

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0098

Reversed
Ineligible

PROCEDURAL HISTORY: On November 30, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work during the weeks of November 5, 2017 through November 18, 2017 (decision # 132102). Claimant filed a timely request for hearing. On January 2, 2018, ALJ Shoemake conducted a hearing, and on January 10, 2018 issued Hearing Decision 18-UI-100606, reversing the Department's decision. On January 30, 2018, the Department filed an application for review with the Employment Appeals Board (EAB).

EAB considered the Department's written argument when reaching this decision.

FINDINGS OF FACT: (1) On October 4, 2017, claimant filed an initial claim for unemployment insurance benefits. Claimant's claim was determined to be valid.

(2) After he filed his claim, claimant sought digital marketing work in strategy, account and project management roles. Claimant resided in Portland, Oregon and Portland was his labor market.

(3) On November 6, 2017, claimant left the United States and traveled to Japan. The purpose of claimant's visit to Japan was to experience Japanese culture. Claimant did not have a job-related reason for the trip. Claimant was not authorized to work in Japan. Claimant remained in Japan until November 20, 2017 when he returned to Portland

(4) Claimant claimed benefits for the weeks of November 5, 2017 through November 18, 2017 (weeks 45-17 through 46-17), the weeks at issue. The Department did not pay claimant benefits for those weeks because the Department's records indicated that claimant had claimed those benefits while physically located in Japan, which was outside his labor market and outside the United States.

(5) During the weeks at issue, while claimant was physically located in Japan, he sought work in his Portland labor market online. Claimant did not seek any work that was located in Japan. While claimant was in Tokyo, Japan, however, he had an informational interview with representatives of a Tokyo advertising firm. Had a potential employer attempted to contact claimant about a job, claimant was available by email and by phone. Had a potential employer wanted to interview claimant while he was in Japan, claimant would have been able to interview by phone, Skype or FaceTime. Had claimant received a job offer that required him to start work quickly, claimant would have begun that work over the internet from Japan if that employer allowed him to work remotely, or he would have returned to Portland at that time. The travel time between Japan and Portland was approximately 13 hours.

CONCLUSIONS AND REASONS: Claimant was not available for work during the weeks of November 5, 2017 through November 18, 2017 and is 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). ORS 657.155(2) provides that an individual who leaves the individual's normal labor market for a major portion of any week is presumed to be unavailable for work, which may be overcome if the individual establishes that the individual conducted a bona fide job search, and was reasonably accessible to suitable work, in the labor market area in which the individual spent the major portion of that week. OAR 471-030-0036(3)(d) (February 23, 2014) provides that an individual is not available for work unless the individual is *physically present* in his or her labor market every day of the week unless the individual is seeking work outside that labor market or the individual is infrequently absent from that labor market for less than half the week (emphasis added). OAR 471-030-0036(3)(i) specifically provides, with limited exceptions, none of which apply here, that an individual is not available for work in any week where the individual spends the major portion of the week outside the United States. OAR 471-030-0036(6)(a) provides that an individual's labor market is considered to be the geographic area surrounding the individual's permanent residence within which employees in similar circumstances are generally willing to commute to seek and accept the same type of work at a comparable wage.

The facts of this case are not disputed. Claimant did not contest that the relevant labor market for the type of work he was seeking during the weeks at issue was the geographic area around Portland, Oregon, or that Japan was not in his labor market. Claimant readily acknowledged that he was in Japan and not physically present in his labor market for the major portions of weeks 45-17 and 46-17. Claimant also conceded that he did not look for work located in Japan during the weeks at issue, was not authorized to work in Japan, and that he confined his online work search to jobs actually located in his labor market of Portland, Oregon. Despite claimant's physical absence from his labor market during the weeks at issue, the ALJ concluded in Hearing Decision 18-UI-100606 that claimant was available for work. The ALJ reasoned that, although claimant might not have been physically present in his labor market, that did not render him ineligible to receive benefits because the work he sought was "customarily performed over the internet and, given that, he can accept it and perform it from anywhere so long as he has a computer available to him." Hearing Decision 18-UI-100606 at 2. We disagree.

The ALJ was persuaded by claimant's position at hearing that since he could search for, apply and perform the work that he sought online from anywhere in the world that had an internet connection, his physical presence in Japan for a majority of weeks 45-17 and 46-17, which was outside of his labor market as well as of the United States, was an irrelevant consideration in determining whether he was

available for work. Audio at ~10:20, ~13:50, ~15:24, ~15:51. However, ORS 657.155(2) requires that an individual be physically present in his or her labor market for a major portion of a week in order to be considered available for benefits unless he is searching for work in another labor market and is accessible for work in the labor market that is visited. OAR 471-030-0036(3)(d) and OAR 471-030-0036(3)(i) explicitly provide that physical presence in the labor market for a majority of the week, or at least not being outside of the United States for a majority of the week, unless certain exceptions are applicable, is a pre-requisite to being considered available for work and eligible for benefits, unless the individual is seeking work outside of his labor market. Neither ORS 657.155(2) nor those regulations give a finder of fact the discretion to eliminate the requirement of labor market physical presence, even if the type of work claimant is seeking may be sought and performed by remote means outside the labor market. Given the plain meaning of that statute and those regulations, the ALJ erred in creating the exception that she did to the requirement that claimant needed to be physically present in his labor market for the majority of weeks 45-17 and 46-17 to be eligible for benefits in those weeks.

Claimant also took the position at hearing that ORS 657.155(2) exempted him from the requirement that he be present in his labor market since he overcame the presumption that his absence rendered him unavailable by performing, while in Japan, a bona fide search for work in his Portland labor market, and being reasonably accessible to suitable work in that labor market. Audio at ~16:46. However, claimant misconstrued that statutory provision. ORS 657.155(2) states that the presumption of unavailability due to absence from an individual's normal labor market is overcome when the individual shows that he or she performed a bona fide search for work located *in the labor market where he or she spent the majority of the week*, and he or she was reasonably accessible to suitable work located *in the labor market in which he or she spent the majority of the week*. See also UI Benefits Manual (rev 04/01/10) §367. Thus, for claimant to overcome the presumption that claimant was unavailable due to having traveled to Japan, he would have needed to show that he searched for and was reasonably accessible to work that was located in the Japan labor market, and not in the Portland labor market.

Claimant was not physically present in his Portland labor market for the majority of weeks 45-17 and 46-17. No exemptions applied to render claimant available for work despite his absence from the labor market. Accordingly, claimant was not available for work during weeks 45-17 and 46-17, and is not eligible to receive benefits for those weeks.

DECISION: Hearing Decision 18-UI-100606 is set aside, as outlined above.

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

DATE of Service: March 2, 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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