

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0631

Affirmed
Ineligible Weeks 1-17 through 13-17

PROCEDURAL HISTORY: On February 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from January 1, 2017 to February 11, 2017, and ongoing until claimant proved himself eligible for benefits (decision # 110952). Claimant filed a timely request for hearing. On May 5, 2017, ALJ Snyder conducted a hearing, and on May 12, 2017 issued Hearing Decision 17-UI-83345, concluding claimant was not available for work from January 1, 2017 to April 1, 2017. On May 23, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) At all relevant times, claimant has been a senior citizen. His \$250 monthly Medicare premium was paid through the Department of Human Services. If claimant were to work more than 18 hours a week he would have to pay the Medicare premium himself.

(2) In approximately 2013 and 2014, claimant experienced ill health while working full time. He had between one and three minor heart attacks and contracted pneumonia. Claimant felt that he did not have good health and he needed to watch out for his health as he got older, particularly because he worked in physically challenging jobs. Claimant has neither asked for nor received any recommendations or restrictions from a physician based upon his physical or mental health.

(3) Claimant subsequently obtained a part time job at a pizza restaurant. Claimant worked 15 hours per week for approximately three years at a rate of \$9.50 per hour. Claimant's employer decided to increase all employees' hours, including claimant's, to full time. Claimant was separated from his employment because he did not want to work more than 15 hours per week.

(4) On January 6, 2017, claimant filed an initial claim for unemployment insurance benefits. Claimant filed weekly claims for benefits from January 1, 2017 to April 1, 2017 (weeks 1-17 to 13-17), the weeks at issue. The Department paid claimant benefits for weeks 1-17 through 6-17, and did not pay him for weeks 7-17 through 13-17.

(5) During the weeks at issue, claimant sought work as a fast food cook. He did not look for full time work and was not willing to accept a full time position if one was offered to him. Claimant was looking for part time work that would allow him to work until 12:00 p.m., and would not require him to work in the afternoons or evenings.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant was not available for work during the weeks at issue, and is therefore ineligible for unemployment insurance benefits.

To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed. ORS 657.155(1)(c). OAR 471-030-0036(3) (February 23, 2014) provides that an individual is considered available for work if, at a minimum, he is:

(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.

* * *

Claimant argued that he should not be required to be available for full time work, alleging he has an impairment under 29 CFR 1630.2(h). 29 CFR 1630.2(h) defines a permanent or long-term physical or mental impairment to include physiological disorders, conditions, cosmetic disfigurement, or anatomical loss affecting at least one body system, or a mental disorder. When asked to identify his impairment, however, claimant referred to heart attacks and pneumonia that occurred in 2014 or before, and did not identify any currently existing physiological or mental disorders that prevented him from working full

time or during particular shifts beyond his advancing age. Although there is no dispute as a matter of common sense that an individual's ability to work full time in a physically demanding job would be affected by his advancing age, aging is not considered as a permanent or long-term impairment under the referenced regulation and does not exempt claimant from the requirement that he be "available for work" full time as a condition of being eligible for unemployment.

Even if it was, claimant has not identified a particular age-related impairment, whether physiological or mental, that required him to limit his availability for work to only 15 or 18 hours a week as opposed to some other increment of time. That particular restriction on claimant's availability for work was, rather, financially motivated, as working additional hours would result in claimant being responsible for paying a \$250 premium in order to work for \$9.50 per hour, thus making 29 CFR 1630.2(h) inapplicable to that restriction on claimant's hours. Although claimant's decision to restrict his hours to avoid that financial impact appears likely to have benefitted him, the availability requirement as set forth in ORS 657.155(1)(c) and OAR 471-030-0036(3) does not excuse people from being available for work for such reasons. Nor can we identify anything in the record that connected his desire not to work after 12:00 p.m. with his health or aging concerns, beyond simply having a preference not to work in the afternoons and evenings.

On the record developed at hearing, neither the impairment exception nor any other exception to the requirement that claimant be "available for work" applies to claimant's situation. Claimant was therefore required to be available to work full time and all the usual hours customary for fast food work as a condition of being eligible for unemployment insurance benefits. By restricting his availability to part time work and restricting himself to working before noon, claimant demonstrated that he was both unwilling to work full time during all of the usual hours and days of the week customary for fast food work and imposed conditions which substantially reduced his opportunities to return to work at the earliest possible time.¹ Claimant was not available for work during the weeks at issue, and he is therefore ineligible for unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-83345 is affirmed.

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

DATE of Service: June 14, 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

¹ Although the record fails to identify the hours and days of the week customary for fast food work, it is a generally cognizable fact that fast food restaurants are usually open seven days a week for lunch and dinner, making it more likely than not that the usual hours and days of the week customary for fast food workers extends past noon every day of the week. Any party that objects to our taking notice of this generally cognizable fact must submit such objection to this office in writing, setting forth the basis of the objection in writing, 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.

'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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