

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-1104**

*Modified*  
*Not Eligible Weeks 38-19 through 40-19*  
*Eligible Weeks 41-19 through 44-19*

**PROCEDURAL HISTORY:** On October 18, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work or available for work from September 15, 2019 through October 12, 2019 (decision # 90600). Claimant filed a timely request for hearing. On November 12, 2019, ALJ Frank conducted a hearing at which the employer failed to appear, and on November 15, 2019, issued Order No. 19-UI-139866, concluding claimant was not able to work or available for work from September 15, 2019 through November 2, 2019.<sup>1</sup> On November 20, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted two written arguments to EAB. EAB did not consider claimant's written arguments when reaching this decision because they did not include a statement declaring that they provided a copy of their arguments to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

**FINDINGS OF FACT:** (1) On May 16, 2019, claimant had total knee replacement surgery. On June 20, 2019, claimant had right rotator cuff repair surgery. Claimant's rotator cuff condition was a long-term impairment. On August 15, 2019, claimant had a work separation from The Rinehart Clinic.

(2) On September 16, 2019, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed benefits for the period of September 15, 2019 through November 2, 2019 (weeks 38-19 through 44-19). The Department denied benefits for weeks 38-19 through 44-19.

(3) From September 15 through 21, 2019 (week 38-19), claimant was medically restricted from working more than four hours per day. Claimant was able to perform work that did not require her to use her

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<sup>1</sup> Order 19-UI-139866 mistakenly stated that claimant was not eligible for benefits from September 15, 2019 through October 2, 2019, although the record shows the order intended to state claimant was not eligible for benefits from September 15, 2019 through November 2, 2019.

right arm for pushing, pulling or lifting greater than ten pounds, including clerical work. Exhibit 1. Claimant had five work seeking activities, two of which were direct contacts with employers. Exhibit 1. Two of the work-seeking activities were for pharmacy technician work. Exhibit 1.

(4) From September 22 through 28, 2019 (week 39-19), claimant was medically restricted from working more than four hours per day. Claimant was able to perform work that did not require her to use her right arm for pushing, pulling or lifting greater than ten pounds, including clerical work. Exhibit 1. Claimant had five work seeking activities, two of which were direct contacts with employers. Exhibit 1. One of the work-seeking activities was for pharmacy technician work. Exhibit 1.

(5) From September 29 through October 5, 2019 (week 40-19), claimant was medically restricted from working more than four hours per day. Claimant was able to perform work that did not require her to use her right arm for pushing, pulling or lifting greater than ten pounds, including clerical work. Exhibit 1. Claimant had five work seeking activities, two of which were direct contacts with employers. Exhibit 1. Two of the work-seeking activities were for pharmacy technician work. Exhibit 1.

(6) From October 6 through 12, 2019 (week 41-19), claimant was medically restricted from working more than four hours per day. Claimant was able to perform work that did not require her to use her right arm for pushing, pulling or lifting greater than ten pounds, including clerical work. Exhibit 1. Claimant had five work seeking activities. Exhibit 1. All claimant's work-seeking activities were for work claimant was physically and mentally able to perform, including clerical, managerial, and customer service/billing work. Exhibit 1.

(7) From October 13 through 19, 2019 (week 42-19), claimant was medically restricted from working more than four hours per day. Claimant was able to perform work that did not require her to use her right arm for pushing, pulling or lifting greater than ten pounds, including clerical work. Exhibit 1. Claimant had five work seeking activities. Exhibit 1. All claimant's work-seeking activities were for work claimant was physically and mentally able to perform, including clerical, managerial, and customer service work. Exhibit 1.

(8) From October 20 through 26, 2019 (week 43-19), claimant was medically restricted from working more than four hours per day. Claimant was able to perform work that did not require her to use her right arm for pushing, pulling or lifting greater than ten pounds, including clerical work. Exhibit 1. Claimant had five work seeking activities. Exhibit 1. All claimant's work-seeking activities were for work claimant was physically and mentally able to perform, including as a "clerk" and customer service work. Exhibit 1.

(9) On October 25, 2019, claimant's doctor released her to full time light duty work that did not require claimant to push, pull or lift more than ten pounds with her right arm. Claimant's doctor stated that claimant was able to perform clerical work.

(10) From October 27 through November 2, 2019 (week 44-19), claimant was not medically restricted from working more than four hours per day. Claimant was able to perform work that did not require her to use her right arm for pushing, pulling or lifting greater than ten pounds, including clerical work. Exhibit 1. Claimant had five work seeking activities. Exhibit 1. All claimant's work-seeking activities were for work claimant was physically and mentally able to perform, including clerical, customer

service, and scheduling work. Exhibit 1. Although claimant applied for a pharmacy technician job at a job fair, attending the job fair was a potential source of other work claimant could perform. Exhibit 1.

(11) During all the weeks at issue, claimant was not physically able to perform 20 to 25 percent of the duties necessary to perform pharmacy technician work because that portion of the job duties required lifting greater than ten pounds.

**CONCLUSIONS AND REASONS:** Claimant was not able to work and actively seeking work during the weeks from September 15 through October 5, 2019 (weeks 38-19 through 40-19). Claimant was able to work and actively seeking work during the weeks from October 6 through November 2, 2019 (weeks 41-19 through 44-19).

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). OAR 471-030-0036(3)(a) (December 8, 2019) provides, in pertinent part, that for an individual to be considered “available for work” for purposes of ORS 657.155(1)(c), they must be 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. 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). However, an individual prevented from working full time or during particular shifts due to a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h) shall not be deemed unable to work solely on that basis so long as the individual remains available for some work. OAR 471-030-0036(2)(b). 29 C.F.R. §1630.2(h)(1) defines a physical impairment 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[.]

For purposes of ORS 657.155(1)(c), an individual is actively seeking work when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity. OAR 471-030-0036(5)(a). With few exceptions, none of which apply here, individuals are “required to conduct at least five work seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual.” *Id.* “Direct contact” means “making contact with an employer . . . to inquire about a job opening or applying for job openings in the manner required by the hiring employer.” OAR 471-030-0036(5)(a)(B). Claimant had the burden to show that the Department should have paid benefits. *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-139866 concluded that claimant was not able to work from September 16 through October 25, 2019 (weeks 38-19 through 43-19), because she was restricted to working no more than four hours per day during that period and therefore was not willing to work full time during all of the usual hours and days of the week customary for the work being sought. Order No. 19-UI-139866 at 3. The

order also concluded that claimant was not able to work or actively seeking work from September 16 through November 2, 2019 (weeks 38-19 through 44-19), all the weeks at issue, because she was seeking pharmacy technician work, which she was not able to perform during all the weeks at issue. Order No. 19-UI-139866 at 3. However, the record shows that claimant was able to work and actively seeking work during the period from October 6 through November 2, 2019 (weeks 41-19 through 44-19).

Claimant's rotator cuff condition was more likely than not a long-term physical impairment because it required surgery in June 2019, and resulted in medical restrictions that lasted until at least November 2019. Accordingly, to be deemed able to work during each week at issue, the record must show that claimant sought "some work," even if it was not full time, that she was physically and mentally able to perform. Thus, because claimant sought work during all the weeks at issue, the four-hour limitation did not render claimant ineligible for benefits if she sought some work that she was able to perform.

However, to be eligible for benefits for each week, claimant had to be actively seeking work for work she was able to perform. In all the weeks at issue, claimant was unable to perform 20 to 25 percent of the duties necessary for pharmacy technician work. Moreover, two of those work-seeking activities had to be direct employer contacts for work that was not pharmacy technician work. Therefore, for any week in which claimant had fewer than five work-seeking activities for work other than pharmacy technician work, claimant was not eligible for benefits.

During weeks 38-19 through 40-19, the record shows that claimant had five work-seeking activities that included seeking work as a pharmacy technician. Because claimant was not physically capable of performing that work, the record shows that claimant was not able to work and available for work during those weeks. During weeks 41-19 through 44-19, however, the record shows that claimant had five work-seeking activities that were for work other than pharmacy technician work, that claimant more likely than not was physically able to perform despite her lifting and/or hours restrictions. Claimant was therefore eligible for benefits during weeks 41-19 through 44-19.

The order under review is modified. Claimant was not able to work or actively seeking work during weeks 38-19 through 40-19. Claimant was able and actively seeking work during weeks 41-19 through 44-19.

**DECISION:** Order No. 19-UI-139866 is modified, as outlined above.

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

**DATE of Service: December 23, 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](http://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 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**

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**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**  
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