

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-1076**

*Affirmed*  
*Eligible – Weeks 37-18 through 40-18*

**PROCEDURAL HISTORY:** On October 10, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was able and available for work from September 9 through October 6, 2018 (weeks 37-18 through 40-18) (decision # 73152). The employer filed a timely request for hearing. On November 8, 2018, ALJ L. Lee conducted a hearing, and on November 13, 2018 issued Order No. 18-UI-119584, affirming the Department's decision. On November 15, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

Both the employer and claimant submitted a written argument to EAB. However, claimant's written argument contained information that was not part of the record, and failed to include an explanation of the circumstance or reason beyond her control that prevented her from presenting the information at the time of the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered the parties' arguments, but only to the extent they were based on information received into evidence during the hearing.

**FINDINGS OF FACT:** (1) Beaverton School District #48J employed claimant as a half-time physical education/health teacher during the 2017-2018 school year. The employer assigned claimant to that position at Cedar Park Middle School.

(2) On February 26, 2018, claimant notified the employer that she would be undergoing hip surgery during the summer, in between the 2017/2018 and 2018/2019 school years. She also notified the employer that following her surgery she would not be able to perform her work duties as a physical education (PE) teacher but would be able to perform her classroom duties as a health teacher.

(3) On July 27, 2018, claimant underwent hip surgery. On or about July 30, 2018, claimant submitted a medical note from her provider to the employer that indicated claimant "could do classroom work" but was restricted from running, jumping and lifting more than 25 pounds. Transcript at 17.

(4) The 2018/2019 school year for the employer began during the last week of August 2018. Claimant returned to work on August 22, 2018 and performed only classroom duties as a health teacher until September 5, 2018. After that, the employer did not allow claimant to continue to work because PE classes were beginning and claimant had not been medically released to fully perform those duties. The employer placed claimant on a medical leave of absence under the Americans with Disabilities Act (ADA). Claimant was ineligible for protected leave under the Family and Medical Leave Act (FMLA) and the Oregon Family Leave Act (OFLA) because she had not yet worked the requisite number of hours during the year to qualify.

(5) On August 28, 2018, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed, and received, benefits for the weeks including September 9 through October 6, 2018 (weeks 37-18 through 40-18), the weeks at issue.

(6) During the weeks at issue, claimant sought work as a classroom teacher and office worker, which work was not precluded by her medical restrictions, within her labor market of Beaverton, Sherwood, Tualatin, Wilsonville, Tigard, Lake Oswego, and Newberg. During each of those weeks, claimant reported, and the Department accepted, that she performed at least five work-seeking activities, with at least two of those being direct contact with an employer that could have hired her.

(7) On October 30, 2018, claimant's medical provider prepared an updated medical release that indicated that claimant could perform classroom work for four hours per day, five days per week, as long as she had the ability to stand and sit every twenty minutes. She remained restricted from performing duties as a PE teacher and it was anticipated that the PE restriction would continue at least through the end of 2018.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ. Claimant was able to work, available for work and actively sought work during each of the weeks at issue.

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) (April 1, 2018). An individual must meet certain minimum requirements to be considered "available for work" for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3). Among those requirements are that the individual be willing to work and capable of reporting to full time, part time and temporary work opportunities throughout the labor market, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.* However, the Department rules provide that an individual who is prevented from working full time or during particular shifts due to a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h) shall not be deemed unable to work or unavailable for work solely on that basis so long as the individual remains available for some work. OAR 471-030-0036(2)(b) and (3)(e). For purposes of ORS 657.155(1)(c), an individual is actively seeking work when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity. OAR 471-030-0036(5)(a). With few exceptions, none of which apply here, individuals are "required to conduct at least five work seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual." *Id.*

As a preliminary matter, because claimant originally was paid benefits for the weeks at issue, the party requesting review, here the employer, carries the burden to establish by a preponderance of the evidence that claimant was ineligible to receive benefits for those weeks. See, *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

In Order No. 18-UI-119584, after finding that during the weeks at issue, claimant actively sought work in accordance with the Department's rules and was willing and capable of performing the work she sought on at least a part-time basis, the ALJ concluded that claimant was eligible for benefits for those weeks. Order No. 18-UI-119584 at 1, 3 and 4. The ALJ reasoned that the record showed that claimant suffered from a long-term physical impairment as defined at 29 CFR §1630.2(h), her hip condition, and because she remained willing and capable of performing at least part-time work, she met the eligibility requirements set forth in OAR 471-030-0036(2)(b) and (3)(e). *Id.* We agree.

Claimant's hip condition likely was a long-term physical impairment as defined at 29 CFR §1630.2(h)<sup>1</sup> because it required surgery, scheduled in February 2018 and performed in July 2018, and resulted in medical restrictions that were expected to last at least until the end of 2018. Accordingly, to avoid being deemed unable to work or unavailable for work, and thus ineligible for benefits, claimant only had to be available for "some work"<sup>2</sup>, which the record shows she was. Claimant initially was released by her medical provider to return to work on or about July 30, 2018 with only running, jumping and lifting restrictions. And, claimant worked for the employer as a teacher in a classroom setting, apparently without any time restriction, between August 22 and September 5, 2018. After that and during the weeks at issue, claimant sought work with other employers as a teacher or an office worker both of which were within her medical restrictions. At hearing, there was no dispute that claimant met the Department's minimum requirements for actively seeking work during the weeks at issue, although the employer seemed to have implied that claimant could have done more by applying for a substitute teaching position with the employer. However, there is no requirement in Employment Department law that claimant seek particular jobs with a particular employer, just that she actively seek work in accordance with the applicable rules, and the fact that claimant did not seek substitute teaching work with the employer does not change the outcome of this decision. Accordingly, the record supports the ALJ's conclusion that claimant was able to work, available for work and actively sought work in accordance with the Department's rules during the weeks at issue.

The employer's assertion at hearing that claimant was not able to work or available for work on even a part-time basis until October 30, 2018, several weeks after the weeks at issue, when claimant's medical provider submitted an updated medical release was not persuasive. Transcript at 11-14. The employer's witness eventually admitted that he probably was aware of the initial medical release that had no time restriction on it when it was submitted on or about July 30, 2018. Transcript at 49-53. Moreover, the

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<sup>1</sup> 29 C.F.R. §1630.2(h) defines "physical impairment" as: (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.

<sup>2</sup> We disagree with the testimony of the Department's witness that if claimant had been limited to performing only part-time work during the weeks at issue, she would have been deemed unable to work and unavailable for work and thus ineligible for benefits. That position is contrary to the plain meaning of OAR 471-030-0036(2)(b) and (3)(e) which state that an individual with a qualifying physical or mental impairment need only be available for "some work" to be deemed able and available for work. Transcript at 39-40.

very fact that the employer allowed claimant to work as a teacher in a classroom setting between August 22 and September 5, 2018 contradicted that assertion. Accordingly the employer failed to meet its burden to show that claimant was not eligible for the benefits she received for the weeks at issue.

In sum, claimant was able to work, available for work and actively sought work during the weeks at issue and was eligible for benefits for those weeks.

**DECISION:** Order No. 18-UI-119584 is affirmed.

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

**DATE of Service: December 20, 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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# Understanding Your Employment Appeals Board Decision

## English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

## Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Traditional Chinese

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## Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyong ito.

## Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

## Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

## Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

**Khmer**

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

**Laotian**

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

**Arabic**

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**Farsi**

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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