

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1444

Modified
Ineligible October 8, 2017 to October 21, 2017

PROCEDURAL HISTORY: On October 30, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work from October 8, 2017 to October 21, 2017 (decision # 160642). On October 31, 2017, the Department served notice of another administrative decision concluding that claimant was not available for work for the same period (decision # 81517). Claimant filed timely requests for hearing. On December 6, 2017, ALJ Scott conducted a consolidated hearing, and on December 8, 2017 issued Hearing Decision 17-UI-98642, concluding claimant was able to work for weeks including October 8, 2017 through October 28, 2017, November 5, 2017 through November 11, 2017 and November 19, 2017 to November 25, 2017, and Hearing Decision 17-UI-98643, concluding claimant did not actively seek work from October 8, 2017 to October 21, 2017. On December 13, 2017, claimant filed applications for review of both decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-98642 and 17-UI-98643. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-1443 and 2017-EAB-1444).

FINDINGS OF FACT: (1) On October 9, 2017, claimant filed an initial claim for unemployment insurance benefits. She filed weekly claims for benefits for weeks including October 8, 2017 to October 28, 2017, November 5, 2017 to November 11, 2017, and November 19, 2017 to November 25, 2017 (weeks 41-17 to 43-17, 45-17 and 47-17), the weeks at issue.

(2) The Department denied benefits to claimant for weeks 41-17 to 42-17. The Department paid claimant benefits for the remaining weeks at issue.

(3) Prior to claiming benefits claimant worked in a warehouse packaging job. During the weeks at issue, claimant sought warehouse and packaging work, and sought work as a housekeeper, child care provider, server and dishwasher. Her labor market included Hillsboro and West Portland, Oregon.

(4) At all relevant times, claimant had medical conditions that required a lifting limitation of five pounds and restricted her from sitting or standing for extended periods of time. Although claimant's physical restrictions limited the work she could perform and affected her marketability to potential employers with those types of work, claimant had personal experience working in all of those fields and believed she could perform the work consistent with her physical restrictions, with accommodations.

(5) Claimant performed approximately ten work seeking activities between October 9, 2017 and December 4, 2017 but did not keep records of the dates upon which she performed those activities. Claimant reported to the Department that, from October 8, 2017 to October 21, 2017 (weeks 41-17 through 42-17), claimant conducted one work seeking activity each week.

CONCLUSIONS AND REASONS: Claimant was able to work during all the weeks at issue; however, claimant failed to actively seek work from October 8, 2017 to October 21, 2017 and is ineligible for benefits during those weeks.

To be eligible to receive benefits, unemployed individuals must be able to 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).

For purposes of ORS 657.155(1)(c), an individual is actively seeking work when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity. OAR 471-030-0036(5)(a). With few exceptions, none of which apply here, individuals are "required to conduct at least five work seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual." *Id.* "Direct contact" means "making contact with an employer . . . to inquire about a job opening or applying for job openings in the manner required by the hiring employer." OAR 471-030-0036(5)(a)(B).

Where the Department has paid benefits to a claimant and seeks to recover them, the Department has the burden to prove that benefits should not have been paid. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). By extension of that principle, where the Department has initially denied benefits to a claimant, the claimant has the burden to prove that benefits should have been paid. In this case, the Department denied benefits to claimant for weeks 41-17 and 42-17; claimant therefore has the burden to show that she was in fact eligible for benefits during those two weeks. The Department having paid benefits to claimant for the remainder of the weeks at issue, the Department has the burden to show that benefits should not have been paid.

With respect to claimant's active work search, although claimant had record of at least ten work seeking activities performed during a nine or ten week period, including the two weeks she was denied benefits based upon her failure to actively seek work, claimant did not keep record of when she performed those activities, and therefore failed to show it was more likely than not that she performed them during weeks 41-17 and 42-17. In the absence of evidence establishing that claimant performed a minimum of five activities, including two direct contacts, we cannot conclude that claimant actively sought work during those weeks. She is therefore ineligible for benefits for those two weeks, and, having so concluded, we need not and do not determine whether or not she was also ineligible for benefits during those two weeks because of her ability to work.

Turning to whether claimant was able to work during the remaining weeks at issue, including weeks 43-17, 45-17 and 47-17, the Department must show that she was not able to work. There is no dispute that claimant had physical issues during the weeks at issue that affected her ability to work, and would require accommodation of her lifting, sitting and standing restrictions should she be hired for any job. Although the Department's evidence showed the impact such restrictions could have upon an individual's ability to work, or would affect the likelihood of an employer to hire her, claimant credibly testified that she remained able to do the types of work she sought despite her restrictions. The fact that claimant had worked in all the industries with which she sought work lends credence to her assertion that she was physically and mentally capable of performing the work she sought. Given that there is credible conflicting evidence about claimant's ability to perform the types of work she sought, the record fails to show that it was more likely than not that claimant was not able to work during the weeks at issue. The Department therefore did not satisfy its burden of persuasion as to claimant's ability to work, and we conclude she was eligible for benefits during weeks 43-17, 45-17 and 47-17.

DECISION: Hearing Decisions 17-UI-98642 and 17-UI-98643 are modified, as outlined above.¹

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

DATE of Service: January 16, 2018

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 Although we agree in substance with the ALJ's decisions in these matters, we have modified the decisions to correct clerical errors in the conclusions and orders.