibit. Because the note is readily identifiable from the discussion at hearing and it is necessary to complete the record under OAR 471-041-0090(1) (October 29, 2006), EAB admits it into the record as EAB Exhibit 1. A copy of EAB Exhibit 1 is served to each party along with this decision. Any party who objects to our admitting EAB Exhibit 1 into evidence must submit such objection to this office in writing, setting forth the basis of the objection within ten days of our mailing this decision. Unless such objection is received and sustained, EAB Exhibit 1 will remain in the record.

FINDINGS OF FACT: (1) Before July 14 or 15, 2016, Home Care Workers employed claimant as a caregiver.

(2) On July 14 or 15, 2016, Claimant underwent surgery on her brain. After the surgery, the neurosurgeon who performed the surgery restricted claimant from work.

(3) Claimant claimed benefits for the weeks of August 7, 2016 through October 14, 2016 (weeks 32-16 through 41-16), the weeks at issue.

(4) Sometime in September 2016, the neurosurgeon evaluated the progress of claimant's recovery. In response to claimant's questions, he told claimant he would not release her to return to work until she had an acceptable brain scan. Claimant's next appointment with the neurosurgeon was scheduled for approximately October 14, 2016.

(5) On October 14, 2016, claimant's neurosurgeon examined her and released her to return to full-time work without restriction as of October 14, 2016 (the end of week 41-16). EAB Exhibit 1. On October 17, 2016 (beginning of week 42-16), claimant returned to work with the employer.

CONCLUSIONS AND REASONS: Claimant was not able to work during weeks 32-16 through 42-16 and is not eligible to receive benefits during 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 who is occasionally and temporarily disabled for less than half of the week is not considered unable to work. OAR 471-030-0036(2)(a). 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).

Claimant's inability to work after the surgery on her brain was not a long term physical impairment since it lasted only for the approximately three months she needed to convalesce from the surgery, and therefore OAR 471-030-0036(2)(b) is not applicable to her situation during the weeks at issue. Claimant agreed at hearing that her neurosurgeon restricted her from working after her surgery on July 14 or 15, 2016 until October 14, 2016, which included all of the weeks at issue. Audio at ~20:01. It appears that the restriction issued by the neurosurgeon was from all work and claimant did not contend otherwise at the hearing. EAB Exhibit 1; Audio at ~20:01. As a result, claimant's inability to work during the weeks at issue was not the result of an occasional or temporary disability, and OAR 471-030-0036(2)(a) also is not applicable to her situation during weeks 32-16 through 40-16. Based on the neurosurgeon's restriction of claimant until she was released for work on October 14, 2016, claimant was able to work only two days during week 41-16 (October 14 and 15, 2016), which was less than half of that week, so that release did not render her eligible to receive benefits during week 41-16. OAR 471-030-0036(2)(a). Accordingly, the neurosurgeon's restriction of claimant from work established that she was not able to work during weeks 32-16 through 41-16. Claimant was not eligible to receive benefits during those weeks.

DECISION: Hearing Decision 16-UI-71417 is affirmed.

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

DATE of Service: January 18, 2017

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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