

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1141

Affirmed
Ineligible

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 during the weeks of April 23, 2017 through May 27, 2017 (decision # 143923). Claimant filed a timely request for hearing. On July 14, 2015, ALJ Shoemake conducted a hearing at which the employer did not appear, and issued Hearing Decision 17-UI-88058, affirming the Department's decision. On July 24, 2017, claimant filed an application for review with the Employment Appeals Board (EAB). On August 22, 2017, the Employment Appeals Board (EAB) issued Appeals Board Decision 2017-EAB-0896, reversing Hearing Decision 17-UI-88058 and remanding this matter for further development of the record. On September 15, 2017, ALJ Shoemake conducted a hearing at which the employer again did not appear and on September 19, 2017 issued Hearing Decision 17-UI-92843, again affirming the Department's decision. On September 22, 2017, claimant filed an application for review of Hearing Decision 17-UI-92843 with EAB.

Claimant submitted a written argument in which he objected to the ALJ's refusal to admit into evidence certain documents that claimant offered in addition to his medical records and his resume which were admitted as Exhibit 1. The excluded documents included records relating to proceedings involving claimant before the Workers' Compensation Board, correspondence to claimant from the Department of Consumer and Business Services regarding complaints claimant had filed, correspondence to claimant from Intel regarding the denial of a short-term disability claim, court papers regarding a custody, parenting time and child support matter involving claimant and the mother of his children, papers from the Department of Justice regarding the collection of past due child support from claimant, correspondence from the Department of Human Services regarding claimant's request for records, and copies of certain past due utility and other accounts held in claimant's name. While the excluded documents addressed claimant's efforts to obtain financial assistance and income replacements and claimant's financial obligations during the weeks at issue, those matters are not relevant or material to the issues of whether claimant was able, available or actively seeking work during the weeks at issue. The ALJ did not err in refusing to admit them into evidence.

FINDINGS OF FACT: (1) Claimant had an associate of technical arts degree in electronics technology. From 1997 until 2017, claimant was employed in the semi-conductor industry. The positions that claimant held progressed through entry-level production technician, various levels of equipment maintenance technician, equipment maintenance specialist and equipment engineering technician. In claimant's last position, he earned around \$38.50 per hour. Claimant did not have a bachelor's degree.

(2) As of September 2016, Intel Corporation employed claimant as an equipment engineering technician working in the semi-conductor field. Sometime before or around this time, claimant was on-site at Intel and responded to an incident in which a tool set exploded. As a presumed result of claimant's exposure to chemicals or chemical fumes during this incident, chronic respiratory symptoms that claimant had previously experienced were severely exacerbated and did not abate. On September 16, 2016, Intel authorized a medical leave for claimant because his respiratory condition did not allow him to work. Sometime later, claimant's medical leave was continued as an unpaid leave under the Americans with Disabilities Act (ADA). Claimant never returned to work at Intel.

(3) On December 13, 2016, a pulmonologist treating claimant completed an attending provider statement. The physician diagnosed claimant with "breathing difficulty" and "irritant induced asthma." Exhibit 1 at 1. The pulmonologist certified that claimant was totally unable to work from "now through 99 yrs." *Id.* Around this time, the pulmonologist told claimant that he "was never working again" and that the pulmonologist "could not fix [claimant]." Audio of July 14, 2017 Hearing (Audio 1) at ~16:12; Audio of September 15, 2017 Hearing (Audio 2) at ~26:25. Claimant believed that the source of this exacerbation of his chronic respiratory symptoms had been exposure to chemicals in the Intel workplace from the tool set explosion.

(4) On March 14, 2017, the pulmonologist notified claimant by letter of the results of his "extensive workup of [claimant's] respiratory condition." Exhibit 1 at 3. The pulmonologist stated his opinion that claimant's current respiratory condition was likely caused by "some type of chemical exposure," but that the "culprit" or the chemical(s) to which claimant had adversely reacted were unknown. *Id.* On April 18, 2017, the pulmonologist completed a second attending provider statement. In that document, the pulmonologist diagnosed claimant with "possible RADS" or reactive airways dysfunction, certified that claimant remained totally unable to work and stated that was "unclear" when or if claimant would ever be able to return to work. Exhibit 1 at 2. The pulmonologist further stated that if claimant returned to work he would be "unable to be exposed to agents that cause exacerbations." *Id.*

(5) On April 24, 2017, claimant filed an initial claim for unemployment benefits. On April 26, 2017, claimant's pulmonologist completed an ADA accommodation request certification that claimant understood was a release for him to return to work. Exhibit 1 at 4-9. In the certification, the pulmonologist noted that claimant developed malaise, a cough, chest tightening and severe chest pain when exposed to chemical irritants. Exhibit 1 at 5, 9. As accommodations, the pulmonologist stated that claimant needed to work in a "clean room with all dust and fumes exhausted out." Exhibit 1 at 6. In connection with claimant's return to work, the pulmonologist stated that it "was unclear[.] [I]f the above [accommodation] is done perhaps he can work," "evidently he can continue to work," and it was "difficult to address to what extent these changes [the accommodations] will help." Exhibit 1 at 7, 8. In a statement appended to the certification, the pulmonologist emphasized that claimant appeared to be "exquisitely sensitive" to a number of different inhaled agents that might include "fumes, smoke,

perfumes, dust or chemicals” and if he was exposed to the irritants to which he was sensitive, claimant might be unable to perform work activities. Exhibit 1 at 9. The pulmonologist concluded that, if claimant’s respiratory symptoms were due various inhaled agents, steps needed to be taken to prevent inhalation if claimant was to be able to work.

(6) Claimant claimed, but was not paid benefits for the weeks of April 23, 2017 through June 17, 2017 (weeks 17-17 through 24-17), the weeks at issue.¹ During week 17-17, claimant sought work as a cook. During others of the weeks at issue, claimant sought work as an engineer or a manager at Intel and two other businesses in the semi-conductor industry. Before claimant began seeking work, he consulted with his workers’ compensation attorney. That attorney advised claimant not to accept any work that paid less than what he had earned at Intel, \$38.50 per hour.

(7) Sometime shortly after April 23, 2017, when claimant filed his claim for benefits, a Department representative contacted claimant to discuss the types of work he was going to seek in light of his medical condition. After claimant mentioned to the representative that he did not think he would accept work that paid less than \$38.50 per hour, the representative told claimant that entry level work as a cook paid far less than \$38.50 per hour. Based on the representative’s comments, claimant decided that “going forward” he would not again seek “low level” or entry level work as a cook because of the low rate of pay. Audio 2 at ~34:55.

(8) As to the jobs that claimant was seeking during the weeks at issue, claimant did not have experience working in a professional kitchen. His only cooking experience was preparing home-cooked meals for himself and his children. Claimant had no work experience as a manager and all of the management positions he applied for during the weeks at issue, at Intel and one other semi-conductor business, required that applicants have prior management experience and hold a bachelor’s degree, which claimant also did not have. Audio 1 at ~18:18, ~25:00; Audio 2 at ~18:22, ~18:58. Claimant thought that his experience working as a technician on teams that were frequently self-managed was an adequate substitute for formal management experience. Audio 1 at ~19:40; Audio 2 at ~19:50, ~25:00. Claimant had never previously worked as an engineer *per se* because he did not have a bachelor’s degree in engineering. The entry level engineering jobs that claimant applied for during the weeks at issue, at Intel and two other semi-conductor businesses, required experience in working as an engineer and at least holding a bachelor’s degree in engineering. Audio 1 at ~18:55. Although representatives of potential employers told claimant he did not qualify for engineer positions in view of his lack of a degree and engineering experience, claimant thought that his experience working as a technician for many years on teams performing aspects of work related to semi-conductor engineering was an adequate qualification for entry level engineer positions. Audio at ~18:55, ~19:50. Although claimant was seeking management and engineering positions in the semi-conductor field, his respiratory symptoms had arisen in a semi-conductor facility and he did not think a mask would effectively prevent him from inhaling the irritants present in semi-conductor facility, he thought that he would avoid exposure to irritants if he found positions that would allow him to work remotely rather than on the premises of a facility, or if they did not involve working around chemicals. Audio 1 at ~20:59, ~21:48; Audio 2 at ~15:18, ~16:46, ~18:48. During the weeks at issue, among the engineering and management jobs he

¹ We take notice of the fact that claimant was not paid benefits during the weeks at issue, which is contained in Employment Department records. Any party that 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.

looked into, claimant was unable find any that would not potentially expose him to chemicals. Audio 2 at ~14:30.

(9) During the weeks at issue, Intel was unable to find a position for which claimant was qualified and which met the restrictions set out in the pulmonologist's ADA accommodation request certification, including principally that claimant avoid exposure to chemicals and irritants. On June 13 or June 14, 2017, Intel returned claimant to its payroll. Thereafter, Intel still was not able to find work for claimant for which he was qualified and which met claimant's medical restrictions.

CONCLUSIONS AND REASONS: Claimant was not available for work during 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). 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). An individual is considered "available for work" for purposes of ORS 657.155(1)(c) if the individual is willing to work and capable of reporting to all full time, part time and temporary work opportunities throughout the labor market, and refrains from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. OAR 471-030-0036(3) (February 23, 2014). An individual with a permanent or long-term physical or mental impairment as defined at 29 CFR §1630.29(h) which prevents the individual from working during a particular shifts shall not be deemed unavailable for work solely on that basis so long as the individual remains available for some work. OAR 471-030-0036(3)(e). By logical extension of the holding in *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976), where, as here, a claimant was not paid benefits during the period at issue, claimant has the burden to show, by a preponderance of the evidence, that he was eligible to receive those benefits. Accordingly, claimant has the burden to show that he was able and available to work during the weeks at issue, and therefore that he was eligible to receive benefits.

We consider, in turn, the three types of work claimant stated he was seeking during the weeks at issue to determine whether he was available for that work and able to perform it. With respect to working as a cook, it was not disputed that given claimant's complete lack of experience working in a professional kitchen, potential employers would likely consider claimant only for entry-level positions and those positions paid far less than \$38.50 per hour that claimant told the Department representative was the minimum compensation he would accept. Audio 2 at ~30:17. Claimant's testimony about whether he was willing to accept work that paid less and, if so, when he changed his mind from the position he stated to the Department representative, was not particularly straightforward or unequivocal. Audio 2 at ~30:17 *et seq.* After some back-and-forth with the ALJ, claimant testified that he stopped applying for "lower paid positions," presumably including entry level cook positions, after he spoke with the Department representative, which apparently was shortly after he filed his claim for benefits. Audio 2 at ~33:00. When the ALJ asked claimant a second time if he had ever decided to accept lower paying positions, claimant repeated that "going forward" after the conversation with the Department representative, he had decided not to apply for positions that paid less than \$38.50 per hour, and after the ALJ pressed claimant to clarify if he ever was willing to accept work that paid less than \$38.50 per hour, claimant stated that he did know the minimum level of pay he was willing to accept for a job, either during the weeks at issue or after. Audio 2 at ~34:55, ~36:32. Given claimant's equivocations and inability to testify with certainty, claimant did not demonstrate that he likely was willing to accept entry-

level cook positions that paid less than \$38.50 per hour, or paid anywhere near the usual rate of pay for such positions. Assuming claimant was physically able to work around the smoke and fumes in a professional kitchen as an entry-level cook despite his irritant induced asthma, by limiting the entry level cook positions he was willing to accept only to those that paid an unrealistically high wage, claimant imposed a condition that substantially limited, if not eliminated, his opportunities to secure work as an entry level cook during the weeks at issue. Claimant did not show that he was available to work for an entry level cook position.

With respect to working as an entry-level engineer or an entry-level manager, while claimant contended he had practical, on-the-job experience that he felt should be an adequate for substitute for the minimum qualifications for both types of jobs, which for all of them was formal experience as a manager or an engineer and a bachelor's degree in engineering or an area related to management, claimant neither had the required job experience nor the required educational credential. In this respect, it is telling that representatives from Intel, who as claimant's employer were presumably were aware that claimant had performed past job duties that might have resembled those of a manager or an engineer, had informed him that, without a degree, he "couldn't apply for those positions." Audio 1 at 19:10. While claimant might have been hopeful he could overcome his lack of credentials and be considered a qualified applicant for engineering and management jobs based on his on-the-job, practical work experience, he did not present evidence showing that this was a reasonably likely outcome or even that his prospects for doing so were better than negligible.

In addition, while claimant generally stated that he thought he would be able to work as an engineer or a manager if he was not exposed to chemicals, during the weeks at issue he was apparently limiting his search for such positions to Intel and a very few other businesses in the semi-conductor industry, where claimant did not show that on the premises of those businesses he would be likely be able to avoid exposure to the same types of chemical(s) that initially had him to develop an apparently disabling form of irritant induced asthma, or that he would be able to successfully use masks, other types of protective apparatuses or that any accommodations would allow him to perform job duties on those businesses' premises without aggravating the disabling respiratory symptoms he had experienced while working at Intel. Audio 1 at ~20:11. Indeed, claimant noted that during the weeks at issue, he was unable to locate any jobs that were performed on-site at semi-conductor facilities that did not involve a potential exposure to the same types of chemicals that might have initially exacerbated his irritant induced asthma. Audio 1 at ~21:48; Audio 2 at ~14:15. Claimant also did not show that any potential employers in the semi-conductor industry could have or would have been willing to employ measures that would have allowed claimant to work on-site at their facility given his sensitivity to chemical exposure and the uncertainty about what chemicals would trigger claimant's respiratory symptoms. Audio 2 at ~15:30, ~16:13. When the ALJ pointedly inquired into what claimant would do to avoid chemical exposure in the jobs he was seeking either as an engineer or a manager, claimant stated that, although he was aware that those jobs often required an employee to "be on hand," he would seek jobs that allowed him to work "from a remote distance," or apparently via a telecommuting arrangement where he would not need to be on the premises of the facility. Audio 1 at ~20:59; Audio 2 at ~18:49. However, claimant did not present evidence as to the prevalence of such jobs in the semi-conductor industry or that they were reasonably obtainable for an entry-level employee. In addition, assuming that OAR 471-030-0036(3)(e) was potentially applicable to limitations that claimant's physical condition imposed on his availability, claimant also did not demonstrate that the limitation of working from a "remote distance" applied only to him during particular shifts, rather than to all shifts he would work, or that any such "remote distance"

positions were reasonably available to him during any shift. Accordingly, on the facts in this record, claimant was not available for work pursuant to OAR 471-030-0036(3)(e).

Viewed in sum, claimant imposed substantial restrictions on the entry level engineering and management positions he was seeking during the weeks at issue. First, claimant was seeking jobs for which he did not have the minimum work experience or educational credentials, and would only secure such a position if he overcame very substantial shortcomings in his qualifications. Second, since claimant apparently limited his work search for engineer and management positions to those available in the semi-conductor industry and it appears that claimant likely could only limit his exposure to irritant inducing chemicals by working off-site, it further appears that claimant reasonably would be willing to accept only “remote” work. While the reasons that claimant would so limit his availability for work were understandable, claimant also did not show that such positions were reasonably available in the semi-conductor industry or that his prospects for finding such positions were better than negligible. For both of these reasons, claimant was imposing conditions on the engineering and management jobs that substantially reduced his opportunities to successfully secure either type of job during the weeks at issue. Claimant was not available for entry level engineering or management work during the weeks at issue.

Claimant was not available for the types of work he was seeking during the weeks at issue. Claimant is therefore not eligible to receive benefits for those weeks.

DECISION: Hearing Decision 17-UI-92843 is affirmed.

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

DATE of Service: October 23, 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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