

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1078

Affirmed
Ineligible

PROCEDURAL HISTORY: On July 28, 2017, the Oregon Employment Department (the Department) served two notices of administrative decisions, the first concluding that claimant voluntarily left work without good cause (decision # 81316), and the second concluding claimant was not able to work from July 9 through 15, 2017 (decision # 84444). Claimant filed timely requests for hearings on both decisions. On August 29, 2017 ALJ Meerdink conducted hearings, and on August 30, 2017 issued Hearing Decision 17-UI-91472, reversing decision # 81316, and Hearing Decision 17-UI-91474, concluding that claimant was not able to work from July 9 through 15 and July 23 through August 19, 2017. On September 8, 2017, claimant filed an application for review of Hearing Decision 17-UI-91474 with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he offered information that he did not present during the hearing. Claimant did not explain why he was not able to offer that information at the hearing or otherwise show that factors or circumstances beyond his reasonable control prevented him from doing so as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider the information that claimant sought to present by way of his written argument when reaching this decision.

FINDINGS OF FACT: (1) As of April 2016, Organically Grown employed claimant as a warehouse worker. In April 2016, claimant sustained an injury to his neck and lower back while at work. Although claimant's physician released him to regular duty work on May 2, 2017, claimant was able to work only sporadically after that date because of continuing symptoms from the injury. On July 3, 2017, claimant accepted a workers compensation settlement due to the injury and resigned from employment. Claimant resigned because he was unable to perform his regular job duties as a warehouse worker.

(2) On July 10, 2017, claimant filed an initial claim for unemployment insurance benefits. That claim was determined valid. Claimant claimed, but was not paid benefits for the weeks of July 9 through 15

and July 23 through August 19, 2017 (weeks 28-19 and weeks 30-17 through 33-17), the weeks at issue.¹

(3) During the weeks at issue, claimant sought work principally performing physical labor. For week 28-17, claimant reported to the Department that he had sought assembly work and work as a gas station attendant. For week 30-17, claimant reported that he sought work as a general laborer and as a nursery worker. For week 31-17, claimant reported that he sought work as a general laborer. For week 32-17, claimant reported that he sought general labor work at Les Schwab and Home Depot. For week 33-17, claimant reported that he sought general labor work at Jiffy Lube and Charlie's Produce.

(4) During the weeks at issue, claimant "did not feel well" and had not felt "good since [he sustained the April 2016 injury]." Transcript at 11, 12. Claimant went to a gym and engaged in various forms of exercise to try to improve the condition of his back and neck. However, claimant observed that "sometimes my back still hurts and hurts so bad that it's like somebody is just hitting me with some nails in my back." Transcript at 14.

(5) During the weeks at issue, claimant was not able to perform the type of physical work he had done for Organically Grown. Transcript at 11. Claimant did not know what type of work he should look for or was able to perform during the weeks at issue, but was aware he had to include some form of job searches in his weekly claim reports. Claimant did not know whether he was physically able to perform the jobs he listed on his weekly claim reports. Transcript at 12, 13. During the weeks at issue, claimant went to his local WorkSource Center for advice about the types of work to seek given his physical condition. While a representative at the WorkSource Center suggested claimant might seek work as a guard, claimant did not think he was physically able to perform the walking that such a job would require. Transcript at 12.

CONCLUSIONS AND REASONS: Claimant was not able to perform the type of work he sought during the weeks at issue and was not eligible to receive 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). 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). By logical extension of the holding in *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976), a claimant who did not receive benefits during the weeks for which his eligibility is at issue, has the burden to show that he was eligible to receive those benefits. Here, since claimant did not receive benefits during the weeks at issue, he must show by a preponderance of the evidence that he was able to work during those weeks and therefore was eligible to receive those benefits.

As of the July dates that claimant left his job with Organically Grown and filed his claim for benefits, claimant was not sufficiently recovered from his back injury to allow him to perform the regular duties of his warehouse job for Organically Grown. From claimant's unguarded description of the condition of

¹ We take notice of the fact that benefits were not paid to claimant, which is contained in Employment Department records. Any party who objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record at EAB.

his back during the weeks at issue, especially his testimony that his back sometimes hurt like someone was pounding nails into it, it also does not appear that he would have been able to reliably perform the manual labor jobs he was seeking during the weeks at issue. While claimant expressed that he was not certain of his physical ability to perform when the ALJ asked claimant directly if he could perform the work he sought during the weeks at issue, a tentative answer such as that was insufficient to meet his burden, particularly in light of the manner in which he described the condition of his back in other portions of his testimony. On this record, claimant did not meet his burden to show that he was able to work during the weeks at issue.

Claimant was not able to work during the weeks at issue. He is not eligible to receive benefits for those weeks.

DECISION: Hearing Decision 17-UI-91474 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: October 9, 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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