

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0386

Affirmed
Ineligible

PROCEDURAL HISTORY: On January 3, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work during the weeks of November 27, 2016 through December 24, 2016 (decision # 82124). Claimant filed a timely request for hearing. On March 16, 2017, ALJ Seideman conducted a hearing, and on March 21, 2017 issued Hearing Decision 17-UI-79297, affirming the Department’s decision. On March 31, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information not offered into evidence during the hearing. Claimant contended that at the hearing, he did not present information about all the employers that he inquired about or to which he applied for work during the weeks at issue because he misunderstood certain language in “ORS 657.155(1)(c)(b)” that supposedly required that he seek work within “the labor market in which work is being sought” meant that he needed to show that he was seeking work in bartending, the field in which he worked immediately prior to filing his claim for benefits. Claimant’s Written Argument at 1. However, there is no provision in ORS 657.155 that contains the language cited by claimant, and the language that claimant quoted is actually found at OAR 471-030-0036(3)(b) (February 23, 2014), which addresses a claimant’s *availability* to work rather than the *ability to work* that is at issue in this matter. As well, the notice mailed to claimant in advance of the hearing plainly advised him, “Claimant’s work search evidence for all weeks at issue may be required at the hearing. Be prepared with that information.” Record Document, February 23, 2017 Notice of Hearing at 1. There was nothing in the notice indicating that less than all of claimant’s work search efforts would be relevant and might be inquired into during the hearing. The notice also advised claimant about what needed to show to establish that he was able to work under OAR 471-030-0036(2) and did not limit the type of work search evidence that might be relevant to his ability to work. *Id.* at 13. The notice further cited OAR 471-030-0036(6)(a), which advised claimant that the term “labor market” did not refer to his prior field of employment, as he understood, but to the geographic area surrounding his permanent residence and the physical area in which he was expected to contact seek work. *Id.* at 14.

Had claimant adequately reviewed the statutes and regulations provided to him in the notice he would not have misunderstood the nature and scope of the work search information that he might be called upon to provide during the hearing. Since carefully reviewing the information contained in the notice was within claimant's reasonable control, he did not show as required by OAR 471-041-0090 (October 29, 2006) that factors or circumstances beyond his reasonable control prevented him from offering a comprehensive account of his work search efforts at the hearing. For this reason, EAB did not consider the new information that claimant sought to present by way of his written argument when reaching this decision.

FINDINGS OF FACT: (1) Sometime before May 5, 2016, claimant was injured while working as a bartender. Claimant sustained injuries to his neck, shoulders and middle back. When claimant sought medical treatment, he was advised not to perform heavy lifting and to avoid staying in one position for a lengthy period of time. Exhibit 1 at 1. Subsequently, claimant's employer let him go as a result of his injury.

(2) On November 14, 2016, a physician from whom claimant sought treatment completed a "disability slip" for claimant. The slip stated that claimant could perform modified work, with restrictions of no lifting over 15 pounds, no repetitive bending, pushing, pulling or reaching and no prolonged standing for periods exceeding two hours at a time. Exhibit 2 at 1. On November 29, 2016, the same physician completed a second "disability slip" for claimant with the same restrictions through December 29, 2016. Exhibit 2 at 2.

(3) On November 30, 2016, claimant filed an initial claim for unemployment insurance benefits. As part of the eligibility profile that was part of the application for benefits, claimant was asked if he was willing to work full-time or part-time. Claimant responded, "No" and further explained that he did not have a release from his doctor to work full-time. Audio at ~17:35. Another question in the profile asked claimant if there was any reason why he could not perform full-time work, to which he responded, "Yes" and stated that he had been "injured at work and re-injured by the doctor he was sent to." Audio at ~17:52. After applying for benefits, claimant sought work as a bartender and a server. Claimant claimed, but was not paid benefits for the weeks of November 27, 2016 through March 11, 2017 (weeks 48-16 through 10-17), the weeks at issue.¹

(4) On December 13, 2016, claimant's physician completed yet another "disability slip" for claimant. The physician stated that claimant was restricted from lifting over 25 pounds, that he should not engage in any repetitive bending, pulling or reaching and that he should not stand longer than two hours at a time. Exhibit 2 at 3. The restrictions were to be in effect until January 13, 2017. *Id.*

(5) On December 28, 2016, a Department representative called claimant to inquire into his ability to work. Claimant told the representative that he was restricted from lifting over 25 pounds and that he was restricted from standing for periods longer than two hours unless he was permitted to have a break of at least 15 minutes. Audio at ~18:16.

¹ We take notice of this fact, which is contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record at EAB.

(6) On January 25, 2017, the physician treating claimant completed another “disability slip” for claimant. The physician continued claimant’s restrictions of not lifting over 25 pounds and no repetitive bending, pulling, pushing or reaching and no standing for periods of more than two hours at a time. Exhibit 2 at 4. The restrictions were to be in place until February 24, 2017. *Id.* On February 24, 2017, the physician issued another “disability slip” for claimant. That disability slip restricted claimant from lifting more than 15 pounds overhead, or above his waist, from carrying more than 40 pounds, and from repetitive bending. Exhibit 2 at 5. The restrictions were to be in effect until March 24, 2017. *Id.*

CONCLUSIONS AND REASONS: Claimant was not able to perform the work that he sought during the weeks at issue and was 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). Because the Department did not pay claimant benefits during the weeks at issue, claimant has the burden to show by a preponderance of the evidence that he was able to work and otherwise eligible to receive benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

At hearing, claimant first took the position that the medical restrictions under which he could perform work did not render him unable to perform the work duties customarily required of a bartender. Claimant contended that the weight restrictions did not preclude him from bartending since he understood them to be only from overhead lifting, bartenders usually only “grabbed bottles” and it was “always easy” to find someone to assist if an item exceeded the weight that he as a bartender could readily lift. Audio at ~19:45. However, except for the final “disability slip” of February 24, 2017, the weight restrictions were not limited only to overhead lifting and it is unlikely that the physician would make the same error in neglecting to state that the restriction was only for overhead lifting in the four successive disability slips that were in effect from November 14, 2016 through February 23, 2017. Claimant did not meet his burden to show that the restrictions were less stringent than the plain language of the disability slips. As to the February 24, 2017 lifting limitation, it was changed to encompass only the lifting of more than 15 pounds above claimant’s waist and otherwise allowed claimant to lift up to 40 pounds, presumably not to an area that was above his waist. Claimant did not dispute that the consistent restriction that he not stand longer than two hours without having a 15 minute break was in effect throughout the weeks at issue, but he contended that employers of bartenders were customarily lenient in allowing bartender to have breaks as needed. Audio at ~24:47, ~25:12, ~26:12. Based on common knowledge, it does not appear as a matter of common sense that bartending work as it is customarily understood could be performed by a bartender who was not allowed to lift, push or pull more than 15 or 25 pounds, lift more than 15 pounds above his waist, or who was required to take a break of 15 minutes for every two hours worked without having a significant workplace accommodation in place. On this record, claimant did not show by preponderance of the evidence that he was able to perform the customary work duties of a bartender during the weeks at issue, or that employers generally would have considered him for bartending positions despite his physical limitations.

Late in the hearing, after claimant apparently realized that his ability to work as a bartender was seriously questioned by both the Department and the ALJ, claimant contended that he looked for work other than bartending during the weeks at issue that was within his physical capacities and his medical

restrictions. Audio at ~30:29. While claimant asserted he had also been seeking “desk work” in the technology field, the “office field” and the “service industry,” he did not specify where precisely he had inquired about such work, but argued at length that it was his understanding that the Department required him to seek work as a bartender. Audio at ~30:50. Claimant did not dispute that the only potential employers that he reported to the Department that he had contacted during the weeks at issue were for bartending positions, and stated that he did not have records of the non-bartending positions he had sought. Audio at ~32:20, ~32:36. Absent more specific evidence, claimant did not meet his burden to show that he actually sought non-bartending work that was within his physical abilities during the weeks at issue.

Claimant did not show that he was able to perform the work that he sought during the weeks at issue. Claimant is not eligible to receive benefits for those weeks.

DECISION: Hearing Decision 17-UI-79297 is affirmed.

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

DATE of Service: April 19, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.