

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0896

Reversed & Remanded

PROCEDURAL HISTORY: On May 31, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work from April 23, 2017 to May 27, 2017 (decision # 143923). Claimant filed a timely request for hearing. On July 14, 2017, ALJ Shoemake conducted a hearing and issued Hearing Decision 17-UI-88058, concluding claimant was not able to work from April 23, 2017 to June 17, 2017. On July 24, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-88058 is reversed, and this matter remanded.

To be eligible to receive benefits, unemployed individuals must be able to work during each week claimed. ORS 657.155(1)(c). 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).¹ Where, as here, the Department had not paid claimant benefits, claimant has the burden to prove that benefits should have been paid.²

The ALJ found as fact that claimant, an engineer, was diagnosed with irritant induced asthma and his doctor said he “can’t fix me.” Hearing Decision 17-UI-88058 at 1. The ALJ further found as fact that claimant has been “on and off medical leave,” could not resume his regular job when released with restrictions at the end of April 2017 because he could not work in specific departments for his regular

¹ The “exceptions” to the able requirement do not apply in this case because claimant did not show or suggest that he was or should be considered “[a]n individual occasionally and temporarily disabled for less than half of the week” or, although he had a permanent or physical impairment, that he was “prevented from working full time or during particular shifts” because of the impairment. See OAR 471-030-0036(2).

² See accord *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (where the Department has paid benefits, the Department has the burden to establish benefits should not have been paid; extrapolating from that premise, where benefits have not been paid, the burden lies with claimant to establish that the Department should have paid benefits to him).

employer and could not work around chemicals, and that he was “seeking work for which he does not have experience . . . [and] has not been able to physically perform for his regular employer due to his medical condition.” *Id.* at 2. The ALJ concluded that claimant was not able to work because while he “has the desire to work, he has not shown that he is physically able to perform the work that he is seeking or any other type of work that he could perform within his medical restriction.” *Id.* at 3. We disagree that the record supports the ALJ’s conclusion and conclude that additional evidence is required.

The question in this case is whether claimant was physically capable of performing the engineering work he was actually seeking during the week. On remand the ALJ should ask claimant specifically what engineering jobs he sought, for which employers, what the jobs were, what types of engineering jobs those were, and why he thought he was physically capable of performing those types of work given his restrictions and inability to find a job placement at his regular place of employment. The ALJ should ask claimant what the minimum qualifications were for the engineering work he sought and whether it did or did not involve exposure to chemicals. Claimant was an experienced engineer. The ALJ should ask claimant whether, in his experience, employers hired individuals with restrictions like his. The ALJ should also ask whether, in his experience, employers customarily offered light- or modified-duty engineering work. The ALJ should ask claimant whether there were any accommodations he could use to perform that work, such as a protective mask to prevent exposure to chemicals or other irritants, whether or not he consulted with a doctor about the types of work he could or should seek or perform in consideration of his health issues, or whether he consulted with vocational rehabilitation workers about the types of work he should seek or would be qualified and able to perform given his condition and, if so, what those workers advised him.

With respect to the management positions claimant sought, the ALJ should ask claimant to specify what jobs he applied for, with what employers, what the minimum qualifications were for those jobs, whether the minimum qualifications included management experience that he lacked or whether he applied for entry-level management jobs that did not require management experience, and why claimant thought he qualified for the positions he sought, or the types of management work he sought. The ALJ should also inquire with the parties as to whether or not claimant was physically and mentally capable of performing the types of management jobs for which he applied.

With respect to working as a cook, the ALJ should inquire further as to why claimant thought he was physically capable of performing work as a cook given the exposure to gas flames and possibly other chemicals. The ALJ should ask if claimant spoke with his physician about doing those sorts of work, or whether there were any accommodations he could use that would allow him to perform that work, such as a protective mask. The evidence at the first hearing raised a question about whether claimant was willing to accept work that paid what the cook jobs he sought paid; the evidence also suggested that claimant was not an experienced professional cook and would likely therefore qualify only for entry-level work. On remand, the ALJ should ask claimant what cook jobs he applied for, and what the cook jobs he sought paid. The ALJ should ask if he was willing to accept any of the cook jobs he sought or applied for given the pay rates for those jobs. If claimant was not, the ALJ should ask claimant why he applied for jobs that paid so little that he was not willing to accept them if he was offered the jobs.

Finally, the ALJ should ask the Department whether it directed claimant to “step down” his job search by searching for jobs that paid less or were of a different sort than that which he had previously applied, given his inability to work around chemicals, or that paid less than he had previously earned as an

engineer. The ALJ should also ask the Department whether claimant was, at any point, directed to seek any particular type of work.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant was able to work, Hearing Decision 17-UI-88058 is reversed, and this matter is remanded for further development of the record.

DECISION: Hearing Decision 17-UI-88058 is set aside, and this matter remanded for further proceedings consistent with this order.³

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

DATE of Service: August 22, 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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³ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-88058 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.