

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0224

Reversed
Not Ineligible

PROCEDURAL HISTORY: On December 26, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was available for work from November 25, 2018 to December 15, 2018 (decision # 113628). The employer filed a timely request for hearing. On February 4, 2019, ALJ Monroe conducted a hearing, and on February 12, 2019 issued Order No. 19-UI-124546, concluding claimant was not available for work. On February 27, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the parties' written arguments when reaching this decision.

FINDINGS OF FACT: (1) Claimant had a bachelor's degree in mental health and until 2012 was licensed by the state to work as a residential foster home manager. Her work experience included skilled caregiving, residential foster home management, and mental health counseling. She had at times earned almost \$30.00 per hour.

(2) Since approximately 1985, claimant periodically worked as a caregiver for a particular client providing skilled caregiving services utilizing her psychology degree and specialized mental health experience. At all relevant times her rate for services performed was \$20.00 per hour.

(3) By late 2010 the client no longer wanted responsibility for managing the technical aspects of directly employing claimant as a caregiver. In December 2010, the client arranged to employ claimant through the employer's business, Care Givers NW, Inc.

(4) The employer hired claimant to work for the same client at the same rate of pay the client had previously paid to her. The employer paid claimant minimum wage, and the client paid the remainder of claimant's hourly wage to make up the difference between minimum wage and \$20.00 per hour.

(5) The client for whom claimant performed services had complex health and psychological issues that required skilled caregiving. Claimant worked 70 to 92 hours per week. In early August 2018, claimant's client moved into an assisted living facility, and claimant's job ended. On September 12, 2018, claimant

notified the employer. The employer told claimant that it had other clients for her. Claimant declined the work because she considered part-time, unskilled caregiving work that paid minimum wage was not commensurate with her educational background and work experience.

(6) On November 13, 2018, claimant filed an initial claim for unemployment insurance benefits. She filed weekly claims for benefits from November 25, 2018 to December 15, 2018 (weeks 48-18 to 50-18), the weeks at issue. The Department paid claimant benefits for all the weeks at issue.

(7) During the weeks at issue, claimant sought types of work consistent with her college degree and prior work experience. Claimant was not willing to accept work that paid minimum wage or \$12.64 per hour; she primarily sought work that paid between \$17.00 and \$25.00 per hour. She sought and was willing to accept work that initially paid \$13.00 per hour if the prospective employer offered opportunities for career advancement and wage increases. She applied for work as a personal aide, treatment specialist, medication aid, mental health support aide, and as a private aide for a stroke patient.¹ She did not seek work with the employer because the employer paid minimum wage and did not offer opportunities for hourly wage increases.

(8) During the weeks at issue, claimant's labor market included Lake Oswego, Beaverton, Tigard, Milwaukie, West Linn, Oregon City, and Portland, Oregon. In the Portland Tri-County area that encompassed claimant's labor market, occupations within the "personal care aide" profile typically paid between \$12.35 and \$15.12 per hour.² The median rate for those occupations was \$12.64. The occupational profile for that type of work included, "Assist the elderly, convalescents, or persons with disabilities with daily living activities at the person's home or in a care facility. Duties performed at a place of residence may include keeping house (making beds, doing laundry, washing dishes) and preparing meals. May provide assistance at non-residential care facilities. May advise families, the elderly, convalescents, and persons with disabilities regarding such things as nutrition, cleanliness, and household activities." The typical entry level education requirement for personal care aides was "less than high school," and position did not require any specialized knowledge or skills.

(9) On December 21, 2018, the Department contacted claimant to discuss her claim for benefits, specifically, her availability for work and wage requirements. The Department employee with whom claimant spoke told claimant that caregivers in claimant's labor market had to be willing to work for \$12.64 per hour. Claimant explained that she was not willing to do that because of her education, experience, past earnings, and wage requirements. After the call, the Department employee found that claimant was required to seek work that paid \$20.00 per hour, and concluded claimant was available for work despite the restrictions claimant had described during the call.

¹ The record does not show what initial hourly wage the positions claimant sought offered, nor does it show that claimant refused to accept positions that paid less than \$17.00 during the weeks at issue.

² We take notice of the facts within this paragraph, which is generally cognizable information available through the Department's "qualityinfo.org" website. See <https://www.qualityinfo.org/jc-oprof?at=1&t1=personal%20aid~399021~411500010~0~true~true~true~true~true~true~true~true~true~true~none~0~1~1>. 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.

(10) At all relevant times, the employer employed part-time unskilled caregivers and paid minimum wage. The employer's caregivers provided non-medical homecare like meal preparation, cleaning, and personal hygiene care. They did not supply medications, do wound care, change bandages, or lift or transfer clients. The employer had that type of work available during the weeks at issue but did not have a need to employ skilled caregivers, and did not pay more than minimum wage.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant was available for work during the weeks at issue.

To be eligible to receive benefits, unemployed individuals must be "able to work, [] available for work, and [] actively seeking and unable to obtain suitable work" during each week claimed. ORS 657.155(1)(c). To be considered "available for work" for purposes of ORS 657.155(1)(c) the individual must, among other things, be willing to work and capable of reporting to suitable full time, part time and temporary work opportunities throughout the labor market, and refrain from imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time. OAR 471-030-0036(3)(April 1, 2018).

The Department paid claimant benefits for the weeks at issue. The Department therefore has the burden to prove that benefits should not have been paid. *See accord Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). The Department did not meet its burden.

The ALJ found as fact that claimant sought work primarily as a personal caregiver, the median wage for which is \$12.64 per hour, according to the Department's qualityinfo.org website.³ The ALJ's finding is inconsistent with the facts adduced at the hearing. The qualityinfo.org website described the occupation of personal care aide as an individual with less than a high school degree performing unskilled tasks like personal hygiene care, housekeeping, and meal preparation. It was that type of work that paid a median rate of \$12.64 per hour. Claimant did not perform that type of work. Although claimant's work for her client of 20+ years might have had the same title, the work claimant actually performed was skilled caregiving work involving a psychological component for a client with physical and psychological needs. The type of skilled caregiving work claimant performed for the 20+ years preceding her claim for benefits required different educational, skill, and knowledge proficiencies than those of the personal care aide occupation described on the website, and paid significantly more than \$12.64 per hour. The record does not show that claimant sought work as a caregiver of the type described on the qualityinfo.org site, nor does it show that the type of work claimant sought paid a median rate of \$12.64 per hour.

The ALJ found as fact that the Department "advised claimant that she must be willing to accept work that pays" a consistent amount.⁴ That finding is not supported by the record. According to the record, claimant spoke with a Department employee on December 21st. During that call, the Department employee told claimant, "That was the last type of work you've been doing for some – quite some time and you'd be willing to do that now in the median rate for that work in your labor market . . . \$12.63 an hour."⁵ The Department's witness at the hearing then added that it was explained to claimant that "[s]he

³ Order No. 19-UI-124546 at 1.

⁴ *Id.* at 2.

⁵ Transcript at 7.

would need to be willing to seek and accept” similar pay.⁶ However, the record shows that claimant then responded to the Department employee by explaining why she was not willing to accept work that paid \$12.64 per hour. After that conversation, the Department employee issued an administrative decision stating, “To be eligible for benefits you must . . . be actively seeking work as a private pay caregiver and mental health counselor at the rate of pay you had been accustomed to, \$20.00 per hour . . .” and stating that claimant was able, available, and actively seeking work based upon the activities and availability she had described during the call.⁷ The record therefore shows that whatever the Department employee might have stated during the call about claimant being required to seek work that paid \$12.64 per hour, that statement occurred as part of a conversation about what claimant needed to do, and the employee ultimately agreed and advised claimant that she needed to seek work that paid \$20.00 per hour to maintain her eligibility for benefits.

Finally, the ALJ concluded that claimant was not available for work during the weeks at issue because, “[c]onsidering the totality of the circumstances, the record supports the conclusion that, more likely than not, claimant’s wage requirements imposed a condition that substantially reduced her opportunities to return to work at the earliest possible time.”⁸ The record does not support that conclusion. According to the relevant law, individuals need only be available and actively seek “suitable” work as a condition of maintaining their eligibility for benefits.⁹ ORS 657.190 provides that when determining whether any work is suitable for an individual, factors to consider include, among other things, the “prior training, experience and prior earnings of the individual.” Claimant had never worked as an unskilled caregiver in a field that did not require a high school diploma or that paid minimum wage or a median wage of \$12.64 per hour. That type of work was not suitable for claimant during the weeks at issue because it was not consistent with her prior training, experience, educational background, and earnings. Claimant’s decision to pursue suitable work – work that required skilled caregiving and mental health work that paid, or had the potential to pay, around \$20.00 per hour – did not impose a condition that substantially reduced her opportunities to return to suitable work. She was not ineligible for benefits for doing so.

In reaching this decision, we considered OAR 471-030-0036(3)(g), which provides, “an individual will be considered not available for work if he or she fails or refuses to seek the type of work required by the Director pursuant to section (1) of this rule.” OAR 471-030-0036(1) provides:

In considering suitable work factors under ORS 657.190 and for purposes of determining eligibility under 657.155(1)(c), the Director may require an individual to actively seek the

⁶ *Id.*

⁷ See Administrative Decision # 113628.

⁸ Order No. 19-UI-124546 at 3.

⁹ The ALJ’s Order analyzed suitability, but the analysis was flawed because it focused on an inaccurate comparison of the median wage rate for caregiver work as described at qualityinfo.org to claimant’s desired rate of pay for a different type of work. See Order No. 19-UI-124546 at 4. The analysis excluded consideration of other “suitability” factors listed in ORS 657.190, which include prior training and experience, among other things. The analysis also purported to apply an administrative rule that defines “suitable” work in disqualification cases decided under ORS 657.176(2), which does not apply to eligibility cases under ORS 657.155.

type of work the individual is most capable of performing due to prior job experience and training except that:

- (a) If an individual is unable to secure the individual's customary type of work after contacting the potential employers in the labor market where benefits are being claimed, the Director may require the individual to seek less desirable but similar work or work of another type which the individual is capable of performing by virtue of experience and training.
- (b) If the type of work an individual is most capable of performing does not exist in the labor market where the individual is claiming benefits, the Director may require the individual to seek any work that exists in the labor market for which the individual is suited by virtue of experience and training.
- (c) After the individual has contacted the potential employers in the labor market where benefits are being claimed and is still unable to obtain work as described in (1)(a) and (b) of this section, the Director may require the individual to further expand work-seeking activities.

The record does not support a finding that claimant was instructed to seek work that paid \$12.64 per hour. For the reasons already explained, claimant was never instructed by the Department to seek unskilled caregiving or personal care aide work of a type described at qualityinfo.org that paid a median rate of \$12.64. Claimant therefore is not considered “not available for work” under OAR 471-030-0036(3)(g) during the weeks at issue. This decision does not, however, preclude the Department from requiring claimant to seek less desirable work than she is currently seeking in the future, should the Department determine that the conditions in OAR 471-030-0036(1) exist.

Claimant was eligible for benefits during the weeks at issue, November 25, 2018 to December 15, 2018 (weeks 48-18 to 50-18) for the reasons explained. Benefits were, therefore, payable to her for those weeks.

DECISION: Order No. 19-UI-124546 is set aside, as outlined above.¹⁰

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

DATE of Service: April 2, 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

¹⁰ This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take from several days to two weeks for the Department to complete.

'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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.



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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.