

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0068

Affirmed
Base Year Extension Denied

PROCEDURAL HISTORY: On November 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision denying claimant's request for a base year extension. Claimant filed a timely request for hearing. On December 29, 2016, ALJ S. Lee conducted a hearing, and on January 5, 2017 issued Hearing Decision 17-UI-74177, affirming the Department's decision. On January 17, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On September 15, 2014, claimant injured his shoulder while working as a welder.

(2) Claimant worked for another employer doing seasonal park maintenance from June 2015 until October 23, 2015, when the work ended. Claimant used medication to manage his shoulder pain while performing park maintenance.

(3) On December 21, 2015, claimant had shoulder surgery for his September 2014 injury. Claimant's doctor verified to the Department that claimant was unable to work from December 21, 2015 through January 20, 2016 due to the surgery on his shoulder.

(4) The doctor released claimant for light duty work on January 21, 2016. The doctor prescribed claimant medication to control his post-surgery pain. Claimant did not ask the doctor to revise his work release due to the effects of his medication. Claimant did not look for light duty work after his surgery. Instead, after January 20, he focused on doing physical therapy so he could return to welding and park maintenance work.

(5) On October 12, 2016, claimant filed an initial claim for unemployment insurance benefits based on the base year of July 1, 2015 through June 30, 2016.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant does not qualify for a base year extension.

To qualify for a base year extension, an individual must prove that he or she was “incapable of work” during the greater part of a calendar quarter in the base year. *See* ORS 657.170. “Incapable of work” means unable “to engage in any gainful occupation solely because of physical or mental defect, disease or injury as verified in writing by a licensed medical or therapeutic practitioner” or other satisfactory evidence. OAR 471-030-0023(1).

Claimant was suffering from a shoulder injury before and during his base year. However, the only period during his base year when his doctor restricted him from performing any work was from December 21, 2015 through January 20, 2016. After January 20, the doctor released claimant to perform light duty work. Eleven days of the time claimant was unable to work, as verified by his doctor, fell in the second quarter of claimant’s base year (October 1 through December 31, 2015), and 20 days fell in the third quarter (January 1 through March 31, 2016). Thus, the period of time claimant was unable to work does not comprise the greater part of the three months in either quarter.

Claimant did not provide other satisfactory evidence that he was incapable of work during any additional time during his base year. Claimant asserted that, after his doctor released him to work on January 21, he did not look for work because he was using pain medication that interfered with his ability to work. Audio Record at 25:01 to 25:40. However, claimant’s assertion is not satisfactory evidence of his alleged inability to work. Claimant had used the same medication when he performed park maintenance in 2015, and the same doctor who released him to work on January 21 had prescribed the medication. Nor did claimant ask the doctor to revise his work release due to the effects of his medication.

Claimant also asserted that he did not look for work after his surgery and for the remainder of his base year because he was doing physical therapy three times a week, with the goal of improving his ability to perform the job-related activities he had done as a welder before his accident. Audio Record at 28:00 to 28:37. However, the rule requiring proof of incapacity is not written in terms of incapacity to work at the particular job the individual held during the base year, or his preferred or regular profession, but rather, in terms of incapacity to perform any work at all. The fact that claimant was incapable of performing his prior job as a welder, and was engaged in treatment so he could return to that type of work, does not qualify him for a base year extension.

For the above reasons, we conclude that the record fails to show claimant was “incapable” of “engag[ing] in any gainful occupation” during the greater part of a calendar quarter in his base year, and that his request for a base year extension must be denied.

DECISION: Hearing Decision 17-UI-74177 is affirmed.

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

DATE of Service: February 6, 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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