

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0698

Affirmed
Ineligible - Weeks 10-17 and 12-17 through 13-17

PROCEDURAL HISTORY: On April 4, 2017, the Oregon Employment Department (the Department) served notice of two administrative decisions, one (decision # 71212) concluding claimant did not actively seek work during the week including March 5 through March 11, 2017 (week 10-17) and the other (decision # 72313) concluding claimant did not actively seek work during the weeks including March 19 through April 1, 2017 (weeks 12-17 through 13-17). Claimant filed timely requests for hearing on both decisions. On April 27, 2017, the Office of Administrative Hearings (OAH) served notice of a consolidated hearing on both decisions scheduled for May 11, 2017. On May 11, 2017, ALJ Wyatt conducted a consolidated hearing, and on May 19, 2017, issued Hearing Decision 17-UI-83859, affirming decision # 71212, and Hearing Decision 17-UI-83854, affirming decision # 72313. On June 6, 2017, claimant filed applications for review of Hearing Decisions 17-UI-83859 and 17-UI-83854 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-83859 and 17-UI-83854. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0699 and 2017-EAB-0698, respectively). EAB considered the entire hearing record in reaching these decisions.

Claimant submitted a written argument to EAB that presented facts not offered into evidence during the hearing. Claimant did not explain why he was unable to present this information during the hearing, or otherwise show as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond his reasonable control prevented him from doing so. Accordingly, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) On March 9, 2017, claimant filed an initial claim for unemployment insurance benefits.

(2) Claimant claimed and received waiting week credit or was paid benefits for the period March 5 through March 11, 2017 (week 10-17) and March 19 through April 1, 2017 (weeks 12-17 through 13-17). These are the weeks at issue.

(3) When claimant claimed benefits for each of the weeks at issue, he checked a box certifying that he was on a temporary layoff with his regular employer and that he was returning to work within 28 days of his layoff date. When claiming benefits for week 10-17, claimant reported that he had been laid off on March 9 and was returning to full time work on April 20, 2017. When claiming benefits for weeks 12-17 and 13-17, claimant reported that he had been laid off on March 17 and was returning to full time work on April 21, 2017. Claimant reported no work searches for each of the weeks at issue other than remaining in contact his regular employer.

(4) During week 10-17, claimant's only work seeking activities were to remain in contact his regular employer. He also worked two 8-hour shifts for his regular employer.

(5) Claimant worked full time during week 11-17, was laid off on March 17, 2017 and was given a return to work date of April 21, 2017.

(6) During weeks 12-17 and 13-17, claimant's only work seeking activities were to remain in contact his regular employer.

(7) Claimant understood that if he was not returning to work within 28 days of his layoff date, to be eligible for benefits, he was required to perform work search activities other than contacting his regular employer.

CONCLUSIONS AND REASONS: We agree with the Department and ALJ. Claimant did not actively seek work during weeks including 10-17 and 12-17 through 13-17 and is ineligible for 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). 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 limited exceptions 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.* An individual who is on a temporary layoff for four weeks or less with the individual's regular employer and had, as of the layoff date, been given a date to return to work, is considered to have actively sought work by remaining in contact with and being capable of accepting and reporting for any suitable work with that employer for a period of up to four calendar weeks following the end of the week in which the layoff occurred. OAR 471-030-0036(5)(b)(A)(February 23, 2014).

The Department retroactively denied benefits for the weeks at issue after concluding claimant did not actively seek work during the weeks at issue. Where, as here, the Department initially gives waiting week credit or pays a claimant benefits for weeks claimed, the Department has the burden to establish by a preponderance of evidence that the claimant is not entitled to those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). The Department met its burden for the following reasons.

It is undisputed that when claimant filed each of his weekly claims, he certified to the Department that he was on “temporary layoff” and had been given a date to return to full-time work within 28 days of his layoff date. Claimant initially reported to the Department that he was laid off on March 9, 2017 and given a return to work date of April 20, 2017. Audio Record ~ 15:30 to 18:00. At hearing, claimant testified that he was not laid off until March 17, 2017 and at that time was given a return to full time work date of April 21, 2017. Audio Record ~ 21:00 to 23:00. March 9 through April 20 is 42 days, and March 17 through April 21 is 35 days. Because claimant had not been given a date to return to full time work that was within 28 days of his lay off date, claimant did not qualify for the modified work search requirements permitted for an individual on a temporary layoff under OAR 471-030-0036(5)(b)(A). Therefore, to be eligible for benefits, he was required to seek work by performing at least five work-seeking activities per week, with at least two of those work seeking activities being direct contact with an employer which might hire him. At hearing, claimant admitted that during the weeks at issue he did not perform any work seeking activities other than contacting his regular employer because he believed that with a “hard” return to work date of April 21, 2017, he did not have to. Audio Record ~ 32:50 to 34:25.

Because claimant failed to engage in the required number and nature of work search activities during the weeks at issue, claimant did not actively seek work during any of those weeks. Claimant is therefore ineligible for benefits for weeks 10-17 and 12-17 through 13-17.

DECISION: Hearing Decisions 17-UI-83854 and 17-UI-83859 are affirmed.

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

DATE of Service: June 30, 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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