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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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AAA 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0664

Reversed & Remanded

PROCEDURAL HISTORY: On May 29, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work from May 13, 2018 to May 19, 2018 (decision # 84014). Claimant filed a timely request for hearing. On June 20, 2018, ALJ Murdock conducted a hearing, and on June 25, 2018 issued Order No. 18-UI-111986, concluding claimant did not actively seek work from May 13, 2018 to June 16, 2018. On June 28, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: This matter should be reversed, and remanded to the Office of Administrative Hearings for additional proceedings.

ORS 657.155(1)(c) requires that individuals actively seek work during each week claimed as a condition of being eligible for benefits. OAR 471-030-0036(5)(a) (April 1, 2018) states that individuals "must conduct at least five work seeking activities per week," including at least two "direct contact[s] with an employer who might hire the individual" and other activities such as registering for job placement services with the Department, participating in a job club or networking group dedicated to job placement, updating a resume, reviewing newspapers or websites without responding to posted job openings, and making additional direct contacts with an employer.

The ALJ concluded that claimant did not actively seek work during the weeks at issue because his direct contacts were with employers advertising jobs for which he lacked the education necessary to qualify. Order No. 18-UI-111986 at 3. The ALJ found that claimant "did not present evidence to establish that he met the minimum qualifications for any of the supervisor or management jobs that he applied for" and "presented evidence of only one employer contact" for an entry-level job suitable to his experience and education. *Id.*

We don't disagree with the ALJ's findings to the extent they were based upon the hearing record. However, the record also shows that after discussing claimant's work seeking activities through May 22, 2018, which fell during the second of the five weeks then at issue, the ALJ stopped questioning claimant and said "we're gonna have to continue this to another day." Transcript at 38. The ALJ proposed a time for the continued hearing, and claimant replied that the new time was "gonna have to work but, you

know, I really need a decision sooner than later so I would hope that you would have enough information with the documents that I've sent in to be able to make a decision." *Id.* The ALJ replied that it was up to claimant to decide whether to continue the hearing or rely on the documents he had submitted; claimant stated, "I think my documents speak for themselves so you can make your decision and if I don't like it, I'll appeal it." Transcript at 38-39. The ALJ then admitted claimant's documents into the record. Transcript at 39. After further discussion, during which claimant requested that some documents the Department's witness relied upon when providing testimony should be admitted into the hearing, the ALJ stated, "I'm gonna accept – I'm going to accept his testimony on it. I'm not gonna – I mean we're either gonna close the record now, or we're gonna continue on another day, and if we do that then we can have additional documents sent in." Transcript at 40. The Department's witness said that he had read his documents "pretty much verbatim" and could send the documents to claimant, and the ALJ responded, "Okay. All right. So with that then the record's closed then I'll get the decision out as soon as possible." Transcript at 41.

The ALJ had questioned claimant extensively during the hour-long hearing but only had time to question claimant about his work seeking activities through May 22nd. That such extensive questioning occurred about weeks covered by claimant's documents suggests that the ALJ did not consider claimant's documents sufficient evidence to inform her about his work seeking activities during the weeks at issue, and suggests that claimant's documents would likewise be inadequate evidence about his work search from May 23rd through June 16th. That the ALJ wanted to continue the hearing also suggests the ALJ knew the record was not complete.

It appears more likely than not that that the ALJ did not consider the record adequately developed when the ALJ ended the hearing. 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. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Claimant's agreement not to continue the hearing did not alleviate the ALJ's responsibility to fully develop the record in this matter. Because the ALJ failed to develop the record necessary for a determination of whether claimant actively sought work during the weeks at issue, Order No. 18-UI-111986 is reversed, and this matter is remanded for development of the record.

Because the disposition of this case remands this matter for additional hearing proceedings, it bears mentioning that claimant was noticeably argumentative with the ALJ during the June 20th hearing. He repeatedly responded to the ALJ's questions in an evasive, sarcastic, or flippant manner, did not follow instructions, and repeatedly suggested that he had already provided certain pieces of information to the Department at other times. Claimant's case has been complicated: he has experienced severe ill-health and issues with his former employer, worker's compensation, vocational rehabilitation, and at least two of the Department's program areas; his unemployment case has involved at least four administrative decisions, hearings and appeals; we infer from those circumstances that he is understandably frustrated by ongoing problems with his claim and the repetition involved in them.[1]

[1] We take notice of these facts, which are contained in Employment Department records. 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 noticed fact will remain in the record.

To be clear, however, claimant is the party with the burden of proof in this case, and "this case" is confined to the issue of whether or not claimant actively sought work from May 13, 2018 to June 16, 2018 by applying for work he was qualified to perform.[2] Claimant, as the party with the burden of proof, is personally responsible for providing enough evidence at this remand hearing to prove it is more likely than not that, he was qualified for the jobs he sought during each of the weeks at issue. If claimant is unwilling or unable to provide that evidence in the remand hearing, even if he might already have provided the same or similar information in other proceedings, he will not prove he was qualified for benefits. Likewise, if claimant chooses to engage in argumentative, evasive, sarcastic or flippant behavior during the remand hearing, he should be informed that in doing so he is obstructing what is likely his only remaining opportunity to prove that he should have been paid benefits during the weeks at issue.

DECISION: Order No. 18-UI-111986 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: August 1, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-111986 or return this matter to EAB. Only a timely application for review of the subsequent Order will cause this matter to return to EAB.

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[2] In this case, the Department did not pay claimant benefits. Claimant therefore has the burden to prove that he did in fact seek work during each week claimed. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).