

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0466**

*Modified*  
*Ineligible Week 12-18*  
*Eligible weeks 13-18 through 16-18*

**PROCEDURAL HISTORY:** On March 27, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work during the weeks from March 18 through 24, 2018, and denying benefits for those weeks and until claimant was able to work again (decision # 73655). Claimant filed a timely request for hearing. On April 25, 2018, ALJ Logan conducted a hearing, and on April 27, 2018 issued Order No. 18-UI-108244, modifying decision # 73655 by concluding that claimant was unable to work during the weeks from March 18 through April 21, 2018, and therefore is ineligible for benefits for those weeks. On May 2, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

**EVIDENTIARY MATTER:** At hearing, without objection from the Department, the ALJ left the record open to allow claimant to submit a doctor's note regarding his ability to work. Audio Record at 24:45. On April 26, 2018, claimant submitted a doctor's note, dated April 25, 2018, which the ALJ received into evidence as Exhibit 1 before closing the record.<sup>1</sup> With his application for review, claimant submitted a corrected doctor's note, dated May 1, 2018, along with a credible explanation as to why the April 25, 2018 doctor's note was not correct. On May 23, 2018, claimant faxed a copy of the corrected doctor's note and explanation to the Department, and certified with EAB that he had done so. Under OAR 471-041-0090(1) (October 29, 2016), the corrected doctor's note claimant submitted on May 2, 2018 is received into evidence as necessary to complete the record. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection 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 corrected doctor's note will remain in the record as EAB Exhibit 1, which is attached to the copies of this decision mailed to the parties.

**FINDINGS OF FACT:** (1) Claimant claimed benefits for the weeks from March 18 through April 21, 2018 (weeks 12-18 through 16-18), the weeks at issue. The Department did not pay claimant benefits for those weeks.

<sup>1</sup> Order No. 18-UI-108244 at 1.

(2) Since 2012, claimant has suffered from what his doctors believe is gout or an autoimmune disease, which causes occasional “flare ups” of foot pain and inflammation. On March 16, 2018, claimant was discharged from his job as a gas station attendant for being unable to work due to a flare up. The flare up lasted approximately one week, and claimant therefore was unable to work during week 12-18. By week 13-18, however, the flare up had subsided, and claimant was able to work again.

(3) During the weeks at issue, claimant was seeking work as a gas station attendant, cook, and customer service representative.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant was unable to work during week 12-18 and therefore is ineligible for benefits for that week. However, we disagree with the ALJ and conclude that claimant was able to work during the remaining weeks at issue, weeks 13-18 through 16-18, and 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 pay a claimant benefits, the claimant has the burden to establish by a preponderance of evidence that he is entitled to those benefits. See *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

In Order No. 18-UI-108244, the ALJ concluded that claimant was unable to work during the weeks at issue because the April 25, 2018 doctor’s note claimant submitted stated that he was released to work without restrictions “as of today,” and not that he was released to work without restrictions during the weeks at issue, which ended on April 21, 2018. Exhibit 1. However, the corrected doctor’s note claimant submitted with his application for review states that claimant was released to work without restrictions “as of 3/25/2018,” the first day of the second week at issue. EAB Exhibit 1. The corrected doctor’s note therefore supports a finding that claimant was not able to work during week 12-18, but was able to work during weeks 13-18 through 16-18. And although the corrected doctor’s note alone is not necessarily dispositive, it corroborates claimant’s testimony at hearing that he was able to work without restrictions after the flare up for which he was discharged on March 16, 2018 had subsided. Claimant therefore established by a preponderance of evidence that he was able to work during weeks 13-18 through 16-18.

Claimant was unable to work during week 12-18 and therefore is ineligible for benefits for that week. However, claimant was able to work during weeks 13-18 through 16-18, and therefore is eligible for benefits for those weeks.

**DECISION:** Order No. 18-UI-108244 is modified, as outlined above.<sup>2</sup>

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<sup>2</sup> This decision modifies an 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.

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

**DATE of Service: June 7, 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](http://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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