

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0670

Reversed
Eligible

PROCEDURAL HISTORY: On January 24, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was able to work from December 4, 2016 through January 14, 2017 (weeks 49-16 through 02-17), and therefore allowed benefits on this claim if otherwise eligible (decision # 152619). The employer filed a timely request for hearing. On May 3, 2017, the Office of Administrative Hearings (OAH) served notice of the hearing on decision # 152619 scheduled for May 16, 2017. On May 16, 2017, ALJ Lohr conducted the hearing, and on May 24, 2017 issued Hearing Decision 17-UI-84128, concluding that claimant was able to work during weeks 49-16 through 02-17 and from January 15 through May 13, 2017 (weeks 03-17 through 19-17), but did not actively seek work during weeks 49-16 through 19-17, and therefore is ineligible for benefits for those weeks. On June 02, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument, but only to the extent it was based on information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

CONCLUSIONS AND REASONS: We conclude the ALJ erred in taking jurisdiction over claimant's eligibility for benefits for weeks 03-17 through 19-17, and her conclusion that claimant is ineligible for benefits for those weeks therefore is reversed. We agree with the ALJ that claimant was able to work during weeks 49-16 through 02-17. However, we disagree with the ALJ and conclude that claimant also was actively seeking work during weeks 49-16 through 02-17. Claimant therefore is eligible for benefits for those weeks.

Weeks 03-17 through 19-17. In his written argument, claimant disagreed with the ALJ taking jurisdiction over whether he is eligible for benefits for weeks 03-17 through 19-17, given that decision # 152619 only addressed his eligibility for benefits for weeks 49-16 through 02-17. We agree that the ALJ erred in taking jurisdiction over claimant's eligibility for benefits for those additional weeks.

The Department concluded in Decision # 152619 that claimant was able to work during weeks 49-16 through 02-17, and did not address whether claimant actively sought work during those weeks, or state that the decision was ongoing or applied to any additional weeks. Claimant then claimed benefits for weeks 03-17 through 19-17, and the Department paid him benefits for those weeks, but did not issue an administrative decision addressing whether claimant was eligible for benefits for those weeks. Transcript at 6. Although the May 3, 2017 Notice of Hearing stated that the issues to be considered at the hearing included whether claimant was able to work and actively seeking work, it did not notify claimant that those issues would be considered for weeks in addition to 49-16 through 02-17. Claimant therefore had no notice on the issue of whether he is eligible for benefits for weeks 03-17 through 19-17.

At hearing, the ALJ asked claimant whether he objected to her taking jurisdiction over his eligibility for benefits for weeks 03-17 through 19-17 without explaining to him that his work search was at issue, or the work search requirements set forth in ORS 657.155(1)(c) and OAR 471-030-0036(5)(a) (February 23, 2014). Audio Record at 5:30- 11:50; Transcript at 4- 9. Nor, after the Department's representative indicated that the Department was unlikely to issue an administrative decision regarding weeks 03-17 through 19-17,¹ did the ALJ explain to claimant that if he consented to the ALJ to taking jurisdiction over his eligibility for those weeks, he unnecessarily risked having the Department's initial determination to pay him benefits reversed, and having to repay the benefits under ORS 657.310 or ORS 657.315. Audio Record at 5:30- 11:50; Transcript at 4-9. The ALJ therefore did not adequately explain to claimant the implications of her taking jurisdiction over whether he is eligible for benefits for weeks 03-17 through 19-17, as required under ORS 657.270(3),² or the potential consequences of her doing so.

Despite that lack of information, claimant objected to the ALJ taking jurisdiction over his eligibility for benefits for weeks 03-17 through 19-17. Transcript at 9. The ALJ initially sustained claimant's objection, but then reversed her decision, overruled his objection, and took jurisdiction over his eligibility for those weeks. Transcript at 9-10; Hearing Decision 17-UI-84128 at 1. Although claimant responded by stating, "I have no objection to that just to make it easier on everyone else,"³ we interpret that statement as a mere acceptance of the ALJ's decision to take jurisdiction over his eligibility for benefits for weeks 03-17 through 19-17, and not an informed waiver of his right to notice on that issue, as required under OAR 471-040-0025(8) (August 1, 2004).⁴

¹ Transcript at 6, 11.

² ORS 657.270(3) provides, in relevant part, that where, as here, the claimant is not represented at the hearing, the administrative law judge shall explain the issues involved in the hearing and the matters that the unrepresented claimant must either prove or disprove.

³ Transcript at 12.

⁴ OAR 471-040-0025(8) state, in relevant part, that in no event shall the ALJ accept jurisdiction of a new issue and proceed with hearing on such issue when an interested party to such new issue has not waived right to notice.

We therefore conclude that the ALJ erred in taking jurisdiction over claimant's eligibility for benefits for weeks 03-17 through 19-17. Thus, to the extent Hearing Decision 17-UI-84128 concluded that claimant is not ineligible for benefits for those weeks, it is reversed. The remaining issues are whether claimant was able to work and actively seeking work during weeks 49-16 through 02-17, and therefore eligible for benefits for those weeks.

Able to Work. Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the conclusion that he was able to work during weeks 49-16 through 02-17 are **adopted**. The remaining issue is whether claimant was actively seeking work during weeks 49-16 through 02-17.

Actively Seeking Work. To be eligible to receive benefits, unemployed individuals must actively seek work during each week claimed. ORS 657.155(1)(c). For purposes of ORS 657.155(1)(c), an individual is actively seeking work when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity. OAR 471-030-0036(5)(a) (February 23, 2014). With few exceptions, none of which apply here, individuals are "required to conduct at least five work seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual." *Id.* Work seeking activities include but are not limited to registering for job placement services with the Employment Department, attending job placement meetings sponsored by the Employment Department, participating in a job club or networking group dedicated to job placement, updating a resume, reviewing the newspaper or job placement web sites without responding to a posted job opening, and making direct contact with an employer. OAR 471-030-0036(5)(a)(A). "Direct contact" means "making contact with an employer . . . to inquire about a job opening or applying for job openings in the manner required by the hiring employer." OAR 471-030-0036(5)(a)(B).

In Hearing Decision 17-UI-84128, the ALJ asserted that because the Department "allowed" claimant benefits for weeks 49-16 through 02-17, the Department had the burden to show claimant was eligible to receive benefits for those weeks.⁵ The ALJ further asserted that, according to the Department, claimant's work search records "show he did not provide sufficient information demonstrating that he contacted two employers directly each week to inquire about or apply for a specific job opening," and that "claimant's work search records consistently indicated that when making direct employer contacts, claimant was seeking 'any work' rather than responding to a job opening." The ALJ therefore found as fact that when claimant reported his work search activities to the Department, "he indicated each week that he was seeking 'any work' available," and "did not provide two direct contacts weekly showing he inquired about or applied for specific job openings."⁶ Based on that finding, the ALJ concluded that claimant was not actively seeking work during weeks 49-16 through 02-17, and therefore is ineligible for benefits for those weeks.

However, the ALJ erred in asserting that the Department had the burden to show claimant is eligible for benefits for weeks 49-16 through 02-17. Where, as here,⁷ the Department initially pays a claimant

⁵ Hearing Decision 17-UI-84128 at 2.

⁶ Hearing Decision 17-UI-84128 at 2.

⁷ Transcript at 6.

benefits and subsequently issues an administrative decision allowing those benefits, the Department, and in this case the employer, have the burden to show that the claimant is not entitled to those benefits. *See accord Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). At hearing, the employer asserted only that claimant was not able to work during weeks 49-16 through and 02-17 and not that he failed to actively seek work during those weeks, and presented no information showing that he failed to do so. The Department's representative never asserted that claimant did not actively seek work during 49-16 through 02-17, and testified that claimant reported two direct employer contacts during each of those weeks. Transcript at 16. Nor is the representative's testimony that claimant reported contacting the employers for "any"⁸ work sufficient to show that claimant did not contact them to inquire about a job opening or to apply for job openings in the manner required by the employers, as required under OAR 471-030-0036(5)(a). The record therefore fails to establish that claimant did not actively seek work during weeks 49-16 through 02-17, or that he is therefore ineligible for benefits for those weeks.

In sum, we conclude the ALJ erred in taking jurisdiction over whether claimant is eligible for benefits for weeks 03-17 through 19-17, and her conclusion that claimant is ineligible for benefits for those weeks therefore is reversed. We agree with the ALJ that claimant was able to work during weeks 49-16 through 02-17. However, we disagree with the ALJ and conclude that claimant also was actively seeking work during weeks 49-16 through 02-17. Claimant therefore is eligible for benefits for those weeks.

DECISION: Hearing Decision 17-UI-84128 is set aside, as outlined above.

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

DATE of Service: July 3, 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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⁸ Transcript at 15-16.