

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0085

Modified
Eligible Weeks 40-18, 41-18, 43-18 and 44-18
Ineligible Week 42-10

PROCEDURAL HISTORY: On November 9, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was available for work during the weeks of September 30 through November 3, 2018 (decision # 74418). The employer filed a timely request for hearing. On January 14, 2019, ALJ Lewis conducted a hearing, and on January 16, 2019 issued Order No. 19-UI-122833, affirming the Department's decision. On January 25, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

Claimant and the employer both filed written arguments, but claimant failed to certify that his argument was provided to the other parties as required by OAR 471-041-0080(2) (October 29, 2006). Both arguments also contained information that was not offered into evidence at the hearing and neither party showed that factors or circumstances beyond their reasonable control prevented them from presenting that new information at hearing as required by OAR 471-041-0090(2) (October 29, 2006). For these reasons, EAB did not consider claimant's argument or the new information offered by either party. EAB considered the employer's written argument only to the extent it was based on information received into evidence during the hearing.

FINDINGS OF FACT: (1) In July 2017, Advanced Security Inc. hired claimant as a security officer. After hire, claimant often worked a graveyard shift.

(2) In or about late May 2018, claimant had a psychological breakdown because of problems in his personal life. The problems exacerbated claimant's long-standing conditions of depression and anxiety. Later, claimant consulted with his medical provider and the provider prescribed medication to treat the mental health conditions. The provider recommended that claimant not work graveyard shifts because being away from home overnight aggravated his mental health conditions.

(3) On September 10, 2018, claimant gave the employer a handwritten note stating that, due to medical conditions, he could work only day and swing shifts, from 5:00 a.m. until midnight, and he could not

work graveyard shifts. The note stated that, if needed, claimant would provide a note from his medical provider setting out his work limitations.

(4) On September 30, 2018, claimant filed an initial claim for unemployment insurance benefits. The claim was determined valid. Claimant claimed benefits for the weeks of September 30, 2018 through November 3, 2018 (weeks 40-18 through 44-18), the weeks at issue.

(5) During the weeks at issue, claimant's labor market was Salem, Keizer and Woodburn, Oregon. During the weeks at issue, the employer did not have regularly assigned work for claimant to perform, but would call him if it had a day shift available. If claimant did not answer the call, the employer would usually leave a message, but would continue calling other employees to fill the available assignment.

(6) On October 8, 2018, the employer called and reached claimant to offer him an assignment in Portland, which was outside his labor market. Claimant told the employer he was declining the assignment because of its distance from his home in Salem.

(7) On October 15, 2018, the employer left a telephone message for claimant to call back about an assignment. That assignment was in claimant's labor market. Claimant returned the call two hours after the employer left the message, but the assignment was already filled.

(8) On October 16, 2018, the employer left a message for claimant about an assignment in claimant's labor market. Claimant did not return the call that day, and the assignment was filled by someone else.

(9) On October 17, 2018, claimant's medical provider prepared a note for the employer limiting claimant's work hours to those set out in claimant's September 10, 2018 handwritten note because of claimant's medical condition. Claimant gave the provider's note to the employer.

CONCLUSIONS AND REASONS: Claimant was available and able to work during weeks 40-18, 41-18, 43-18 and 44-18, and is eligible to receive benefits for those weeks. Claimant was not available for work during week 42-18 and is not eligible to receive benefits for that week.

To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seeking work during each week claimed. ORS 657.155(1)(c). 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) (April 1, 2018). Among those requirements are that the individual be willing to work full time, part time, and accept temporary work opportunities, during all of the usual hours and days of the week customary for the work being sought; capable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought; and not imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.* However, an individual with a permanent or long-term impairment (as defined at 29 CFR 1630.2(h)) which prevents the individual from working full time or during particular shifts shall not be deemed unavailable for work solely on that basis so long as the individual remains available for some work. OAR 471-030-0036(3)(e).

In Order No. 19-UI-122833, the ALJ concluded that claimant was available for work during all of the weeks at issue. The ALJ reasoned that because claimant remained available for two out of the three

shifts that a security officer worked and it was not shown that claimant “ever declined suitable work during the weeks at issue,” claimant was available for work during those weeks. Order No. 19-UI-122833 at 3. We disagree that claimant was available for work during week 42-18, but agree that claimant was available during all of the other of the weeks at issue.

We agree with the ALJ that claimant’s inability to work during graveyard shifts during the weeks at issue was due to an exacerbation of his pre-existing depression and anxiety, which likely was a long term or permanent impairment. Because claimant remained willing and able to work day and swing shifts, however, his inability to work the graveyard shift did not render him unavailable for work under the language of OAR 471-030-0036(3)(e). We also agree with the ALJ that claimant turning down a work assignment in Portland on October 8 did not render him not available for work that week. OAR 471-030-0036(3) generally limits the geographic area of the work opportunities to which a claimant must be willing and capable of reporting to claimant’s labor market, which in this case was limited to Salem, Keizer, and Woodburn. Claimant was not prohibited from declining a work opportunity outside his labor market to remain available for work.

We disagree with the ALJ, however, that claimant may still be considered available for work during week 42-18 despite having failed to respond in time to accept the work that the employer offered in messages left for him on October 15 and 16. OAR 471-030-0036(3) plainly requires that a claimant be *capable of accepting and reporting* for all suitable work opportunities in the labor market during all of the days and hours customary for the work sought. It does not require only that claimant not decline any work opportunity. By not responding to the employer’s messages in sufficient time to accept the work offered to him on October 15 and 16, claimant was not capable of accepting and reporting to those suitable work opportunities within his labor market during that week. As a result, he was not available for work during week 42-18.

Claimant was available to work during weeks 40-18, 41-18, 43-18 and 44-18, and is eligible to receive benefits for those weeks. Claimant was not available for work during week 42-18 and is not eligible to receive benefits for that week.

DECISION: Order No. 19-UI-122833 is modified, as outlined above.

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

DATE of Service: February 21, 2019

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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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

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。

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 desisyon.

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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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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