

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0736-R

Modified
Ineligible Weeks 20-18 through 23-18; Eligible Weeks 24-18 through 28-18

PROCEDURAL HISTORY: On June 7, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was unable to work from May 13 through June 2, 2018 (decision # 81526). Claimant filed a timely request for hearing. On July 18, 2018, ALJ Schmidt conducted a hearing, and on July 19, 2018 issued Order No. 18-UI-113440, modifying decision # 81526 by concluding that claimant was not able to work from May 13 through July 14, 2018. On July 26, 2018, claimant filed an application for review with the Employment Appeals Board (EAB). On August 24, 2018, EAB issued Appeals Board Decision 2018-EAB-0736, modifying the ALJ's order, but including an error in within the decision concerning the weeks claimant was determined eligible for benefits. This decision is issued to correct that error pursuant to EAB's authority under ORS 657.290(3).

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 not able to work or actively seeking work from May 13 through June 9, 2018 (weeks 20-18 through 23-18) are **adopted**. The remainder of this order addresses whether claimant was able to work from June 10 through July 14, 2018 (weeks 24-18 through 28-18).

FINDINGS OF FACT: (1) Claimant filed an initial claim for unemployment insurance benefits on September 19, 2017. He later claimed, but was not paid, benefits for the weeks including June 10 through July 14, 2018 (weeks 24-18 through 28-18), the weeks at issue.

(2) Claimant's customary occupation was machinist. In late February or early March, 2018, claimant was not sleeping well and coworkers told him that he always appeared tired. He then saw a physician who prescribed him three different anti-depressant medications. The medications caused him severe stomach problems to the extent that, sometime in April 2018, he had to be treated at an emergency room where he was prescribed a medication that eventually resolved his stomach problems. However, his anti-depressant medications seemed to have the opposite effect on him and he became depressed to the point where he missed so much work that, on May 16, 2018, the employer terminated his employment. The next day, the physician that had prescribed him the anti-depressant medications gave him a note for his employer that restricted him from "any and all work," and the employer did not reinstate him. Audio

Record ~ 18:15 to 19:00. Claimant began claiming benefits and for the weeks including May 13 through June 9, 2018 (weeks 20-18 through 23-18), he reported to the Department that he was unable to work and had not looked for work. Consequently, he was denied benefits.

(3) On June 4, 2018, a Department representative interviewed claimant and told him that to qualify for benefits, he had to be able to work, available for work and actively seek work, which was explained to him as performing five work seeking activities, including two direct employer contacts, each week. During their conversation, claimant told the representative about his doctor's note restricting him from "any and all" work. The representative did not tell claimant that he had to obtain a doctor's note releasing him to work to qualify for benefits. After the interview, claimant decided to stop seeing his doctor and discontinue taking his anti-depressant medication because he suspected it was the source of his problems, as he had not experienced stomach difficulties or depression before taking it.

(4) That week, after discontinuing his medication, claimant almost immediately began to feel better. Beginning the next week, starting June 10, 2018 (week 24-18), claimant felt he was able to work and conducted five work seeking activities, including two direct employer contacts. When filing his benefit claim for that week, he reported his work seeking activities and that he was able to work. He did the same for the subsequent weeks at issue, June 17 through July 14, 2018 (weeks 25-18 through 28-18).

(5) At the end of June, claimant began seeing another doctor who suggested a sleep study and recommended that he engage in aerobic exercise and yoga to help him sleep. Although claimant had continued to experience some fatigue, it was no different than before his health problems appeared, and it had never prevented him from working in the past. Claimant never requested a work release from his doctor because he did not think it was necessary.

CONCLUSIONS AND REASONS: We disagree with the ALJ, in part, and conclude claimant was able to work during weeks 24-18 through 28-18 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 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 claimant benefits, claimant has the burden to establish that he is entitled to those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

In Order No. 18-UI-113440, after finding that as of the hearing date, "claimant ha[d] not obtained a release to work from his doctor," the ALJ concluded that claimant "was not able to work" and therefore was ineligible for benefits for the weeks at issue. Order No. 18-UI-113440 at 2-3. We agree with the ALJ that claimant failed to show that he received a doctor's note after May 17, 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 credibly testified that after discontinuing his antidepressant medication, he almost immediately felt better and felt well enough the next week both to seek work and be able to work. Claimant's credibility was supported by his honest reporting regarding his work seeking activities and inability to

work when claiming benefits for weeks 20-18 through 23-18. It was also supported by his subsequent doctor's advice in late June to engage in strenuous activities such as aerobics. Viewing the record as a whole, claimant's failure to obtain a doctor's note releasing him to work was not dispositive, as the Department never advised him that one was necessary and, because he was no longer employed by his previous employer, it was plausible that claimant saw no reason to obtain one.

And, viewed objectively, claimant's apparent sleeping difficulty is not sufficient to support a conclusion that he was not able to work. He testified that his sleeping difficulty was long standing and although it may have contributed to an appearance that he was tired, it had never prevented him from working before. More likely than not, claimant was capable of performing the machinist work he was seeking during the weeks at issue, 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 those weeks.

In summary, claimant was not able to work and did not actively seek work during weeks 20-18 through 23-18, and therefore is ineligible for benefits for those weeks. However, claimant was able to work during weeks 24-18 through 28-18, and therefore is eligible for benefits for those weeks.

DECISION: Order No. 18-UI-113440 is modified, as outlined above.

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

DATE of Service: August 27, 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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