

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0428

Affirmed
Ineligible

PROCEDURAL HISTORY: On February 16, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was no able, available or actively seeking work during the weeks of January 28, 2018 through February 10, 2018 (decision # 74321). Claimant filed a timely request for hearing. On March 22, 2018, ALJ Monroe conducted a hearing, and on April 9, 2018 issued Order No. 18-UI-106903, concluding claimant was not able to work during the weeks of January 28, 2018 through February 24, 2018. On April 27, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: The ALJ left open the record after the hearing to allow the parties to submit additional documents, until March 27, 2018 for the employer and March 29, 2018 for claimant and the Department to submit any documents in response to the employer's submission. The employer submitted documents to the ALJ on March 27th, but the ALJ failed to mark any of the documents so submitted as Exhibit 2 other than the certification that they would be emailed to claimant prior to 5:00 p.m. on March 27, 2018. Since the documents that the employer intended to submit as Exhibit 2 were described in detail in the certification, EAB has corrected the ALJ's oversight and has marked all of the documents submitted to the ALJ on March 27th as Exhibit 2.

On March 27, 2018, claimant submitted one page from an after-visit summary by a physician who apparently examined her for back pain on January 18, 2018, which the ALJ did not admit into evidence. Claimant contended that the partial summary showed that the physician had not at that time imposed any restrictions on claimant's work activities. From the incomplete nature of the one page excerpted from an apparently multi-page summary, it cannot be determined whether or not that physician was asked to address the issue of work restrictions or whether the physician did or did not restrict claimant's work activities. For that reason, the ALJ did not err in failing to admit the incomplete document that claimant proffered into evidence.

Claimant also objected to the ALJ's admission of the employer's Exhibit 2 into evidence, contending that the ALJ should not have allowed the submission of any documents after the hearing and also appearing to contending that she did not have access to the email of Exhibit 2 until March 28, 2018, one

day after the ALJ's submission deadline of March 27th for the employer and that the employer did not email the documents comprising Exhibit 2 to her until March 28, 2018. While claimant contended that the employer should not have sent Exhibit 2 to her by email, she did not object to service of it by email at the hearing and, during the hearing, she consulted her phone to access her email for purposes of reviewing the employer's Exhibit 1, which was emailed to her and to which she did object to the form of service. Transcript at 15-16, 36-46. In her objection sent to the ALJ and in her written argument to EAB, claimant did not suggest that the documents in Exhibit 2, which she apparently did ultimately receive on March 28, 2018, were not authentic, were not accurate in any way or that she sustained any prejudice by having received them one day before the deadline for claimant's submission of responsive documents. For these reasons, the ALJ did not err in admitting Exhibit 2 into evidence.

In the narrative of the written argument that claimant submitted to EAB, claimant also offered new evidence that she did not present during the hearing. Claimant did not explain why she did not offer this new information at the hearing or otherwise show that factors or circumstances beyond her reasonable control prevented her from doing so. For this reason, EAB did not consider the new information that claimant sought to present by way of her written argument.

FINDINGS OF FACT: (1) Beginning in 2016, Advantage Dental Clinics, LLC employed claimant as a dental assistant.

(2) As a dental assistant, claimant's regular duties required her to frequently sit, stand, bend, twist and reach and to lift push, pull and carry up to 25 pounds. Occasionally, claimant was required to lift, carry, push and pull items weighing between 25 to 50 pounds.

(3) Around April 19, 2017, claimant sustained a thoracic and lumbar back strain. After, claimant continued working as a dental assistant, but the condition of her back progressively worsened. The condition of claimant's back affected her ability to perform aspects of her duties as a dental assistant. At times, claimant's back would flare up and she was unable to work without experiencing significant pain.

(4) Sometime in late November 2017, claimant went on medical leave from work due to the condition of her back. On January 3, 2018, claimant's physician examined claimant and released her to return to work without any restrictions as of that date. Shortly thereafter, claimant returned to work as dental assistant in the employer's Albany office.

(5) After she returned to working as a dental assistant, claimant's back "acted up." Transcript at 14. Claimant told the employer that her back was hurting and that she wanted the employer to commission an ergonomic assessment for her position or to make accommodations that would allow her to work without pain. The employer asked claimant to complete in collaboration with her physician a document setting out the physical activities that claimant was able to perform. Claimant and her physician did so. Around January 12, 2018, claimant provided to the employer recommendations from her physician that she minimize or avoid bending and twisting at work and that she limit her lifting to less than ten pounds. Transcript at 16, 19-20, 22. The employer was unable to accommodate these recommendations in a way that would allow claimant to perform the duties of a dental assistant and, pending receipt of a more comprehensive statement from claimant's physician about claimant's work restrictions, it assigned claimant to perform light duty clerical work at its Lebanon office, including scanning documents. Around the end of January 2018, the employer informed claimant that its business needs and workload

would not allow it to continue providing light duty work to claimant. Around that time, claimant stopped performing light duty work for the employer because it had none available.

(6) Around January 30, 2018, claimant submitted to the employer a request for a leave of absence from work.

(7) On January 30, 2018, claimant filed an initial claim for unemployment insurance benefits. Claimant's claim was determined valid. Claimant claimed benefits for the weeks of January 28, 2018 through February 24, 2018 (weeks 05-18 through 08-18), the weeks at issue. Claimant did not receive benefits for any of the weeks at issue.

(8) During the four weeks at issue, claimant principally sought and applied for work as a dental assistant with various dental and orthodontic offices. Claimant sought one position as a bus person in a restaurant during the weeks at issue. Claimant also sought one position as an assistant manager in an apartment complex.

(9) On February 13, 2018, claimant was examined by a physician who restricted her to modified work as follows: do not lift, push or pull over ten pounds, minimize twisting or bending and change positions frequently. Exhibit 2 at 13.

(10) On February 14, 2018, a Department representative contacted claimant to inquire into her work restrictions. Claimant told the representative that she was restricted from lifting in excess of ten pounds, she was restricted from bending or twisting greater "more than five percent a day" and "need[ed] to move and change my position consistently, constantly, but still can do more work if the employer can *** accommodate my needs." Transcript at 6.

CONCLUSIONS AND REASONS: Claimant was not able to perform the work that she sought during the weeks of January 28, 2018 through February 24, 2018 and is not eligible to receive benefits during 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 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). Since the Department did not pay claimant benefits during the weeks at issue, by necessary implication from the holding in *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976), claimant had the burden to show by a preponderance of the evidence that she was eligible to receive those benefits, including showing that she was able to work.

At hearing, claimant did not dispute that, with few exceptions, she was looking for work during the weeks at issue as a dental assistant. While claimant did not directly dispute that the physical requirements of her dental assistant position were as set out in the employer's job description and that she was not physically able to perform those duties without significant pain, she contended that since she had been able to work at a temporary job as a dental assistant for two days during the weeks at issue, and that she had not needed to bend and twist at that job and "all dental assistant jobs are different," she was able to work as dental assistant during the weeks at issue. Transcript at 13-14. However, claimant

did not demonstrate that the temporary employer would have been able or willing to accommodate her physical limitations for more than a very few days, or that a significant proportion of dental assistant positions did not require frequent bending and twisting or lifting and pushing in excess of ten pounds, which exceeded the amounts allowed under claimant's medical restrictions. As such, claimant did not, more likely than not, rebut the employer's testimony that the physical requirements of the usual or standard dental assistant position were substantially similar to the dental assistant position that claimant had been unable to perform. Transcript at 33.

While claimant appeared to argue that she should be presumed to have been able to work as a dental assistant at least for the period of January 28, 2018 until February 13, 2018 because she did not have any formally imposed work "restrictions" until February 13, 2018, she not only did not dispute, but agreed, that as of January 28, 2018, she could not work as a dental assistant without significant pain. Transcript at 14-16, 18-20. In addition, despite that they might not have been formally titled work "restrictions," claimant agreed that as of January 12, 2018, she and her physician had prepared "recommendations" for appropriate work activities that prevented her from continuing to work as a dental assistant for the employer. Transcript at 14-16, 18-20. Claimant also did not dispute that those physician-approved "recommendations" were substantially the same, if not identical, to the work restrictions that her physician imposed on February 13, 2018 and which remained in effect through February 24, 2018. Transcript at 16. However denominated, either as a "recommendation" or a "restriction," it appears that a physician had evaluated claimant and determined that she was not able to perform physical activities that were customarily required of a dental assistant during the weeks at issue. On this record, claimant did not show, more likely than not, that she was physically able to perform the dental assistant that she was principally seeking during the weeks at issue. Claimant did not show that she was eligible to receive benefits for the weeks at issue.

DECISION: Order No. 18-UI-106903 is affirmed.

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

DATE of Service: June 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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