

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0822**

*Affirmed*  
*Ineligible*

**PROCEDURAL HISTORY:** On May 11, 2017, the Oregon Employment Department (the Department) served notice of administrative decision # 94746, concluding that claimant was not able and available for work from April 9 through May 6, 2017, and therefore denied benefits for that period and until the reason for the denial had ended. Claimant filed a timely request for hearing. On June 21, 2017, ALJ Frank conducted a hearing, and on June 23, 2017 issued Hearing Decision 17-UI-86454, concluding that claimant was not able to work from April 9 through 29 and May 14 through June 17, 2017, and not available for work from May 14 through June 17, 2017, and therefore is ineligible for benefits for those two periods. On July 10, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

On July 20, 2017, EAB received a timely written argument from claimant. However, claimant failed to certify that she provided a copy of her argument to the employer as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). EAB therefore did not consider claimant's written argument, and considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) Claimant claimed benefits for the weeks from April 9 through 29 and May 14 through June 17, 2017 (weeks 15-17 through 17-17 and 20-17 through 24-17), the weeks at issue. The Department did not give claimant waiting week credit or pay her benefits for any of those weeks.

(2) Claimant worked for the employer as a certified nursing assistant (CNA). During weeks prior to April 3, 2017, she worked for the employer on light duty due to a shoulder injury. On April 3, 2017, claimant's doctor informed the employer that claimant was physically unable to continue working for the employer on light duty, and was restricted from all work.

(3) Claimant did not work for the employer during week 15-17.

(4) With respect to week 16-17, claimant returned to light duty work for the employer on April 18, 2017, but was further restricted by her doctor to lifting, carrying, pushing and pulling 1 to 10 pounds, and only with her uninjured shoulder. Claimant did not work for the employer on April 19 or 20, 2017. On April 21, 2017, claimant's doctor again informed the employer that claimant was unable to continue working for the employer on light duty, and was restricted from all work.

(5) Claimant did not work for the employer during week 17-17.

(6) On May 2, 2017, claimant again returned to work for the employer with the same work restrictions, and worked for the employer through May 10, 2017. Claimant did not work for the employer on May 11 or 12, 2017. On May 13, 2017, claimant informed the employer that she was unavailable for work until May 15, 2017 or later.

(7) With respect to week 20-17, on May 15, 2017, claimant's doctor informed the employer that claimant was unable to work for the employer until June 5, 2017. Claimant nevertheless returned to work on May 17, 2017, but did not return to work for the employer after that date.

(8) Claimant did not work for the employer during weeks 21-17 through 23-17.

(9) With respect to week 24-17, on June 15, 2017, claimant's doctor released her to work without restrictions. Claimant did not return to work for the employer because the employer would not switch her from working swing shift to working day shift.

(10) During the weeks at issue, claimant primarily sought work as a CNA, although she also sought work as a store clerk, advocate, receptionist, server, and in protective and human services.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant failed to establish her eligibility for benefits for the weeks at issue.

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). Where, as here, the Department did not give a claimant waiting week or pay her benefits for the weeks at issue, the claimant has the burden to establish her eligibility for benefits for those weeks by a preponderance of evidence. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). In this case, claimant failed to meet that burden.

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). And individual is not considered available for work if the individual is imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time. OAR 471-030-0036(3)(c). An individual prevented from working full time or during particular shifts due to a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h)<sup>1</sup> shall not be deemed unable to work or unavailable for work solely on

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<sup>1</sup> 29 C.F.R. §1630.2(h) defines "physical or mental impairment" as:

that basis so long as the individual remains available for some work. OAR 471-030-0036(2)(b), OAR 471-030-0036(3)(e).

At hearing, claimant argued that she was able to perform the work she actually sought during the weeks at issue, and that she was able to perform the light duty work for the employer but essentially did not do so because of the possibility that one of the employer's residents might reinjure her shoulder. Audio Record at 26:45-29:15. During all the weeks at issue, however, claimant's doctor either restricted her from all work or to light duty that required her to lift, carry, push and pull no more than 10 pounds, and only with her uninjured shoulder. Claimant failed to show that she was physically capable of performing any of the work she actually sought during the weeks at issue with such limited use of only one arm, much less when she was restricted from all work. And to the extent, if any, claimant was able to perform light duty work for the employer during the weeks at issue but chose not to do so, she imposed a condition which substantially reduced her opportunities to return to work at the earliest possible time. Finally, even if claimant's shoulder injury constituted a "long-term" physical impairment, she failed to show that it only prevented her from working full time or during particular shifts.

Claimant therefore failed to establish that he was able to work and actively seeking work during the weeks at issue. She therefore is not eligible for benefits for those weeks.

**DECISION:** Hearing Decision 17-UI-86454 is affirmed.

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

**DATE of Service:** August 8, 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](http://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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(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.