

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0090

Affirmed
Ineligible

PROCEDURAL HISTORY: On December 14, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was available for work and able to work during the weeks of October 3, 2016 through December 10, 2016 (decision # 103303). The employer filed a timely request for hearing. On January 12, 2017, ALJ Triana conducted a hearing, and on January 18, 2017, 2016 issued Hearing Decision 17-UI-74901, reversing the Department's decision. On January 24, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument which contained information that was not part of the hearing record. Because claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006), EAB did not consider it. EAB considered only information received into evidence at the hearing when reaching his decision.

FINDINGS OF FACT: (1) C & K Market, Inc. employed claimant as a buyer for the natural and organics department of its grocery store from November 1, 2014 until October 28, 2016.

(2) In approximately 2014, claimant was diagnosed with complex post-traumatic stress disorder (PTSD). In approximately 2015, claimant's health care provider determined that his PTSD was the result of long-term childhood trauma.

(3) Sometime before March 2016, claimant started to experience severe anxiety episodes associated with working. When these episodes occurred at work, claimant would "begin to panic," would "freeze up," "sweat," "could barely move or even speak" and "would rock back and forth" in his office chair or, if he was able to stand up, would "turn in circles" aimlessly around his office. Audio at ~31:37. Once these episodes began, claimant was not physically able to leave his office. Audio at ~32:02. If these episodes occurred when claimant was home and thinking about work or reporting for work, he would "curl up into a ball" in the fetal position, was unable to move and could not leave his home. Audio at ~32:38.

Claimant experienced these episodes as “literally paralyzing,” and as “something [he] could not control” as to their occurrence, duration and severity. Audio at ~31:54.

(4) Sometime around March 2016, claimant’s mental health provider determined that claimant’s anxiety episodes were triggered by interactions or the prospects of interactions in the workplace with males in positions of authority over claimant. One of the employer’s male vice-presidents, who was the supervisor of claimant’s direct supervisor, triggered severe anxiety reactions in claimant, even though claimant had few direct interactions with the vice-president and, most often, merely observed him in the workplace. The vice-president “reminded [claimant] of a lot of authority figures in the past.” Audio at ~21:10. Prior to coming into contact with this vice-president, the last time claimant had been directly or indirectly supervised by a male was approximately ten to twelve years ago. Audio at ~26:37.

(5) Sometime shortly before March 22, 2016, claimant’s health care provider prepared authorizations to allow claimant to secure a leave of absence from work due to PTSD and associated anxiety symptoms. It was the employer’s understanding that claimant had “social anxiety” that prevented him from “being around other people.” Audio at ~14:20, ~34:24. On March 22, 2016, the employer authorized a leave for claimant under the Family Medical Leave Act (FMLA) and the Oregon Family Leave Act (OFLA).

(6) Sometime in October 2016, claimant exhausted all leave available to him under FMLA and OFLA. The employer asked claimant to submit an accommodation request under the Americans with Disabilities Act (ADA) to determine if other arrangements could be made to continue claimant’s employment. On October 19, 2016, claimant’s health care provider sent an accommodation request to the employer stating that claimant would be unable to perform his job for a “minimum of six months,” or until approximately April 19, 2017, due to social anxiety. Audio at ~13:44. Claimant’s provider thought that within six months, claimant’s condition would either improve sufficiently to enable him to work in an environment with a male authority figure, or claimant would have arranged in that time to work from home. On October 28, 2016, the employer discharged claimant because he was unable to return to work.

(7) On October 29, 2016, claimant filed a claim for unemployment insurance benefits. That claim was determined valid. Claimant claimed benefits for the weeks of October 30, 2016 through December 10, 2016 (weeks 44-16 through 49-16), the weeks at issue.

(8) During the weeks at issue, claimant’s labor market was Medford, Central Point, White City and Gold Hill, Oregon. Claimant sought work in retail management and sales. The days and hours customary for retail work in claimant’s labor market was all days, from 7:00 a.m. until 10:00 p.m.

(9) During the weeks at issue, claimant knew it “would be difficult” for him to accept a job in a retail workplace if that workplace had the types of male supervisory figures that triggered his anxiety episodes. Audio at ~25:21. In late November 2016, claimant obtained seasonal employment in the retail field. At that job, all of claimant’s supervisors were female. There were no males in positions of authority. Audio at ~24:08.

CONCLUSIONS AND REASONS: Claimant was not available for work during the weeks at issue.

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)(a)-(d) (February 23, 2014). Among those requirements are that the individual be willing to work and capable of reporting to all suitable work opportunities throughout the labor market, including full time, part time and temporary work opportunities, and refrain from imposing conditions that limit the individual’s opportunities to return to work at the earliest possible time. *Id.* An individual with a permanent long-term physical or mental impairment which prevents the individual from working during particular shifts shall not be deemed unavailable for work solely on that basis if the individual remains available for some work. OAR 471-030-0036(3)(e).

It appears that the PTSD that claimant experienced was a long-term physical or mental impairment since he was diagnosed with the disorder some years before the weeks at issue and it was not disputed that the effects of that disorder on him could be severe. However, claimant does not fall within the exception set out at OAR 471-030-0036(3)(e) to the strict definition of “available” as stated in OAR 471-030-0036(3)(a)-(d). Claimant did not contend or assert that PTSD limited the shifts he was able to work but, rather, testified that he was looking for retail work in all shifts that such work was offered in his labor market during the weeks at issue. Audio at ~26:44, ~27:15, ~27:52. For this reason, despite claimant’s impairment, whether he was available for work during the weeks at issue must be determined under the general standard stated in OAR 471-030-0036(3)(a)-(d).

Claimant testified to the severe and profound adverse effects a male supervisor or other authority figure who reminded him of authority figures in his past would have on him if he accepted a job in a workplace with such male manager in it, and that it would be “difficult” for him and he did not know whether he would or could accept such a job if it was offered to him. Audio at ~24:14, ~25:21. Given the magnitude of the symptoms that such authority figures evoked in claimant, the extent to which they debilitated claimant and the fact that immediately before the weeks at issue his health care provider had advised that he would not return to work with the employer for six more months due to the presence of the male vice-president in the workplace, it is unlikely that claimant was undecided whether he would look for, let alone accept, a position if there were such an authority figure in that workplace who would potentially trigger his anxiety. It appears that claimant may have minimized the impacts of that PTSD “trigger” on work he would considered due to a strong desire to return to work.. However, on this record, it does not appear that claimant actually would have pursued or sought work with an employer who had such a male supervisor in the workplace with whom claimant would have interacted.

Claimant did not describe the characteristics of the employer’s vice-president who triggered his deep anxiety other than to note that he was male and superior to claimant in authority. Audio at ~21:21. This description does not lend itself to principled distinctions between male supervisors who would trigger seriously adverse reactions in claimant from those who would not. As such, it must necessarily be assumed claimant also was unable to make this type of distinction among different males. Because we infer claimant’s PTSD prevented him from accepting or reporting to suitable retail work if that work was associated with reporting directly or indirectly to a male authority figure that evoked certain types of authority figures from his past, claimant was not available within the meaning of OAR 471-030-0036(3)(b) since he was not capable of accepting and reporting *for any suitable work opportunities* in the labor market during the weeks at issue, including with his former employer.

Claimant was not available for work during the weeks at issue. Claimant was not eligible to receive unemployment insurance benefits during those weeks.

DECISION: Hearing Decision 17-UI-74901 is affirmed.

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

DATE of Service: February 17, 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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