

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-1026

Reversed & Remanded

PROCEDURAL HISTORY: On August 26, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant did not meet one or more of the requirements to be able, available and actively seeking work from July 28, 2019 through August 17, 2019 (decision # 144046). Claimant filed a timely request for hearing. On October 2, 2019, ALJ Snyder conducted a hearing, and on October 9, 2019 issued Order No. 19-UI-137836, modifying the Department's decision and concluding that claimant was not available for work from July 28, 2019 through September 28, 2019. On October 23, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to 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. EAB considered claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Claimant filed an initial claim for unemployment insurance benefits on August 1, 2019. Claimant claimed but was not paid benefits for the weeks from July 28, 2019 through September 28, 2019, (weeks 31-19 through 39-19).¹

(2) Claimant had permanent or long-term anxiety, depression, fibromyalgia and high blood pressure. Due to these medical conditions, claimant was not able to work more than 20 hours per week, and not more than 5 hours per day.

¹ EAB has taken notice of the fact that the Department paid claimant, which is contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). Any party that objects to our taking notice of this information 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(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

(3) Claimant was not willing to accept work from which she would have gross monthly earnings of more than \$1,100.

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

The order under review concluded that claimant's unwillingness to work in employment that would pay more than \$1,100 per month was a condition that substantially limited her opportunities to return to work at the earliest possible time.² The order concluded that claimant therefore was not available for work during the weeks from July 28, 2019 through September 28, 2019, the weeks at issue.³

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

(d) Physically present in the normal labor market area as defined by section (6) of this rule, every day of the week * * *.

(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.

* * *

OAR 471-030-0036(3) (April 1, 2018). Claimant has the burden to prove she should have been paid benefits for 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).

² Order No. 19-UI-137836 at 4.

³ Order No. 19-UI-137836 at 4.

Claimant was willing to accept work only if it required a maximum of 20 hours of work per week, and it would provide gross earnings of no more than \$1,100 per month. The reason for the hour-per-week limitation was that claimant had long-term impairments that resulted in her being medically restricted from working more than 20 hours per week. Under OAR 471-030-0036(3)(e), the claimant cannot be deemed unavailable for work solely because she restricted her hours to 20 hours per week. She is therefore available for work despite the limitation on the number of hours per week she was willing to work, and she is not denied benefits because of the 20-hour per week restriction or because of her disabilities.

However, claimant may have limited her availability during the weeks at issue because she was not willing to accept work in which she would earn more than \$1,100 per month. Claimant believed earning more than \$1,100 could affect the outcome of her pending social security disability claim. However, the record does not contain sufficient information to determine if the earnings cap claimant imposed “substantially reduced” claimant’s opportunities to return to work at the earliest possible time.

Claimant testified that she worked “in retail,” and the record shows claimant’s last job prior to claiming the weeks at issue paid \$11.25 per hour. Audio Record at 19:54, Exhibit 1. Claimant would earn \$975 per month working 20 hours per week at \$11.25 per hour. The record does not contain other information regarding the type of work claimant was seeking, the type of work claimant had done in the past, how much claimant had earned in the past, and how much claimant was likely to earn per hour from prospective employers in her new labor market in Texas. Nor does the record show what wage rate claimant was willing to accept. It is necessary to know claimant’s probable wage rate to determine if the monthly earnings cap claimant imposed was a condition that would substantially reduce her abilities to return to work at the earliest possible time.

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 available for work during weeks 31-19 through 39-19, Order No. 19-UI-137836 is reversed, and this matter is remanded.

DECISION: Order No. 19-UI-137836 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: November 26, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-137836 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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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