

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0969

Affirmed
Ineligible Weeks 18-17 through 23-17

PROCEDURAL HISTORY: On June 6, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 92646) concluding that claimant was not available for work from April 30 through June 3, 2017. Claimant filed a timely request for hearing. On June 15, 2017, the Office of Administrative Hearings issued notice of a hearing scheduled for June 29, 2017. On June 29, 2017, ALJ Wyatt issued Hearing Decision 17-UI-86964, dismissing claimant's hearing request for failure to appear at the hearing. Claimant filed a timely request to reopen. On July 25, 2017, ALJ M. Davis conducted a hearing, and on July 26, 2017, issued Hearing Decision 17-UI-88911, granting claimant's request to reopen and concluding that claimant was not available for work from April 30 through June 10, 2017 (weeks 18-17 through 23-17). On August 14, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

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 claimant established good cause for reopening her hearing are **adopted**.

FINDINGS OF FACT: (1) On April 16, 2017, claimant injured her foot. She was told that she needed to have surgery on her foot, which was scheduled for May 31, 2017. From April 17 until May 31, 2017, her foot injury prevented her from standing for more than two to three hours per day.

(2) On May 2, 2017, claimant filed an initial claim for benefits. Claimant claimed benefits for the period April 30 through June 10, 2017 (weeks 18-17 through 23-17), the weeks at issue. Claimant was not paid benefits for the weeks at issue.

(3) On May 31, 2017, claimant had foot surgery. After the surgery, the doctor restricted her to part time work until June 29, 2017, when she was released for full time work.

(4) During the weeks at issue, claimant sought work as a cook; this is her customary occupation. Work as a cook is performed all days, all shifts, and requires that the person stand up to work.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that claimant was not available for work during weeks 18-17 through 23-17.

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). An individual must meet certain minimum requirements to be considered “available for work” for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (February 23, 2014). Among those requirements are that the individual be willing to work and capable of reporting to full time, part time and temporary work opportunities throughout the labor market, and refrain from imposing conditions that limit the individual’s opportunities to return to work at the earliest possible time. *Id.* Where, as here, the Department initially denies a claimant benefits for weeks claimed, the claimant has the burden to establish by a preponderance of evidence that the claimant is eligible for those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

From April 16 through May 30, 2017, claimant was unable to stand for more than two to three hours per day. As a result, she was not capable of reporting to full time work opportunities as a cook, the work she was seeking, because she could not stand for an entire shift. After her May 31, 2017 foot surgery, claimant was restricted to part time work until the doctor released her to work full time on June 29, 2017. Because claimant was incapable of reporting to all work opportunities in her labor market during the weeks 18-17 through 23-17 (April 30 through June 10, 2017), the weeks at issue, claimant was not available for work during these weeks.¹ Claimant is therefore ineligible to receive benefits for the weeks at issue.

DECISION: Hearing Decision 17-UI-88911 is affirmed.

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

DATE of Service: August 31, 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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¹ OAR 471-030-0036(3)(e) (February 23, 2014) provides that an individual “with a permanent or long-term physical or mental impairment (as defined at 29 CFR 1630.2(h)) which prevents the individual from working full time or during particular shifts shall not be deemed unavailable for work solely on that basis so long as the individual remains available for some work.” Because claimant’s injury, which was resolved after an operation and a period of part time work, was not a permanent or long-term physical impairment, this rule is inapplicable.