

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0766

Affirmed
Ineligible Weeks 14-17 to 17-17

PROCEDURAL HISTORY: On May 5, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from April 2, 2017 to April 29, 2017 (decision # 152031). Claimant filed a timely request for hearing. On June 7, 2017, ALJ Amesbury conducted a hearing, and on June 9, 2017 issued Hearing Decision 17-UI-85323, affirming the Department's decision. On June 22, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

In her written argument, claimant alleged that the ALJ failed to perform his duty to inquire into what the customary days and hours for pharmacists were in claimant's labor market and asked that the ALJ's decision be reversed on that basis. A failure to inquire such as that claimant identified would, at most, justify a remand for additional evidence, and would not support a finding that claimant was eligible for benefits. That is particularly true where, as here, the Department did not pay benefits to claimant and claimant therefore has the burden to prove that benefits should have been paid. *See e.g. Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (where benefits were paid and the Department seeks to reverse that decision the Department has the burden to prove benefits should not have been paid; by extension of that principal, where the Department has initially denied benefits, claimant has the burden to prove that benefits should have been paid).

We agree with claimant that the ALJ's inquiry into what the customary days and hours were for pharmacists in claimant's labor market was brief, and it would have been preferable had the ALJ conducted a fuller inquiry. The ALJ's scant inquiry was not error, though. There is nothing in this record that refutes or suggests that the Department's witness's testimony was inaccurate or unreliable, nor is there evidence suggesting that the Department's employee was not competent to testify about the basis upon which the Department denied claimant benefits. Although the ALJ gave claimant the

opportunity to question the Department's witness, questioned her about the hours she was available for work, and gave her the opportunity to provide additional information, and considering that claimant was a lay witness without representation, the record still shows that claimant never suggested or implied that she thought the customary days and hours for pharmacists were different than what the Department claimed they were or that she disagreed with the Department about that fact. Given that there is seemingly no dispute about the Department's evidence on this matter, or suggestion that contradictory evidence existed, we conclude that the ALJ did not err in failing to expand his inquiry. Also notable is that claimant's argument did not include an offer of proof explaining what claimant might have said about the customary days and hours pharmacists in her labor market work had the ALJ asked her to do so, much less that she had information that might have changed the outcome of this matter.

Even if we had concluded that the ALJ erred, it appears on this record that the error would have been harmless and would not require remand. Assuming *arguendo* that the customary days and hours for pharmacists in claimant's labor market were confined only to the one shift of work she was most available for – the day shift – and based solely on claimant's testimony about the days and hours she was actually available for work during the weeks at issue, she was free to work a maximum of 38 hours in any given week, which is less than full time work. The Department's rules generally require individuals to be available for "full time work." Given that claimant was not available for full time work, in our view there are no circumstances under which claimant might have established she was available for work based on whatever evidence she might have provided showing that pharmacists in her labor market did not customarily work all days and hours.

FINDINGS OF FACT: (1) On March 29, 2017, claimant filed an initial claim for unemployment insurance benefits. She filed weekly claims for benefits for the weeks of April 2, 2017 to April 29, 2017 weeks 14-17 to 17-17), the weeks at issue.¹ The Department did not pay claimant benefits for any of the weeks at issue.

(2) Claimant sought work as a pharmacist. Her labor market included the Portland Metro area. In claimant's labor market the customary days and hours for pharmacists included all days and all shifts.

(3) At all relevant times, claimant was the single parent of two minor children. During the weeks at issue, claimant had childcare arranged for Mondays through Thursdays during the day shift, and Fridays during the day shift until 2:00 p.m. She did not have childcare for the swing or graveyard shifts, weekends, or Fridays after 2:00 p.m. Claimant had tried to work swing shift when she had one child and found it too difficult; she decided not to attempt to do so again when she had two children. Claimant considered it too difficult to work the graveyard shift because she would need childcare while she was at

¹ During the June 7, 2017 hearing, the Department's witness stated that the Department denied benefits to claimant for weeks including April 30, 2017 through June 3, 2017 for the same reasons identified in decision # 152031, and asked the ALJ to take jurisdiction over those weeks. Claimant did not object and the ALJ agreed to do so, but ultimately the ALJ's decision did not cover the additional weeks, apparently because the Department's decision in this matter was not an open-ended denial of benefits and was instead confined to the weeks of April 2, 2017 to April 29, 2017. Despite the parties' agreement to extend the weeks at issue through June 3, 2017, the ALJ appropriately confined his decision to the weeks of April 2, 2017 to April 29, 2017, and we have done the same.

work and while she slept during the day, and thought she would not be able to spend enough time with her children if she had to sleep during the day.²

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant was not available for work during the weeks at issue.

ORS 657.155(1)(c) requires that individuals be available for work during each week claimed as a condition of being eligible to receive unemployment insurance benefits. OAR 471-030-0036(3) provides, in pertinent part, that an individual is considered “available for work” if she is willing to work “during all of the usual hours and days of the week customary for the work being sought.”

The hours and days of the week customary for the work claimant sought included all days and all hours. Claimant testified, however, that she was only willing to work on Mondays through Thursdays during the day shift and Fridays during the day shift until 2:00 p.m. Because the usual hours and days of the week customary for pharmacists in claimant’s labor market included Mondays through Thursdays during the swing and graveyard shift, Fridays after 2:00 p.m. and Saturdays and Sundays, and claimant was not willing to work those days and hours, she was not “available for work.”

OAR 471-030-0036(4) excuses individuals with children under 13 years of age from having to be available for all of the customary days and hours for the work being sought, but only under certain conditions, including that the individual confines her unavailability to “a particular shift,” the work is performed during other shifts, and claimant is willing to and capable of working during such shifts. The exception does not apply to claimant’s circumstances. Claimant did not confine her unavailability to work to just one particular shift, she was unwilling to work two shifts, swing and graveyard, unwilling to work a part of the day shift on Fridays, and unwilling to work the day shift on weekends, as well.

For those reasons, we conclude that claimant was not available to work from April 2, 2017 to April 29, 2017. She is, therefore, not eligible to receive unemployment insurance benefits during those weeks.

DECISION: Hearing Decision 17-UI-85323 is affirmed.

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

DATE of Service: July 18, 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.

² Claimant also testified that she was not willing to work Tuesdays and Fridays from 7:00 p.m. to 9:00 p.m., or all day every Sunday, because she had church obligations at those times. Because we have determined claimant’s eligibility on other grounds, we need not and do not address the effect her church obligations might have had on her eligibility for benefits, nor was the ALJ’s failure to inquire about the nature of claimant’s church obligations grounds for remand.

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