

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0442

Reversed & Remanded

PROCEDURAL HISTORY: On March 20, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available, able or actively seeking work from February 17, 2019 through March 16, 2019 (decision # 90305). Claimant filed a timely request for hearing. On April 23, 2019, ALJ Shoemake conducted hearing, and April 30, 2019 issued Order No. 19-UI-129025, concluding that claimant was not available for work from February 17, 2019 through April 13, 2019. On May 8, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted to EAB a note from his physician dated May 3, 2019 that addressed his physical abilities during the period of February 17, 2019 through April 13, 2019. EAB may consider additional information presented for the first time on review if the party offering it establishes that it was prevented from offering that information at the hearing by factors or circumstances beyond its control. OAR 471-041-0090(2) (October 29, 2006). While claimant did not make the showing required to have EAB consider this additional information in the first instance, claimant may offer this doctor's note into evidence at the remand hearing. At that time, it will be determined if the doctor's note is relevant to the issues on which this matter has been remanded and, if appropriate, it will admitted it into evidence. Claimant is advised that to allow the note to be considered, he should follow the instructions on the notice of the remand hearing that he receives relating to documents a party wishes to have considered at the hearing. These instructions will direct claimant to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing to the hearing notice.

FINDINGS OF FACT: (1) Around 1997, claimant was diagnosed with diabetes.

(2) On August 30, 2018, claimant filed an initial claim for unemployment insurance benefits. Subsequently, claimant began working as a welder.

(3) Sometime on or before February 17, 2019, claimant's foot became injured as a result of diabetes. Sometime later, claimant's physician issued a note that released him for modified work. The note stated that claimant was released only for "stationary" and "sedentary" work. Audio at ~ 9:11, ~9:22. Claimant

understood that the doctor's note initially restricted him from work that required him to be on his feet, walk, move around and perform lifting and pushing and pulling. The note indicated that the physician would re-examine claimant in six weeks, around the end of March 2019.

(4) Sometime around February 17, 2019, claimant presented the doctor's note to the employer for whom he was then working as a welder. The employer laid claimant off because it did not have modified work to give him.

(5) On February 17, 2019, claimant restarted his claim for benefits. Claimant claimed benefits for the period of February 17, 2019 through April 13, 2019 (weeks 08-19 through 15-19), the weeks at issue.

(6) During the weeks at issue, claimant sought work as a telemarketer, cashier, salesperson, in customer service, and as a delivery driver. During the weeks at issue, the physician's note that restricted claimant to sedentary and stationary work was not superseded and remained in effect. During the weeks at issue, claimant was not able to perform work like welding, which required him to wear steel-toed boots during the weeks at issue. Such boots aggravated the injury to his foot.

CONCLUSIONS AND REASONS: Order No. 19-UI-129025 is reversed, and this matter remanded another hearing and order.

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).

For an individual to be considered "available for work" for purposes of ORS 657.155(1)(c), they must be

(b) Capable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought, including temporary and part time opportunities;

OAR 471-030-0036(3) (April 1, 2018).

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).

Order No. 19-UI-129025 concluded that claimant was not available for work during the weeks at issue. The order reasoned that because claimant did not show that he was physically able to perform the work he was seeking, he "was not capable of accepting and reporting for all suitable work during the weeks at issue." Order No. 19-UI-129025 at 3. However, the order is incorrect because confused availability to work with ability to work.

As for being available for work, a claimant must be capable of accepting and reporting for *suitable* work opportunities within the labor market. ORS 657.190 provides that in determining whether work is suitable for an individual, the individual's physical fitness for that work must be considered. If claimant was not physically able to perform the work that he was seeking during the weeks at issue that would show that the work was not suitable for him. If it was not suitable work, claimant's inability to accept

and report for that work cannot be basis for concluding that he was not available for work. Order No. 19-UI-129025 therefore erred in concluding that claimant was not available for work, and in denying claimant benefits for that reason.

Order No. 19-UI-129025 should have considered whether or not claimant was able to work during the weeks at issue, and whether or not claimant should be denied benefits under OAR 471-030-0036(2) based on his physical limitations. In commenting on claimant's ability to work, Order No. 19-UI-129025 appeared to place the burden of proof on claimant when it stated that "claimant has not shown at this time [] that he is physically able to perform the work that he is seeking." Order No. 19-UI-129025 at 2-3.

However, whether claimant or the Department carries the burden of proof in this matter depends on whether depends on whether claimant was paid or was not paid benefits during the weeks at issue. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (where the Department has paid benefits it has the burden to prove benefits should not have been paid; by logical extension of that principal, where benefits have not been paid claimant has the burden to prove that the Department should have paid benefits). The record does not disclose whether claimant was paid benefits during the weeks at issue, and additional information is needed to allow a determination of which party carries the burden of proof as to claimant's ability to work during the weeks at issue.

In order to determine whether claimant was able to work during some or all of the weeks at issue, additional information is required. For instance, the record does not show the basis for claimant's belief that he was able to "walk normal" and perform "normal work" by around March 15, 2019 (in week 11-19). Audio at ~15:48, ~17:20. The record does not show if claimant's physician evaluated his physical abilities during the weeks at issue after the physician issued the note imposing work restrictions around February 17, 2019, or if the physician advised claimant at any time during the weeks at issue that he could ignore some or all of the restrictions.¹ The record does not show the treatment that claimant's physician or other medical providers gave to claimant for his injured foot during the weeks at issue and if any procedures were performed on the foot. The record does not show what claimant's physical abilities actually were during the weeks at issue, how if at all, they were limited, and if they changed or improved during the weeks at issue. The record does not show how and why wearing steel-toed work boots continued to aggravate claimant's foot injury after March 15 when, according to claimant, standing, walking and lifting did not. In addition, the record does not show what jobs that claimant applied for or sought during each of the weeks at issue, the physical requirements of those jobs, whether claimant could perform those requirements with or without accommodation, and the basis for claimant's belief that he could.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant was able to work during some or all of the weeks at issue, Order No. 19-UI-129025 is reversed, and this matter remanded for further development of the record.

¹ The May 3, 2019 note from claimant's physician appears relevant to this area of inquiry.

DECISION: Order No. 19-UI-129025 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: June 12, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-129025 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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 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 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 الاستئناف 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.