

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0430

Modified
Eligible Weeks 05-18 and 07-18 through 14-18

PROCEDURAL HISTORY: On March 7, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was unable to work from January 28 through February 3, 2018 and until he was able to work again (decision # 85746). Claimant filed a timely request for hearing. On April 11, 2018, ALJ Griffin conducted a hearing, and on April 19, 2018 issued Order No. 18-UI-107697, modifying decision # 85746 by concluding that claimant was not able to work from January 28 through February 3, 2018 and February 11 through March 3, 2018, but that he was able to work from March 4 through April 7, 2018. On April 30, claimant filed an application for review with the Employment Appeals Board (EAB).

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 able to work from March 4 through April 7, 2018 (weeks 10-18 through 14-18) are **adopted**. The remainder of this decision addresses whether claimant was able to work from January 28 through February 3, 2018 (week 05-18) and February 11 through March 3, 2018 (weeks 07-18 through 09-18).

With his application for review, claimant submitted new documentation regarding his ability to work during weeks 05-18 and 07-18 through 09-18. However, claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering the document into the hearing record, as required under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006). EAB therefore did not consider the document when reaching this decision.

FINDINGS OF FACT: (1) Claimant claimed benefits for weeks 05-18 and 07-18 through 09-18, the weeks at issue. The Department did not pay benefits for those weeks.

(2) Claimant's customary occupation was construction laborer. In November 2017, however, he was working for United Parcel Services (UPS) as a truck loader. On or about November 20, 2017, claimant was in a bicycling accident, went to a hospital, and was diagnosed with a concussion. The attending physician told him to be off work until he was seen by a doctor and cleared to return.

(3) As a result of his concussion, claimant experienced memory loss, fatigue, blurry vision, headaches and extreme fatigue after strenuous activity. On December 7, 2017, claimant saw a doctor, who advised “several days” of complete rest and time off work. Exhibit 1.

(4) On December 13, 2017, claimant began physical therapy. By mid-January 2018, he was no longer experiencing memory loss, fatigue (except after strenuous activity), or blurry vision. Claimant continued to experience mild headaches about once per week, which he was able to treat with nonprescription pain medication. Claimant was capable of performing full time work that was less physically demanding than work as a truck loader or construction laborer.

(5) On January 21, 2018, claimant filed his initial claim for benefits. During the weeks at issue, he searched for types of work that he was capable of performing, including work as a bicycle mechanic and tour guide, and in customer service and sales.

(6) On February 26, 2018, claimant told a Department adjudicator that after sustaining his concussion, he was off work for approximately two months, but that he could now drive, work full or part-time, and that he was searching for work as a server, bicycle mechanic and tour guide, and in merchandising and retail sales. Claimant told the adjudicator that that he was mentally and physically capable of performing those types of work.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant was able to work during week 05-18 and weeks 07-18 through 09-18. Claimant therefore 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 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). Where, as here, the Department did not initially pay a claimant benefits, the claimant has the burden to show that he is entitled to those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

In Order No. 18-UI-107697, the ALJ stated that, at hearing, claimant testified that he was seen by a doctor in mid-January 2018 and cleared for full time work, but that he had lost the doctor’s note to that effect.¹ The ALJ further stated that although he left the record open for one week to allow claimant to submit any and all doctor’s notes clearing him for full timework, no note from a January visit was submitted.² The ALJ therefore concluded that claimant did not meet his burden to prove that he was able to work full time during weeks 05-18 and 07-18 through 09-18 (January 28 through February 3, 2018 and February 11 through March 3, 2018).³

We agree with the ALJ that claimant failed to show that he received a doctor’s note in mid-January 2018 clearing him for work. However, we disagree with the ALJ’s conclusion that the record therefore fails to show claimant was able to work during the weeks at issue. Claimant was working for UPS as a truck

¹ Order No. 18-UI-107697 at 3.

² *Id.*

³ *Id.*

loader when first diagnosed with a concussion. The attending physician therefore was likely referring to that work when he or she told claimant to be off work until he was seen by a doctor and cleared to return. And although the doctor who saw claimant on December 7, 2017 may have referring to work in general, he advised only several days off. Claimant began physical therapy on December 13, 2017 and, by mid-January 2018, his only remaining symptom was a mild headache about once per week, which he was able to treat with nonprescription pain medication. The record therefore shows that even if claimant was not able to work as a truck loader or construction laborer during the weeks at issue, he likely was capable of performing the less physically demanding work he was actually seeking during those weeks, as required under OAR 471-030-0036(2). Claimant therefore met his burden to establish by a preponderance of evidence that he was able to work during the weeks at issue.

Claimant was able to work during the weeks at issue, and therefore is eligible for benefits for those weeks.

DECISION: Order No. 18-UI-107697 is modified, as outlined above.

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

DATE of Service: June 1, 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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