

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0022

Affirmed
Ineligible ~ Weeks 46-19 through 52-19

PROCEDURAL HISTORY: On November 27, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work and did not actively seek work during the weeks from November 10 through November 23, 2019, and was ineligible for benefits for those weeks and until the reason for the denial had ended (decision # 140744). Claimant filed a timely request for hearing. On January 2, 2020, ALJ Murdock conducted a hearing, and on January 7, 2020 issued Order No. 20-UI-142192, modifying decision # 140744 by concluding claimant was not able to work and did not actively seek work during the weeks from November 10 through December 28, 2019. On January 12, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On November 12, 2019, claimant filed an initial application for unemployment compensation benefits online. Claimant claimed and was denied benefits for each of the weeks including November 10, 2019 through December 28, 2019 (weeks 46-19 through 52-19), the weeks at issue.

(2) Claimant's employer was Fred Meyer Distribution Center, where he worked in his regular occupation of forklift operator and warehouseman. Claimant had worked in that occupation since 1991. In that occupation, claimant was required to operate a forklift, and to climb on and jump off a forklift several times each hour to fill orders. His duties required twisting, turning, bending, getting down on his knees, picking up cases and stacking them on pallets, and walking around pallets at a fast pace to wrap them with shrink wrap. While working for the employer, claimant was a member of Teamsters Local 206.

(3) During each of the weeks at issue, claimant was on a medical leave of absence from the employer because he could not perform his regular occupation. Claimant had suffered an off-the-job knee injury that required a total knee replacement, which was scheduled to take place in January 2020.

(4) Before filing his first weekly claim for benefits, claimant met with a Department representative at a local WorkSource Center. The representative mistakenly told claimant that he was a member of a

“closed” union, and therefore only needed to remain in contact with his union to meet the eligibility requirement that he actively seek work during each week claimed, and did not need to seek other work outside of his union. Audio Record at 27:00 to 29:00. Based on claimant’s belief that he was in a closed union, claimant did not perform any work-seeking activities other than remaining in contact with his union during the weeks from November 10 through November 30, 2019 (weeks 46-19 through 48-19).

(5) On November 26, 2019, claimant spoke to another Department representative regarding his leave of absence and availability for work. The representative asked claimant, “Can you currently perform any kind of work?” Claimant responded, “Not really.” Audio Record at 30:15 to 33:00.

(6) Shortly after November 26, 2019, claimant received decision # 140744 concluding that claimant was “on a medical leave of absence and wholly unable to perform any job,” and “did not actively seek work” during the weeks claimed. Decision # 140744. Claimant then contacted a union representative and learned that his union was not a closed union and that he needed to seek work outside of the union to be eligible for benefits. Audio Record at 26:00 to 26:30.

(7) During each of the weeks from December 1 through December 28, 2019 (weeks 49-19 through 52-19), claimant performed five work-seeking activities, including two direct contacts with potential employers. Claimant believed that he could still perform “light duty” work within his restrictions, which included no heavy lifting, no twisting or turning movements, no jumping on or off of forklifts, no lifting and stacking merchandise cases, and no sitting or standing for extended periods of time. Audio Record at 14:00 to 15:00.

(8) During week 49-19, claimant contacted two potential employers seeking regular work as an assembler. During week 50-19 claimant contacted one potential employer seeking regular work as a forklift driver, and another potential employer seeking regular work as a warehouse worker. During week 51-19, claimant contacted one potential employer seeking regular work as a shipping clerk, and another potential employer seeking regular work as a delivery driver. During week 52-19, claimant contacted one potential employer seeking regular work as a delivery driver, and another potential employer seeking regular work as a grinder. Claimant sought only regular work, and not light duty work, in those occupations. Although claimant only sought regular work, his hope for each potential employer was that it would hire him after he disclosed during an interview his knee condition requiring a total knee replacement, all of his physical limitations, and his intent to return to Fred Meyer Distribution Center after his upcoming surgery.

CONCLUSIONS AND REASONS: Claimant was not able to work during each of the weeks including of November 10, 2019 through December 28, 2019 (weeks 46-19 through 52-19), and is not 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 suitable¹ work during each week claimed. ORS 657.155(1)(c).² An individual is considered

¹ In determining whether any work is suitable for an individual, the Director of the Employment Department shall consider, among other factors, the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual. ORS 657.190.

able to work for purposes of ORS 657.155(1)(c) only if the individual is physically and mentally capable of performing the work the individual is actually seeking during all of the week. OAR 471-030-0036(2) (December 8, 2019).

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, the claimant has the burden to prove that the Department should have paid benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). Here, because claimant was not paid benefits, claimant has the burden to show that he was eligible for benefits during each of the weeks at issue. Claimant did not meet his burden.

Although claimant may have believed he could have performed some light duty work during the weeks at issue, there is no dispute that he was on a leave of absence from the employer because he was not able to perform his regular union job of forklift driver and warehouse worker. After that leave of absence began, claimant sought work during weeks 46-19 through 48-19 only through his union, and during weeks 49-19 through 52-19 by applying for regular, as opposed to light duty, jobs outside of his union in the occupations of assembler, forklift driver, warehouse worker, shipping clerk, delivery driver, and grinder. Claimant's testimony that if he was ever interviewed for a position, he intended to explain to a potential employer his knee condition requiring a total knee replacement, and all of his physical limitations, demonstrated that he did not truly believe that he was physically capable of performing the regular work he was seeking during those weeks. Moreover, his admission to the Department representative in week 48-19, that he did "[n]ot really" think that he could perform any kind of work at that time undermines his assertion that he was able to perform even light duty work in the type of work he was seeking while awaiting surgery.

Viewing the record as a whole, claimant failed to meet his burden to establish that he was physically capable of performing the work he sought during each of weeks 46-19 through 52-19. Accordingly, under OAR 471-030-0036(2), claimant was not able to work and is therefore not eligible for benefits during those weeks.

DECISION: Order No. 20-UI-142192 is affirmed.

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

DATE of Service: February 12, 2020

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

² Although the order appealed from concluded that claimant was not able to work *and* did not actively seek work during each of the weeks including November 10 through December 28, 2019, consideration of whether claimant actively sought work during those weeks under ORS 657.155(1)(c) is unnecessary given that this decision has concluded that claimant was not able to work during those weeks. Accordingly, this decision will not analyze that issue.

'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.

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 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.

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.