

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0337

Order No. 18-UI-105555, Affirmed in Part, Reversed & Remanded in Part
Affirmed ~ Not Available for Work During Weeks 30-17, 33-17, 42-17
Reversed and Remanded ~ Availability for Work During Weeks 31-17, 39-17, 40-17, 44-17

PROCEDURAL HISTORY: On January 16, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from July 23 through August 5, August 13 through August 19, September 24 through October 7, October 15 through October 21 and October 29 through November 4, 2017 (decision # 81756). Claimant filed a timely request for hearing. On March 15, 2018, ALJ Murdock conducted a hearing, and on March 20, 2018, issued Order No. 18-UI-105555, affirming the Department's decision. On April 9, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: In written argument, claimant provided EAB with new information, the Department's "REA Work Search Advisory and Reemployment Plan," dated August 1, 2016, that was not part of the hearing record. We admit claimant's evidence into the record as EAB Exhibit 1 under OAR 471-041-0090 (October 29, 2006), which states:

Information not received into evidence at the hearing will not be considered on review, except, subject to notice and an opportunity to be heard:

* * *

(2) New information may be considered when the party offering the information establishes that:

(a) The new information is relevant and material to EAB's determination; and

(b) Factors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing[.] * * *

The new information consists of the Department's personal work search advisory plan for claimant that she was obligated to follow to be eligible for benefits. The plan is relevant and material to the Department's contention that claimant was not available for work when claimant was absent to attend job interviews in accordance with the Department's plan. That the Department would assert that claimant was not available for work when missing work that ostensibly was not "suitable" under the Department's plan to attend job interviews, for jobs it deemed suitable for claimant and obligated her to seek was not reasonably foreseeable under the circumstances. Given the records likely are what they purport to be, we considered them in reaching this decision. The Department or the employer may object to our doing so, in writing, 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 Exhibit 1. However, because the case is being remanded to the Office of Administrative Hearings (OAH) for further inquiry on this issue, both the Department and the employer will have the opportunity to respond to the new information.

EAB considered the remainder of claimant's written argument to the extent it was based on the record when reaching this decision.

CONCLUSIONS AND REASONS: Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the conclusion that claimant was not available for work during the weeks ending July 29¹, August 19² and October 21, 2017³ (weeks 30-17, 33-17 and 42-17) are **adopted**. With respect to the ALJ's conclusion that claimant was not available for work during the remaining weeks at issue, however, this matter must be reversed and remanded for additional evidence.

To be eligible to receive benefits, an unemployed individual must be able to work, available for work, and actively seek, but unable to obtain "suitable work" during each week claimed. ORS 657.155(1)(c). An individual must meet certain minimum requirements to be considered "available for work" for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (February 23, 2014). Among those requirements are that the individual be willing to work full time, part time, and accept temporary work opportunities, during all of the usual hours and days of the week customary for the work being sought, unless such part time or temporary opportunities would substantially interfere with return to the individual's regular employment, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. OAR 471-030-0036(3)(a)(b)(c). An individual will be considered not available for work if he or she fails or refuses to seek the type of work required by the Department pursuant to section (1) of OAR 471-030-0036. OAR 471-030-0036(3)(g). OAR 471-030-0036(4) excuses individuals with children under 13 years of age from having to be available for all of the customary days and hours for the work being sought, but only under certain conditions, including that the individual confine her unavailability to "a particular shift," the work is performed during other shifts, and that the individual be willing to and capable of working during such shifts.

¹ Claimant missed work to attend a dental appointment.

² Claimant missed work to prepare for an upcoming personal trip.

³ Claimant missed work after volunteering to take time off work when there was insufficient work for all scheduled employees.

The Department initially paid claimant benefits for the weeks at issue before issuing its denial. Therefore, the Department has the burden to establish that benefits should not have been paid for those weeks. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

Here, Department records show that the Department required claimant to actively seek work “as a/an Economic/Urban Development Manager, Program Manager, Senior Development Director, [and] Community Relations/Engagement Manager” in her labor market of Beaverton, Hillsboro, Portland and Tigard. EAB Exhibit 1. And, there was no dispute that claimant missed some work as a part-time “sortation associate” working at a low wage for Amazon during weeks 31-17, 40-17 and 44-17 because she attended job interviews, ostensibly in the above-described areas of work. Audio Record ~ 13:15 to 13:45. During week 39-17, claimant also missed some work to care for her sick child because of the lack of available child care during the shift she was working that week.

In Order No. 18-UI-105555, after finding as fact that during weeks 31-17, 39-17 40-17 and 44-17, claimant missed work to attend job interviews or because her son was sick, the ALJ concluded that claimant was not available for all “suitable” work during those weeks, reasoning,

During each of those weeks, claimant missed scheduled work for various reasons, such as that she wanted to interview with other employers for a more desirable job or her son was sick.... On those occasions, she either was not willing to work...or she imposed conditions that substantially interfered with her opportunities to work. Therefore, even though it is understandable that she would have missed work,... she was not available for all suitable work...and did not meet the eligibility requirements for those weeks.

Order No. 18-UI-105555 at 1-3. We disagree and conclude that it cannot be determined from the record, as it stands, and the application of the relevant rules, whether the Department met its burden to show that claimant was not available for work during weeks 31-17, 39-17 40-17 and 44-17.

Missed Work to Attend Job Interviews. Neither the Department nor the ALJ addressed the conundrum claimant faced when deciding whether to work scheduled part-time hours at Amazon or attend job interviews for suitable positions the Department required her to seek. On one hand, if claimant missed a scheduled work opportunity at Amazon, she was at risk for being found unavailable for work under Department rules and ineligible for benefits. On the other hand, if she failed to attend job interviews for jobs she was required to seek under the Department’s work search advisory, she was at risk for being found to be not actively seeking work, and thereby also considered not available for work under OAR 471-030-0036(3)(g). We cannot determine from the record how the Department reconciled that Catch-22 conflict in applying these rules. On remand, the ALJ should inquire about how the Department resolved or even considered this conflict with regard to claimant or how it generally resolves such conflicts in interpreting its rules. The ALJ should also inquire if the Department even considered whether claimant’s part-time or temporary opportunity with Amazon could or might “substantially interfere” with claimant’s return to suitable employment, as determined by the Department, if it caused her to miss an ostensibly critical job interview. *See* OAR 471-030-0036(3).

In written argument, claimant asserted, “On one occasion, I called OED and asked about having to use time, I was told that it was acceptable. It was not until I received the inquiry regarding the specific weeks that I was told that I could “not miss one minute of work.” Written Argument at 1. If claimant

clarifies on remand that she was told she could miss work hours as an Amazon employee to engage in work search activities regarding the suitable work the Department required her to seek, estoppel might apply. The doctrine of equitable estoppel “requires proof of a false representation, (1) of which the other party was ignorant, (2) made with the knowledge of the facts, (3) made with the intention that it would induce action by the other party, and (4) that induced the other party to act upon it.” *Keppinger v. Hanson Crushing, Inc.*, 161 Or App 424, 428, 983 P2d 1084 (1999) (citation omitted). In addition, to establish estoppel against a state agency, a party “must have relied on the agency’s representations and the party’s reliance must have been reasonable.” *State ex rel SOSOC v. Dennis*, 173 Or App 604, 611, 25 P3d 341, rev den, 332 Or 448 (2001) (citing *Dept. of Transportation v. Hewett Professional Group*, 321 Or 118, 126, 895 P2d 755 (1995)). On remand, if claimant alleges that such a representation occurred, the ALJ must develop the record sufficient to determine whether estoppel applies to this situation.

Missed Work Based on a Lack of Child Care. OAR 471-030-0036(4) excuses individuals with children under 13 years of age from having to be available for all of the customary days and hours for the work being sought, but only under certain conditions, including that the individual confine her (or his) unavailability to “a particular shift,” the work is performed during other shifts, and that the individual be willing to and capable of working during such shifts. We are unable to determine from this record whether claimant’s circumstances during week 39-17 allowed her to be excused from the application of the general rules governing availability for work based on her lack of available child care. On remand, the ALJ should inquire whether claimant would have been able to confine her unavailability to the shift in question, whether the work in question was performed during other shifts and if so, whether claimant would have been willing and capable of working during such shift or shifts based on an alternate source of child care.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case and, if necessary, to ascertain the department's interpretation of any statutory or regulatory terms at issue. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986); *Johnson v. Employment Department*, 189 Or App 243, 74 P3d 1159 (2003). Because the ALJ failed to develop the record necessary for a determination of whether or not claimant was available for work during each of the weeks that are still at issue, Order No. 18-UI-105555 is reversed as to those weeks, and this matter is remanded for development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-105555 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

DECISION: Order No. 18-UI-105555 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: May 15, 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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