

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0239

Modified
Eligible Weeks 51-17 through 3-18
Ineligible Weeks 4-18 and 5-18

PROCEDURAL HISTORY: On January 9, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work from December 17, 2017 to January 6, 2018 (decision # 102418). Claimant filed a timely request for hearing. On February 14, 2018, ALJ Seideman conducted a hearing, and on February 21, 2018 issued Hearing Decision 18-UI-103691, concluding claimant was not able to work from December 17, 2017 to February 3, 2018. On March 7, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Sometime prior to November 11, 2017, claimant fractured his fibula. His doctor restricted him from working and other activities to control swelling and allow him time to heal. As of December 17, 2017, claimant's doctor placed him in a walking boot and did not restrict him from standing, walking, or any other activity.

(2) Claimant's regular employer was the U. S. Postal Service. Although claimant was physically capable of working after December 17, 2017, the USPS did not allow claimant to do so because his walking boot had an open toe, which was deemed a safety hazard. The USPS told claimant he had to wait to return to work until he was out of the boot and could wear a closed-toed shoe. Claimant also thought he would be unable to perform his usual rural delivery duties with the USPS because he frequently had to walk on uneven terrain and slippery surfaces, and take stairs, which were difficult or unsafe in a walking boot. As of December 17, 2017, however, claimant was physically capable of walking and standing for long periods of time on even terrain while wearing the walking boot.

(3) On December 22, 2017, claimant filed an initial claim for unemployment insurance benefits. He filed weekly claims from December 17, 2017 through February 3, 2018 (weeks 51-18 through 6-18).

(4) During the weeks at issue, claimant sought work as a clerk and in retail. The only physical restriction claimant's physician had imposed between December 17, 2017 and January 22, 2018 was that

claimant wear a walking boot on his fractured leg. Claimant was physically capable of standing and walking for long periods, and had on occasion stood and walked all day without adverse effects.

(5) On January 22, 2018, claimant's physician removed him from the walking boot. Thereafter, claimant walked unassisted. Claimant's physician asked claimant if he felt capable of immediately returning to work once he was out of the walking boot. Claimant said he did not feel capable of working, and the doctor agreed with claimant that, to avoid re-injury, claimant needed time to get used to walking without the boot before he returned to work. After January 22, 2018, claimant's physician did not release claimant to unrestricted duty until February 3, 2018.

CONCLUSIONS AND REASONS: Claimant was able to work weeks 51-17 through 3-18, and was not able to work from week 4-18 through 5-18.

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

The ALJ concluded that claimant was not able to work during the weeks of December 17, 2017 through February 3, 2018. The ALJ reasoned that claimant's "testimony varied as to his ability to work. At times he testified that with his boot he could do most anything, but at other times he testified that he couldn't be on his foot for long periods of time. Additionally, he testified that even two weeks before the end of the period of time, he felt that he needed more time to completely recover and not risk additional injury." Hearing Decision 18-UI-103691 at 2. We agree with the ALJ in part, and disagree with the ALJ in part.

Claimant's testimony varied because his physical condition changed during the weeks at issue depending on whether he was using the walking boot. From December 17, 2017 through January 21, 2018, claimant's only physician-imposed restriction appears to have been that he wear the walking boot. Claimant testified that he could walk and stand for long periods of time while wearing his walking boot and navigating even terrain such as would be found in a retail or clerking environment; he further testified that the basis for his belief that he was physically capable of doing so was that he had, in fact, stood and walked all day without adverse effect. Claimant was not capable of doing his regular work for the USPS due to the open-toed walking boot and uneven terrain, but he was not seeking that type of work while claiming benefits, so his inability to do the work does not affect whether or not he was "able to work." On this record, we cannot determine a reason why an individual recovering from a fractured fibula, who is physically capable of standing and walking for long periods of time on even terrain while wearing a walking boot, would not be "able to work" as a clerk or in retail. We therefore conclude that claimant was "able to work" from December 17, 2017 through January 21, 2018 (weeks 51-17 through 3-18).

Claimant's circumstances changed, however, on January 22, 2018. On that date, claimant was removed from the walking boot that had previously provided him with the support and protection he needed to stand and walk for long periods of time. Claimant and his physician both agreed that without the walking boot, claimant needed time to get used to walking without the boot to avoid re-injuring himself, which would have affected both his ability to return to his regular job with the USPS and his ability to

perform other types of work. Claimant did not adequately explain why he should be considered physically capable of performing the clerk and retail work he sought without the boot, given that it was the boot that had previously given him the support and stability he needed to stand and walk for long periods of time. Claimant was not paid benefits in this case, and therefore had the burden to prove that he was, more likely than not, physically capable of performing the clerk and retail work he sought between January 22, 2018 and February 3, 2018. *See accord Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). In the absence of evidence establishing that claimant was physically capable of standing and walking for long periods of time without his walking boot, during a period of time in which claimant and his doctor both agreed claimant needed time to get used to walking without the walking boot before he returned to work to avoid re-injuring himself, we conclude claimant was *not* “able to work” from January 22, 2018 through February 3, 2018 (weeks 4-18 and 5-18).

DECISION: Hearing Decision 18-UI-103691 is modified, as outlined above.

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

DATE of Service: April 5, 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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