

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0168

Affirmed

Ineligible Weeks 47-18 through 51-18 and 02-19 through 03-19

PROCEDURAL HISTORY: On December 7, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from November 18, 2018 through December 1, 2018 (weeks 47-18 through 48-18) and continuing until the reason for the denial had ended (decision # 92105). Claimant filed a timely request for hearing. On January 23, 2019, ALJ Janzen conducted a hearing and on January 24, 2019, issued Order No. 19-UI-123330, concluding claimant was not available for work from November 18, 2018 through December 22, 2018 and January 6, 2019 through January 19, 2019 (weeks 47-18 through 51-18 and 02-19 through 03-19). On February 13, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: On March 19, 2019, EAB received written arguments from claimant that included new information about claimant's participation in a drug treatment program during and after the weeks at issue. EAB already had extended claimant's deadline for filing a written argument in this case to March 18, 2019 at 5:00 p.m. *See* OAR 471-041-0080(4)(October 29, 2006). However, claimant's written argument of that date was not fully received at EAB by fax transmission, more likely than not due to circumstances beyond claimant's reasonable control described in the argument. EAB Exhibit 1 at 1-2, EAB Exhibit 3 at 1-2. Claimant then submitted the argument to EAB by fax and email on March 19, 2019. We have extended claimant's deadline to file a written argument in this case to March 19, 2019, and have accepted her March 18 and 19, 2019 transmissions and marked them as EAB Exhibits 1-3.

Claimant's arguments are construed as a request to have EAB consider additional evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering the information shows that the new information is relevant and material to EAB's determination and the party was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. The new information is relevant and material to claimant's availability for the work she sought during and after the weeks at issue, and claimant could not have foreseen that her counselor would be unresponsive to her multiple requests for the information prior to the hearing. EAB Exhibit 2 at 1-3. Accordingly, the new information, marked as EAB Exhibits 1, 2, and 3, are admitted into the record. Any party that objects to the admission of EAB Exhibits 1, 2 and 3 into the record must submit

such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090. Unless such objection is received and sustained, the exhibits will remain in the record.

FINDINGS OF FACT: (1) Beginning in October 2016, claimant participated in a drug treatment program located in Salem, Oregon. The program dispensed doses of medication to participants, initially on a daily or near-daily basis, and less frequently as participants progressed in the program. The dispensary opened at 5:00 a.m. and usually had a line that required participants to wait 15 minutes to an hour to receive their doses. The program required participants to participate in group and counseling sessions, the frequency of which depended on the participants' circumstances. The program offered group sessions Monday through Saturdays. On weekdays, the hour-long sessions began at 5:15 a.m. and repeated at 75-minute intervals. The program offered counseling sessions by appointment Mondays through Saturdays. The nature of the program participation requirements necessitated that participants travel to Salem between one and six days per week as a condition of participating. The frequency of travel depended upon the participant's status in the program.

(2) At the time claimant began participating in the treatment program she worked as a "relationship banker" for Umpqua Bank. Claimant normally began working at 9:45 a.m. but was sometimes late to work because she drove to Salem to participate in treatment three to five days a week before work. Because the wait times in the dispensary lines could vary, it was difficult to judge how much time it would take for her to pick up her medication. Claimant tried to pick up her medication at 5:00 a.m. and attend the 5:15 a.m. group sessions, but if the medication line took too long she was unable to attend that session and had to attend a later one.

(3) In June of 2017, the employer approved intermittent leave for claimant under the Family Medical Leave Act (FMLA). The intermittent leave enabled claimant to report for work at 10:00 a.m. so she would not be late for work while participating in the drug treatment program. Claimant still experienced difficulty reporting to work on time due to the rehabilitation program participation requirements. On November 1, 2018, claimant lost her job with Umpqua.

(4) On November 19, 2018, claimant filed an initial claim for unemployment insurance benefits. She filed weekly claims for benefits for the weeks of November 18, 2018 through December 22, 2018 and January 6, 2019 through January 19, 2019 (weeks 47-18 through 51-18 and 02-19 through 03-19), the weeks at issue. The Department did not pay claimant benefits for any of the weeks claimed.

(5) During the weeks at issue, claimant sought work as a loan officer. Claimant was a resident of Gleneden Beach, Oregon and her labor market area was Gleneden Beach, Depoe Bay, Lincoln City, and Otter Rock. In claimant's labor market, the customary days and hours for work as a loan officer were Monday through Friday, 8:00 a.m. to 5:00 p.m.

(6) Between November 18, 2018 and January 19, 2019, the period at issue, claimant participated in the treatment program by traveling from Gleneden Beach to Salem three to five days per week. The trip took claimant approximately 90 minutes to travel each way, but it could take longer depending on the weather and time of day. The program required claimant to participate in two group sessions each week. Claimant attended weekday sessions, not Saturday sessions. She did not return to her labor market by 8:00 a.m. on the days she traveled to Salem.

CONCLUSIONS AND REASONS: We agree with the ALJ. Claimant was not available for work during the weeks at issue.

To be eligible to receive benefits, an unemployed individual must be able to work, available for work, and actively seek 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 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.* By logical extension of the holding in *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) where, as here, claimant was not paid benefits or given waiting week credit during any of the weeks at issue, claimant has the burden to show by a preponderance of the evidence that she was eligible to receive benefits for each week claimed.

During the weeks at issue, claimant sought work as a loan officer, which in her labor market was customarily performed Monday through Friday from 8:00 a.m. to 5:00 p.m. Claimant failed to show that given her participation in her Salem drug treatment program during those weeks, she was capable of reporting for work by 8:00 a.m. Neither at hearing nor in her written argument did claimant assert or show that her practice during those weeks was to attend her group and counseling sessions on Saturday and obtain her medication doses, Monday through Friday, at a time early enough that allowed her to return to her labor market by 8:00 a.m. She testified that during the weeks at issue it would have been “difficult” for her to have begun a job at 8:00 a.m. Transcript at 20-21. When asked directly by the ALJ how she would have managed attending her required group and counseling sessions and obtaining her medication doses in Salem if she had been offered a job beginning at 8:00 a.m., claimant failed to respond other than to state, “[W]e may need to relocate.” Transcript at 25-26. Claimant added, “[I]f I had a job right now...it would be a little bit tricky, so I would look for a position...that didn't start at 8:00.” Transcript at 21.

The record also showed that claimant was late to work when her job started at 9:45 a.m. because of her treatment program participation, and delayed her start time to 10:00 a.m. for that reason. Despite her efforts while working to arrive at the dispensary for medication by 5:00 a.m. and attend the 5:15 a.m. group session, she was sometimes unable to do so. On occasions when the dispensary line took longer than 15 minutes, she was unable to attend group until 6:30 a.m. If she attended a 6:30 a.m. group, she would not leave Salem until 7:30 a.m. or later, and would not arrive back in her labor market for work until 9:00 a.m. at the earliest. The preponderance of the evidence claimant presented therefore showed that while it was theoretically possible that she could both participate in her treatment program in Salem and report to work at 8:00 a.m. in her labor market, the likelihood that she could actually do so with any dependability was improbable. Accordingly, claimant failed to show that, during the weeks at issue, she was capable of reporting for the work she sought during all of the days and hours of the week customary for that work. And, by likely limiting the positions she sought to jobs that started later than 8:00 a.m. to accommodate her attendance at her drug treatment program, claimant likely imposed a condition that substantially reduced her opportunity to return to work at the earliest possible time. Claimant failed to meet her burden to establish that she was available for work during the weeks at issue.

In written argument, claimant asserted that she was available for work under OAR 471-030-0036(3)(e) based on “medical necessity.” EAB Exhibit 2 at 1. That provision provides, in pertinent part, “an

individual with a permanent or long-term physical or mental 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.” However, even assuming that claimant’s drug addiction was a qualifying impairment under the rule, it was not her impairment that prevented her from being available for work by 8:00 a.m., but her chosen treatment program to address that impairment. Claimant also asserted that she could have attended her group and counseling sessions on Saturday, received her medication doses Monday through Friday at 5:00 a.m., and left the treatment facility at 5:15 a.m. with sufficient time to begin a job within her labor market at 8:00 a.m. EAB Exhibit 2 at 2-3. While that may be true going forward, there is no evidence in the record to establish that that was claimant’s practice during the weeks at issue.

Although claimant now might only be obligated to attend one group session per week, which she could likely do on a Saturday, and might now have achieved a status that would allow her to take extra doses of medication home instead of traveling to Salem so frequently, the preponderance of the evidence in the record shows that during the weeks at issue claimant’s participation in the rehabilitation program in Salem left her unavailable to work all the usual days and hours customary for the type of work she sought in her labor market.¹ Claimant therefore was not available for suitable work during the weeks at issue (weeks 47-18 through 51-18 and 02-19 through 03-19), and is ineligible for benefits for those weeks.

DECISION: Order No. 19-UI-123330 is affirmed.

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

DATE of Service: March 22, 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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¹ This decision only applies to the weeks at issue. If claimant’s circumstances have changed since the weeks at issue, and she no longer has to frequently travel to and from Salem on the customary workdays of loan officers, claimant should report her new rehabilitation schedule and obligations to the Department so the Department can re-adjudicate claimant’s availability in light of her changed circumstances.



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 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

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

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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