

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0664

Reversed & Remanded

PROCEDURAL HISTORY: On May 17, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not eligible for benefits from April 28, 2019 to May 11, 2019 because she was not “physically capable of performing the work sought, full time, part-time and temporary” (decision # 95818). Claimant filed a timely request for hearing. On June 18, 2019, ALJ Snyder conducted a hearing, and on June 26, 2019 issued Order No. 19-UI-132344, concluding claimant was not eligible for benefits from April 28, 2019 to June 8, 2019 because she was not able to work or available for work. On July 16, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On approximately March 9, 2019, claimant became severely ill and was hospitalized with kidney, liver, and pancreas failure, and collapsed lungs. On March 11, 2019, claimant was placed in a medically induced coma. In mid-April, claimant’s doctors began waking her; she was not discharged from the hospital until April 29, 2019.

(2) After leaving the hospital, claimant’s ongoing symptoms included coma-related muscle weakness and mobility problems. She was tentatively diagnosed by doctors at OHSU with kidney disease.

(3) On April 29, 2019, claimant filed an initial claim for unemployment insurance benefits. Claimant filed weekly claims for benefits from April 28, 2019 through June 8, 2019 (weeks 18-19 through 23-19), the weeks at issue. At all relevant times, claimant sought work in bookkeeping, customer service, accounting, administrative, and human resources.

(4) During the week of April 29, 2019 through May 4, 2019, claimant was hospitalized on April 28, 2019 and part of April 29, 2019. She also had an appointment to see her primary care physician and had her blood drawn during that week.

(5) During the week of May 5, 2019 through May 11, 2019, claimant had her blood drawn. Claimant also had a physical therapist home visit.

(6) During the week of May 12, 2019 through May 18, 2019, claimant went to the physical therapist on May 14, 2019. On May 15, 2019, claimant had her blood drawn.

(7) During the week of May 19, 2019 through May 25, 2019, claimant had her blood drawn on May 23, 2019.

(8) During the week of May 26, 2019 through June 1, 2019, claimant went to the physical therapist on May 28, 2019.

(9) Claimant sought work during each week claimed. When prospective employers asked her why she was unemployed, claimant explained her medical situation and indicated that she had some medical appointments to attend. She told prospective employers, "I would have medical appointments, but I would be able to make up the time or, um, work around my schedule." Transcript at 11.

CONCLUSIONS AND REASONS: The order under review should be reversed, and this matter remanded.

The order under review concluded that claimant was not eligible for benefits during the weeks at issue. The order summarily concluded that claimant was not able to work, without specifying what aspects of the types of work claimant sought she was physically unable to perform. Order No. 19-UI-132344 at 3. The order concluded that claimant was not available for work because she informed potential employers that she had ongoing medical appointments that she was required to attend, which "imposed a condition which substantially reduced her opportunities to return to work at the earliest possible time." *Id.* However, additional evidence is necessary to determine whether or not claimant was eligible for benefits during all or some of the weeks at issue.

To be eligible to receive benefits, unemployed individuals must be able to work and available for work during each week claimed. ORS 657.155(1)(c). The record must therefore be developed sufficiently for a separate ability and availability determination to be made for each of the weeks at issue.

Claimant has the burden to prove that she was able to work and available for work during the weeks at issue. *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).

Able to work. OAR 471-030-0036(2) defines "able to work" for purposes of ORS 657.155:

For the purposes of ORS 657.155(1)(c), an individual shall be considered able to work in a particular week only if physically and mentally capable of performing the work he or she actually is seeking during all of the week except: * * *

(b) 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 unable to work solely on that basis so long as the individual remains available for some work.

The record fails to show during each of the weeks at issue whether claimant was physically capable of performing the work she was actually seeking, which primarily included bookkeeping, accounting, administrative work, and human resources work. The record does not show what the physical requirements of each of those types of work were. Nor does the record show what claimant's physical capacity was during each of the weeks at issue. For example, claimant testified at the hearing that she had muscle weakness and mobility issues after being released from the hospital, including. Transcript at 17. The record does not show what the limitations were or how they affected claimant's physical ability to work in bookkeeping, accounting, administrative work, and human resources work.

Claimant also testified that she "kept it open in regards to retail" with respect to her job seeking. Transcript at 17. The record does not show whether or not she actually sought retail work, which weeks she sought retail work, what the physical demands were of retail work, or whether claimant was physically capable of meeting those demands in light of her physical health.

The Department alleged at the hearing that claimant limited her availability to work full time, testifying at various times that during a phone call with a Department employee claimant had either questioned her ability to work eight hours in a week, or questioned her ability to work eight hours in a day. *Compare* Transcript at 7, 19. Given the discrepancy, the record does not show precisely how claimant was limiting her work schedule. Even if claimant was physically incapable of working full-time, however, she may not be deemed unable to work solely on that basis if the reason she could not work full-time was that she had a long-term or permanent "impairment." *See* OAR 471-030-0036(2)(b). 29 C.F.R. §1630.2(h)(1) defines "physical or mental impairment," in relevant part, as:

Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; * * *

Claimant was hospitalized for almost two months with kidney, liver, pancreas, and lung failure. She was tentatively diagnosed with kidney disease. Those factors suggest that claimant might have an impairment. However, additional inquiry about claimant's medical conditions, diagnoses, whether the conditions are curable, and her prognosis for recovery is necessary to determine whether claimant's conditions meet the definition of an "impairment." Nor does the record show whether or not any "impairment" claimant has was, or was expected to be, of a sufficient duration that it should be considered long-term or permanent.¹ Absent an inquiry into those matters, and any other relevant line of questioning in the ALJ's discretion, the record cannot support any conclusion as to whether or not claimant was able to work during some or all of the weeks at issue.

¹ The advisory the Department employee gave claimant during her phone interview was, in essence, that she did not meet the eligibility requirements at that time, but "[o]nce you are able to work full-time, even if limitations, give us a call. Or if the doctor finds you have a permanent condition, disability, and gives you a diagnosis and tells you how many hours you can work." Transcript at 8. That advisory appears to be flawed because it suggests that claimant must have a diagnosis of a permanent condition or disability, and be advised by a doctor how many hours she can work, in order to be eligible for part-time benefits as a person experiencing an impairment. However, the applicable laws and rules do not require evidence of a diagnosis, permanent condition, disability, or a doctor-established hour limitation as a condition of eligibility for persons experiencing an impairment.

Available for work. OAR 471-030-0036(3) provides, in pertinent part, that “[f]or the purposes of ORS 657.155(1)(c), an individual shall be considered available for work if, at a minimum, he or she is:

(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; * * *

(e) However, 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.

* * *

During the week of April 28, 2019 through May 5, 2019, claimant was, more likely than not, not available for work. She was hospitalized on April 28th and at least a portion of April 29th, which likely was a substantial limitation on her availability to work. She also had a doctor appointment during that week that was likely, as a matter of common sense, scheduled during the day shift, and therefore interfered with her ability to report to work if asked to do so. Although the record suggests claimant's unavailability during that week, the record also fails to show that claimant was asked questions about how her hospitalization and doctor appointment affected her availability to work. Due process requires that claimant be given an opportunity to meet her burden of proving her availability during that week.

The record developed at the hearing does not show whether or not claimant should be considered available for work during the remaining weeks at issue. The Department alleged claimant was seeking cashiering, bookkeeping, and customer service work, and that the customary days and hours for cashiering work included all days and shifts. Transcript at 7. Claimant testified that she sought “bookkeeping, accounting, administrative, and Human Resources” work, “[n]ot necessarily cashiering,” and “kept it open in regards to retail because I’ve done retail.” Transcript at 16. The record does not, however, show what work claimant actually sought during the weeks at issue, or should have been expected to seek based upon her work experience and employment history. The record also does not show if claimant was seeking or expected to seek cashiering or retail work, and to what extent seeking that type of work affected or should affect the hours she was required to be available for work. Additionally, if claimant was not seeking cashiering work, then the record fails to show what the customary days and hours were for the types of work claimant sought. Without evidence of the customary days and hours of the types of work claimant sought, the record does not establish what hours claimant needed to be available for work during the weeks at issue.

Claimant had physical limitations during the weeks at issue that included muscle weakness and mobility issues. The record does not show whether or not claimant had any other physical limitations or symptoms. Nor does the record show whether the muscle weakness, mobility, or any other limitations affected her willingness to work, or affected whether or not she was capable of performing suitable work, during each of the weeks at issue.

Claimant had to visit a medical facility for blood draws each week between April 28, 2019 and May 25, 2019. The record does not show whether she had blood draws during the weeks of May 26, 2019 through June 8, 2019. The medical facility where claimant had her blood drawn was open Monday through Saturday, but the record does not show what the business hours were on those days or whether all of the facility's hours conflicted with the customary hours of the types of work claimant sought. *See* Transcript at 13. Absent that evidence, the record fails to show that claimant's blood draws limited her availability for work.

Claimant had to visit a physical therapy office for exercises every week from May 5, 2019 through May 18, 2019 and May 26, 2019 through June 1, 2019. The record does not show if claimant had to go to the physical therapy office during the weeks of May 19, 2019 through May 25, 2019 and June 2, 2019 through June 8, 2019. The physical therapy office was open Monday through Friday, but the record does not show what the business hours were on those days or whether all of the hours conflicted with the customary hours of the types of work claimant sought. Transcript at 13. Absent that evidence, the record fails to show that claimant's physical therapy visits limited her availability for work.

The record also does not show whether claimant needed appointments to have her blood drawn or visit the physical therapy office or if she did those activities on a walk-in basis. If claimant needed appointments, the record does not show how far in advance claimant had to make them or what were the terms under which she could cancel or reschedule her appointments if they conflicted with a work schedule. Absent that evidence, the record fails to show whether the blood draws and physical therapy office visits affected claimant's availability for work.

Finally, the record shows that claimant likely told many prospective employers that she had medical appointments. However, the record also suggests claimant might have told employers that if she could not have time off to attend appointments she could schedule them around her work schedule. The record must be clarified about what claimant told prospective employments about the days and hours she could work, any special needs she had, and whether or not she would require time off for her medical appointments. Absent those inquiries, the record does not show if claimant was available, or not, during each week at issue.

Evidentiary ruling. The Department's case was based almost exclusively upon admissible hearsay evidence taken from notes made by a Department employee, who did not testify at the hearing, of claimant's May 16th call with that employee. However, claimant questioned the accuracy of the notes, indicating that she had not made statements attributed to her and the notes were incomplete. *See* Transcript at 11, 13, 14, 16-17. In response, the Department's witness vouched for the reliability of the notes, testifying that "the Department is meticulous about keeping notes for any conversation," that "I fully have faith that the Department took accurate notes," and that while the notes were not a transcript, they were "backed up by telephone call recordings." Transcript at 21-22.

The characterization of the quality of the Department's notes as "meticulous," and the related implication that the employee's notes about the May 16th conversation were also meticulous, have no evidentiary value. Generally speaking, it is a well-established standard that in legal matters it is inappropriate for one witness to vouch for the reliability of an absentee witness, or, as in this case, to vouch for the "meticulous" nature of the absentee witness's notes. And, if such vouching occurs notwithstanding, the ALJ is obligated to inquire into the basis of such a characterization. No such inquiry occurred in this case. The assertion that the notes were "backed up" by recordings of the call, likewise, has no evidentiary value absent evidence that the notes were in fact compared for accuracy against the recording, coupled with corroborating evidence about the recording itself. Therefore, while hearsay is admissible, and it is appropriate for the Department's witnesses to, for example, testify about the Department's standard business processes, training, policies, or quality assurance processes and standards with respect to note-taking and validating the accuracy of employee note-taking, vouching for the reliability of evidence is not, and the statements specified above are without evidentiary value.

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 further development of the record is necessary for a determination of whether claimant was able to work and available for work, Order No. 19-UI-132344 is reversed, and this matter is remanded.

DECISION: Order No. 19-UI-132344 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: August 21, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-132344 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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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
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.