

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0500

Reversed
Eligible

PROCEDURAL HISTORY: On April 5, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was available for work during the weeks of February 24, 2019 through March 30, 2019 (decision # 134821). The employer filed a timely request for hearing. On May 6, 2019, ALJ Wyatt conducted a hearing, and on May 14, 2019 issued Order No 19-UI-129903, concluding that claimant was not available for work during the weeks of February 24, 2019 through March 30, 2019. On May 31, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Claimant had elderly parents who lived on the east coast. Claimant regularly visited and cared for her parents in their east coast home.

(2) Until summer 2019, claimant worked at Oregon State University (OSU) developing communications curricula for the college of engineering. OSU let claimant go and she filed an unemployment insurance claim. Claimant's claim was determined valid.

(3) When claimant began to look for work, she could locate few positions like the one she had at OSU. Claimant spoke with a Department representative about the type of work she should seek and, after describing her training and experience during the last several years, the representative told her to seek technical editing work. Claimant did so.

(4) Claimant's labor market included Corvallis, Albany, and Lebanon Oregon. The days and hours customary for the type of work claimant was seeking were Mondays through Fridays, day shifts.

(5) In fall 2019, claimant stopped claiming weekly benefits because she was discouraged by her inability to secure an editing or other suitable job and wanted a respite from job search activities. Sometime later, claimant applied for a job as a substitute teacher's aide with Edustaff LLC. Among other things, the employer supplied substitute teacher's aides and paraprofessional staff for 13 public schools in the Corvallis School District and for other school districts. Although claimant had no training or experience working as a teacher's aide, claimant wanted to do some "community service" and "give back" to her community during her period of unemployment. Transcript at 18. Claimant did not intend to change her career path from editing work to become a teacher's aide or education paraprofessional. Claimant did not think she had the temperament to work as a teacher's aide on a prolonged basis and did not think she could financially sustain herself in that position. The teacher's aide job paid approximately one-third of what claimant had earned at OSU and expected to earn at an editing job.

(6) In spring 2019, claimant restarted her unemployment insurance claim. Claimant claimed benefits for the weeks of February 24 through March 30, 2019 (weeks 09-19 through 13-19), the weeks at issue. The Department paid claimant benefits for the weeks at issue.

(7) During the weeks at issue, claimant sought editing work. During the weeks at issue, the employer also continued to employ claimant and offer her work as a teacher's aide. Claimant confined her work as a teacher's aide to one school only in the Corvallis School District. There were many days during the weeks at issue that claimant could have worked as a teacher's aide for the employer, but did not.

(8) During the weeks at issue, the types of editing jobs that claimant sought were ones that she could largely perform remotely from any location. Claimant wanted the flexibility to visit her parents on the east coast when needed and still be able to perform work from their home. However, claimant was willing to accept a job that occasionally required her to report to an employer's workplace.

CONCLUSIONS AND REASONS: Claimant was available for work during the weeks at issue. Claimant is eligible to receive benefits for those weeks.

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:

(a) 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, unless such part time or temporary opportunities would substantially interfere with return to the individual's regular employment; and

(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; and

(c) Not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time; and ***

* * *

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

Where, as here, the Department paid benefits to claimant for the weeks at issue, it has the burden of proving that claimant was not eligible to receive those benefits or, in other words, that she was not available for work. *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).

Order No. 19-UI-129903 concluded for two reasons that claimant was not available for work during the weeks at issue. The first reason on which the order relied was that claimant did not make herself available for substitute paraprofessional work as a teacher's aide with the employer. Order No. 19-UI-129903 at 3. In support of its conclusion, the order found that claimant was qualified to perform substitute paraprofessional work and did perform such work occasionally. *Id.* The conclusion that claimant was not available for this reason is not correct.

Claimant did not seek work as a substitute teacher's aide or educational paraprofessional during her period of unemployment. Claimant sought editing work, the field in which she was experienced, during the weeks at issue. Claimant worked as a teacher's aide to allow her to give back to her community while she was attempting to secure an editing job. On these facts, the court's decision in *Crothers v. Employment Department*, 250 Or App 62, 279 P3d 304 (2012) is applicable.

In *Crothers*, the court held that where an unemployed construction superintendent also worked as a CPR instructor, the construction superintendent was not required to make himself available for more work as a CPR instructor in order to remain eligible for benefits. The court based its holding on the finding that claimant's work as a CPR instructor was an "avocation," rather than an occupational pursuit, since claimant was an experienced construction superintendent, claimant consistently sought work as a construction superintendent during his period of unemployment, and claimant did not seek work as a CPR instructor during that period. *Crothers*, 250 Or App at 64. Like the construction superintendent in *Crothers*, claimant's work as a teacher's aide was an avocation that she did not undertake as an occupation or a future employment prospect, but for reasons of personal fulfillment. The record also did not indicate that claimant's work as a teacher's aide interfered with her ability to secure work in the editing field. That claimant was working on a limited basis, as a teacher's aide during the weeks at issue did not require that she make herself available for more opportunities to work as a teacher's aide in order to remain eligible for benefits.

The second reason on which the order relied for the conclusion that claimant was not available for work during the weeks at issue was that claimant would accept only editing work that she could perform remotely from her home and, as a result, imposed a condition that substantially reduced her opportunity to return to work at the earliest possible time. Order No. 19-UI-122903 at 3. However, the Department and the employer had the burden in this case to show, more likely than not, that claimant's desire to work remotely substantially reduced her opportunities to return to work. The record does not show, more likely than not, that claimant was not available for work due to limiting her work search to jobs she could perform remotely.

Here, neither the Department nor the employer took the position that seeking work she could perform remotely made claimant unavailable for work. Neither the Department nor the employer showed that claimant missed job opportunities by seeking to work remotely, or that on-site, in-office work was available in claimant's labor market that she excluded from her work search. The record lacks a

foundation on which to conclude that by limiting herself to work that she could perform remotely, claimant substantially reduced her opportunities to return to work at the earliest possible time.

No other grounds were raised in this record to find that claimant was not eligible to receive benefits during the weeks at issue. Claimant was available for work during the weeks at issue. Claimant was therefore eligible to receive benefits for those weeks.

DECISION: Order No. 19-UI-129903 is set aside, as outlined above.

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

DATE of Service: July 5, 2019

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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

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
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