

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0344

Reversed
Eligible - Weeks 51-17 through 09-18

PROCEDURAL HISTORY: On March 2, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work during the weeks including December 17, 2017 through February 24, 2018 (decision # 154216). Claimant filed a timely request for hearing. On March 29, 2018, ALJ Shoemake conducted a hearing, and on April 3, 2018, issued Order No. 18-UI-106518, concluding claimant was not available for work during the weeks including December 17, 2017 through March 3, 2018. On April 6, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written arguments to the extent they were based on the hearing record.

FINDINGS OF FACT: (1) On December 22, 2017, claimant filed an initial claim for unemployment insurance benefits. She filed claims for benefits for each of the weeks including December 17, 2017 through March 3, 2018 (weeks 51-17 through 09-18), the weeks at issue. The Department initially paid claimant benefits for weeks 52-17 through 06-18, but did not pay claimant benefits for weeks 51-17 and 07-18 through 09-18.

(2) During the weeks at issue, claimant searched for work in her customary occupation of counselor. Claimant's labor market area included Oregon City, Clackamas, Portland and the communities between the Portland area and Salem, Oregon. In that labor market, counselors customarily performed work Monday through Friday, day shift.

(3) Although, as of February 15, 2018, claimant occasionally saw clients from her former job as counselor for the purpose of completing their counseling as needed and closing their files, during each of the weeks at issue, she sought and was willing to accept full-time, part-time and temporary work opportunities within her labor market. During each of those weeks, she performed more than the five work seeking activities required by the Department and was able to physically perform the counseling work that she sought.

CONCLUSIONS AND REASONS: We disagree with the Department and the ALJ and conclude that claimant was available to work during the each of the weeks including December 17, 2017 through March 3, 2018 (weeks 51-17 through 09-18), and is eligible for 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). 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 and capable of reporting to full time, part time and temporary work opportunities throughout the labor market, and refrain from imposing conditions that limit the individual’s opportunities to return to work at the earliest possible time. *Id.*

Here, because claimant was paid benefits for weeks 52-17 through 06-18, the Department had the burden to demonstrate that she was not eligible to receive benefits for those weeks because she was not available for work. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). Conversely, because claimant was not paid benefits for weeks 51-17 and 07-18 through 09-18, claimant had the burden to establish that she was eligible to receive benefits for those weeks.

The issue with respect to claimant’s eligibility for benefits is whether claimant was available for work during the weeks at issue; more specifically, whether she limited her work searches to part-time work because she allegedly was unwilling to seek and accept full-time work during those weeks. Claimant testified at hearing that she did not limit her work searches to part-time work, and both sought and was willing to accept full-time work as well. Audio Record ~ 19:45 to 26:45. By contrast, the Department’s witness testified that claimant told a Department employee that she only sought and was willing to accept part-time work during the weeks at issue. Audio Record ~ 6:30 to 11:00. In Order No. 18-UI-106518, after accepting the Department’s evidence, the ALJ concluded that claimant was not available for work during the weeks at issue, reasoning,

During the weeks at issue, claimant was involved in self-employment...and [was not] willing to drop her self-employment for full-time work...Claimant also told the Employment Department that she was not willing to work full-time. Claimant’s self-employment and unwillingness to work full-time during the weeks at issue rendered her unavailable for work...

Order No. 18-UI-106518 at 2.

However, the Department’s witness was not the individual who investigated claimant’s eligibility for benefits; rather, the Department’s witness’s testimony appears to have been based upon the notes of another Department employee from that employee’s conversations with claimant and other Department records not in evidence. *See e.g.* Audio Record ~ 6:30 to 11:00. The Department’s evidence that claimant did not seek and was unwilling to accept full-time work opportunities was, therefore, based entirely on hearsay, whereas claimant testified from personal knowledge of the conversations or events in question. Absent a basis for concluding that claimant was not a credible witness, we gave her firsthand testimony under oath more weight than the Department’s hearsay evidence, and therefore found facts in accordance with her testimony. Accordingly, we conclude that claimant established that she was available for work during the weeks at issue.

With respect to whether claimant was able to work or actively sought work during those weeks, the Department did not contend that claimant was ineligible for benefits on either of those bases. As such, we do not reach those issues.

Claimant was able to work, available for work and actively sought work during each of the weeks' 51-17 through 09-18 and is eligible to receive benefits for those weeks.

DECISION: Order No. 18-UI-106518 is set aside, as outlined above.¹

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

DATE of Service: May 4, 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 This decision reverses a hearing order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.