

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0073

Affirmed
Ineligible

PROCEDURAL HISTORY: On December 5, 2015 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 October 23, 2016 through November 26, 2016 (decision # 121952). Claimant filed a timely request for hearing. On January 9, 2017, ALJ Vincent conducted a hearing, and on January 11, 2017 issued Hearing Decision 15-UI-74152, concluding claimant was available to work during the weeks of October 23, 2016 through January 7, 2017. On January 18, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Sometime in 2015, claimant injured his back at work and was off work on leave under the Family Medical Leave Act (FMLA). A surgery on claimant's back was planned. On October 22, 2016, before the surgery, claimant's physician released him for light duty work. The physician's restrictions for claimant included not lifting more than fifteen pounds and taking a half hour break after working for two consecutive hours. On October 25, 2016, Bright Wood Corporation released claimant from work because claimant had exhausted all FMLA leave available to him and Bright Wood could not accommodate his medical restrictions.

(2) On October 28, 2015, claimant filed an initial claim for unemployment benefits. The claim was determined valid. Claimant claimed benefits for the weeks of October 23, 2016 through January 7, 2017 (weeks 43-16 through 01-17), the weeks at issue. The medical restrictions issued by claimant's physician on October 22, 2016 remained in effect during the weeks at issue.

(3) During week 43-16, claimant reported to the Department that he sought millwork. During week 44-16, claimant reported that he sought work as a cashier, in clean-up, in food preparation, in maintenance and as a construction laborer. During week 45-16, claimant reported that he sought work as a landscaper, an auto detailer, an agricultural worker and as a maintenance, stocking and clean-up worker. During week 46-16, claimant reported he sought work as a cook, a janitor, a store clerk, cleaning carpets, as a housekeeper and as a fuel station attendant. During week 47-16, claimant reported he sought work as a cook, a janitor and a cashier. During week 48-16, claimant reported that he sought

work as a dishwasher, an appliance repair person, a janitor and an auto detailer. During week 49-16, claimant reported that he sought work as a laborer at a livestock auction and for a fencing company, as millworker, a janitor or a dishwasher. During week 50-16, claimant reported that he sought work as a dishwasher, auto detailer, cashier, and janitor. During week 51-16, claimant reported that he sought work as a millworker, for a tire shop and elsewhere as a janitor. During week 52-16, claimant reported that he sought millwork, janitorial work, and miscellaneous light duty work. During week 01-17, claimant reported that he sought work as a millworker, a janitor, a fuel station attendant, a dishwasher and a snow plow operator. When claimant made these contacts, he informed the potential employers that he was limited to light duty work.

CONCLUSIONS AND REASONS: Claimant was not available for work during the weeks of October 23, 2016 through January 7, 2017. Claimant is not eligible to receive benefits for 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 must meet certain minimum requirements to be considered “available for work” for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (February 23, 2014). Among those requirements are that the individual be willing to work and capable of reporting to all suitable full time, part time and temporary work opportunities throughout the labor market. . *Id.*

It is not likely that claimant could have performed most of the work he sought during the weeks at issue given the medical restrictions his physician had issued. While claimant generally contended that he was able to perform the work he sought, it is implausible that the jobs about which he inquired, including millwork, landscaping, construction laborer, cleaning and housekeeping, janitorial or as a cook would not have involved lifting more than fifteen pounds, or that they and could have been performed by claimant without significant accommodation or modification. Transcript at 12. The test for determining whether an individual is available to work requires that the individual be capable of accepting and reporting for *any* suitable work opportunities within the labor market. OAR 471-030-0036(3)(b). Because claimant’s physical limitations and work restrictions eliminated him from accepting or reporting for much of the work he was ostensibly seeking during the weeks at issue, it follows that he was not available within the meaning of OAR 471-030-0036(3)(b), even if his limitations were attributable to physical injury. Although OAR 471-030-0036(3)(e) provides that individuals who are subject to physical impairments that limit their availability to work may, under certain circumstances, not be deemed unavailable for work solely due to their physical limitations, its application is limited to individuals with permanent or long-term impairments who are prevented from working during particular shifts. There is no evidence in the record that claimant’s back injury was not temporary, that it was a permanent or long-term impairment, or that the back injury limited claimant only from performing suitable work during particular shifts. Since this exception does not apply to claimant’s circumstances, and there are no other applicable exceptions to the broad definition of available as set out at OAR 471-030-0038(3)(b), claimant was not available during the weeks at issue due to his physical condition and his work restrictions.

DECISION: Hearing Decision 17-UI-74512 is affirmed. *Decisión de la Audiencia 17-UI-74512 queda confirmada.*

Susan Rossiter and J. S. Cromwell;

D. P. Hettle, not participating.

DATE of Service: February 24, 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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NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.