

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0990

Affirmed
Ineligible

PROCEDURAL HISTORY: On August 29, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work from May 26, 2019 to June 29, 2019 (decision # 153838). Claimant filed a timely request for hearing. On October 2, 2019, ALJ Murray-Roberts conducted a hearing, and on October 9, 2019 issued Order No. 19-UI-137772, concluding that claimant was not available for work from May 26, 2019 to June 29, 2019. On October 17, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) On April 8, 2019, claimant filed an initial claim for unemployment insurance benefits. Claimant filed weekly claims for benefits from May 26, 2019 to June 29, 2019, the weeks at issue. The Department did not pay claimant benefits for those weeks.

(2) During the weeks at issue, claimant sought field service and technician work. Claimant's labor market included Beaverton and the southwest Portland area. The customary days and hours for field service and technician work in claimant's labor market included all days and shifts.

(3) During the weeks at issue, claimant and his spouse provided sole child care for their four children. Claimant's spouse worked swing shift. As a result, claimant thought it was not possible for him to work shifts other than the day shift. He limited his availability and work search activities to the day shift.

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

To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed. ORS 657.155(1)(c). OAR 471-030-0036 provides, in relevant part:

* * *

(3) For 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

* * *

(4) Notwithstanding the provisions of OAR 471-030-0036(3), an individual who is the parent, step-parent, guardian or other court/legally-appointed caretaker of a child under 13 years of age or of a child with special needs under the age of 18 who requires a level of care over and above the norm for his or her age, who is not willing to or capable of working a particular shift because of a lack of care for that child acceptable to the individual shall be considered available for work if:

(a) The work the individual is seeking is customarily performed during other shifts in the individual's normal labor market area as defined by OAR 471-030-0036(6); and

(b) The individual is willing to and capable of working during such shift(s).

Claimant had the burden to establish that he was, more likely than not, willing to work during all the usual hours and days of the week customary for the types of work being sought.¹ He did not meet that burden.

Claimant argued in his written argument that when he was seeking work “I applied for all jobs I was qualified for,” including “many jobs with no shift indicated.”² He stated he “was not limiting myself to work based on my understanding on shift times as I was willing and able to work any shift offered to me,” and that the ALJ misunderstood what hours he was willing to work.³ However, his argument is irreconcilably different than what he said at the hearing and therefore is not credible.

Claimant testified at the hearing that “it wasn’t really a – a possibility for me to work any other shift but daytime.”⁴ When the ALJ asked him if the only shift he was available to work was the day shift, claimant replied, “Uh, yeah. That was indicated to – when I first went in with my interview with my job seeking counselor, uh, I then told him that, you know, I – I really can only work a daytime shift.”⁵ Claimant testified he could only work “anytime between 4:00 a.m. and 3:30 p.m.” and could not work

¹ *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).

² Emphasis in original written argument.

³ Emphasis in original written argument.

⁴ Transcript at 17.

⁵ Transcript at 17.

between 3:30 p.m. and 4:00 a.m.⁶ He said if offered such work, he would have to decline it unless his wife was able to change her schedule.⁷ He further testified at the hearing, “anything that was swing or graveyard I didn’t attempt to apply for unless it was something that I would really benefit from,” and that he stated on applications that he could only work the day shift.⁸ He also testified that he “would directly contact or apply I would ask if it’s – what – what shift it is.”⁹

Notably, the reason claimant restricted his availability for work was because of his responsibility to provide child care for four minor children. Under certain circumstances, an individual who is not available for all work shifts might still be available for work notwithstanding the limitation. However, that is only the case when the individual is unwilling to work “a particular shift” to provide child care. Here, it does not appear that claimant qualifies for that exception. For example, the Department testified that the work claimant sought was customarily performed during three shifts. Claimant testified that he limited his availability to one shift. If that is the case, that means he was not available for two shifts, not just “a particular shift.” Claimant therefore would not be eligible for benefits under the child care exception for that reason.

However, claimant disputed that the Department’s witness correctly identified when the customary days and hours for the types of work claimant sought were and did not include a 7:00 a.m. to 5:00 p.m. day shift, because he had previously worked 6:00 a.m. to 2:30 p.m. and customary day shifts in his field were usually 5:00 a.m. to 3:30 p.m. If that is the case, it is notable that claimant testified, “Most of – most service jobs are, you know, 6:00 a.m. or so to 5:00 p.m.” Transcript at 19. By restricting himself to 4:00 a.m. to 3:30 p.m., as claimant testified he did, claimant established that he was not even available for one full shift. He therefore would not be eligible for benefits under the childcare exception for that reason, either.

The preponderance of the evidence, based upon claimant’s own clear testimony, is that claimant limited his availability for work during the weeks at issue to a portion of the day shift hours customary for the type of work he sought. He therefore cannot be considered available for work, and is not eligible for benefits during the weeks at issue.

DECISION: Order No. 19-UI-137772 is affirmed.

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

DATE of Service: November 19, 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

⁶ Transcript at 18.

⁷ Transcript at 18.

⁸ Transcript at 20.

⁹ Transcript at 20.

'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 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 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 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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