

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1412

Reversed & Remanded

PROCEDURAL HISTORY: On September 19, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from August 14, 2016 to September 3, 2016 (decision # 92752). Claimant filed a timely request for hearing. On November 28, 2016, ALJ Murdock conducted a hearing, and on December 5, 2016 issued Hearing Decision 16-UI-72264, affirming the Department's decision. On December 19, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's argument when reaching this decision.

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-72264 should be reversed, and this matter remanded.

ORS 657.155(1)(c) requires that individuals be available for work as a condition of being eligible to receive unemployment insurance benefits. OAR 471-030-0036(3) defines "available for work," in pertinent part, as:

- (a) Willing to work full time, part time, and accept temporary work opportunities, during all of the usual hours and days of the week customary for the work being sought, unless such part time or temporary opportunities would substantially interfere with return to the individual's regular employment; and

(b) Capable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought, including temporary and part time opportunities; and

(c) Not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time; and

* * *

(e) However, an individual with a permanent or long-term physical or mental impairment (as defined at 29 CFR 1630.2(h)) which prevents the individual from working full time or during particular shifts shall not be deemed unavailable for work solely on that basis so long as the individual remains available for some work.

(f) For the purposes of ORS 657.155(1)(c), an individual is not available for work in any week claimed if:

(A) The individual has an opportunity to perform suitable work during the week and fails to accept or report for such work due to illness, injury or other temporary physical or mental incapacity.

* * *

In Hearing Decision 16-UI-72264, the ALJ concluded that claimant “was not available for all suitable work.” The ALJ wrote,

Claimant was seeking social work or case manager work, but he could not work in a typical office setting, due to his sensitivity to Wi-Fi and cellular [sic] transmissions. The condition that he work from home or remotely rendered him incapable of accepting and reporting for all suitable work because the work he was seeking is customarily performed in an office setting and it is not likely that all employers in the social work field would or could allow claimant to work from home. Therefore, claimant was not available for all suitable work opportunities.

Hearing Decision 16-UI-72264 at 3. We disagree that the record contains sufficient information to support that conclusion.

Claimant may only be considered not “available for work” based on his unwillingness to work or incapability of reporting for work if the work opportunities he is unwilling or incapable of reporting for are “suitable” work opportunities. For work to be considered “suitable” for purposes of establishing whether or not an individual must be “available for” that type of work, the factors that must be considered include, among others, “the degree of risk involved to [claimant’s] health” and “safety,” and his “physical fitness.” ORS 657.190. Claimant had some sort of unspecified medical condition that caused him health problems if exposed to Wi-Fi and cellular signals, and affected his ability to work in office settings in which he would be exposed to them. In order to determine whether social work or case management work was “suitable” for claimant, then, the ALJ must develop the record as to claimant’s

physical and mental condition, his diagnosis or diagnoses, whether claimant was given any medical restrictions from a physical or mental healthcare provider because of his condition, whether the work was typically performed in an office setting or elsewhere, whether he was physically or mentally capable of performing the types of work associated with those fields in the locations where employees in those fields typically worked, what kind(s) of work claimant considered suitable given his health, and what duties claimant felt he was capable of performing.

To any extent claimant's reluctance or inability to work in an office imposed a condition that reduced his opportunities to return to work, he may only be found not "available for work" on that basis if that reduction in opportunities was "substantial." The ALJ wrote that "it is not likely that all employers in the social work field would or could allow claimant to work from home," but there was little inquiry about the nature of claimant's social work during the hearing. The ALJ must develop the record as to how common it was in the social work and case management fields for employees to work from home or otherwise work outside of an office setting, how many job announcements specified whether the successful applicant would have to work from an office, and whether and what portion of the jobs claimant sought offered telecommuting or long-distance working options. To help determine whether any reduction in opportunities to return to work was "substantial" based on claimant's desire not to work in an office, the ALJ should also ask what claimant told prospective employers about his condition, or what type of work environment he asked them to provide.

To any extent the record developed on remand suggests that claimant's health condition was a permanent or long term impairment (as defined at 29 CFR 1630.2(h)), OAR 471-030-0036(2) and (3) both contain provisions that claimant may still be considered eligible for unemployment insurance benefits despite limitations imposed by his impairment(s), even if he cannot work full time or during particular shifts, as long as he still "remains available for some work." On remand, the ALJ should inquire with the parties about the applicability of those provisions to claimant's situation.

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-72264 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 16-UI-72264 is set aside, and this matter remanded for further proceedings consistent with this order.¹

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

DATE of Service: January 13, 2017

¹ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-72264 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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