

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0140

Reversed & Remanded

PROCEDURAL HISTORY: On January 3, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work or available for work from December 8, 2019 to December 28, 2019 (decision # 113152). Claimant filed a timely request for hearing. On February 5, 2020, ALJ Shoemake conducted a hearing, and on February 7, 2020 issued Order No. 20-UI-144124, modifying decision # 113152 by concluding claimant was not able to work, available to work, or actively seeking work from December 8, 2019 to January 25, 2020. On February 14, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On December 18, 2018, claimant was injured in a car accident, suffering a concussion. Claimant's subsequent medical care included doctor's visits, chiropractic visits, and physical therapy, and her injuries caused her to miss work with her prior employer until April 2019.

(2) In April 2019, claimant returned to her prior employer, having received a full release to return to work from her physician. Claimant worked as a clinic service representative in her prior employment, which required her to spend a great deal of her work time sitting at a desk, while performing duties that included patient registration, telephone calls, faxing, mail, and assisting patients.

(3) Claimant began experiencing back pain and migraines during the workday, which would affect her concentration. She requested accommodations from her prior employer due to these medical issues, and was provided a sit/stand desk to assist her with her work. The sit/stand desk did help claimant work with less back pain, but her back pain and migraines did not fully subside and "actually piped up with the type of work [she] was doing." Audio Record at 23:37.

(4) In early December 2019, claimant voluntarily left her prior employment due to the continuing migraines and back pain.

(5) Claimant filed an initial claim for unemployment insurance benefits on December 9, 2019. Claimant claimed benefits, but was not paid, for the weeks including December 8, 2019 through January 25, 2020 (weeks 50-19 through 04-20), the weeks at issue.

(6) At all relevant times, claimant sought customer service work and office/clerical work. Claimant had a particular interest in working as a “patient access specialist” in a hospital setting, which was similar to the type of office work she had performed with her prior employer, but it was “a more mobile position in that... you will be going around to patient rooms so you are more active ... I am not just ... sitting down in one spot which is really bad for your back.” Audio Record at 21:06.

(7) But for its view that claimant was seeking the same type of work she had just quit due to her physical limitations and, therefore, was not able to perform, the Department viewed claimant’s work search records for each week claimed to otherwise be “adequate.” Audio Record at 09:00.

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

The order under review concluded that because claimant was seeking the same type of office work that she had with her prior employer, which she was unable to perform due to her physical injuries, it followed that claimant was “not actively seeking work” for eligibility purposes because she was “unable/unwilling to perform the type of work that she is seeking.” Order No. 20-UI-132344 at 3. The order also concluded that because claimant could not physically perform office work for her prior employer, and because the work she was actually seeking was not “substantially different from that which she performed for her [prior] employer,” claimant was neither able to perform the work she was actually seeking, nor was claimant available to perform that type of work. Order No. 20-UI-132344 at 3.

To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seeking suitable work during each week claimed. ORS 657.155(1)(c). Claimant has 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).

Able to work. 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) (December 8, 2019). 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).

The record fails to show that claimant was not able to work during the weeks at issue. Here, the record demonstrates that claimant faced physical challenges with her prior employment because the office work she was engaged in required her to sit stationary at a desk throughout the work day, and that this lack of movement exacerbated her back pain. The record demonstrates that in support of her applications for weekly benefits, claimant specifically sought work as a patient access specialist. Although work as a patient access specialist can be classified as office work, claimant asserted that patient access specialist work incorporated more periodic physical movement throughout the work day than stationary desk work, and that the more active work she sought would alleviate the back pain she suffered from at her prior employment. The record therefore does not support Order No. 20-UI-144124’s conclusion “that the work [claimant] was seeking was [not] substantially different from that which she performed for her [prior] employer.” Order No. 20-UI-132344 at 3.

Although the record supports the conclusion that claimant was seeking a different type of office work with her physical limitations in mind, further development of the record is necessary in order to determine the precise nature of the work involved in claimant's weekly employment contacts, and whether claimant was physically capable of performing the duties associated with each of the jobs she sought during each of the weeks at issue. Furthermore, the record supports the conclusion that claimant's recurring back pain and migraines may have constituted long-term physical impairments, requiring further development of the record to determine whether claimant was able to perform "some work" given these health issues.

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; and

* * *

(e) However, an individual with a permanent 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.

* * *

In determining whether any work is suitable for an individual, the 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.

The record, in its current form, fails to support the conclusion that claimant was not available for work during the weeks at issue. Here, the preponderance of the evidence supports the conclusion that claimant was seeking office/clerical work and customer service work, as well as work as a patient access specialist, and that she was otherwise meeting her weekly job search obligations. There is no evidence in the record to support the conclusion that claimant was not willing to work full time, part time, or on a temporary basis, nor is there any record evidence demonstrating that claimant was unwilling to work the hours and days of the week that are customary for the work she was seeking. Likewise, the record fails

to support the conclusion that claimant was imposing any conditions that would substantially reduce her opportunities to return to work at the earliest possible time or that she was not capable of accepting and reporting for the work that she was seeking.

Claimant is not required to seek work that is unsuitable for her as a condition of being considered "available" for work; however claimant might be considered unavailable for work if she limited her availability to work she was not physically capable of performing. On remand, the record must therefore be developed about the suitability of the work claimant was available for each week, specifically with respect to the degree of risk the work imposed to her health, and her physical fitness to perform that type of work. The record must be developed about the physical work requirements of the jobs claimant was available for during each week at issue. To any extent claimant made herself available to work without knowing whether she was physically capable of performing it, the record must be developed about whether in doing so claimant substantially limited her opportunities to return to work at the earliest possible time with respect to any of the weeks at issue. Because claimant appears likely to have had a long-term or permanent physical impairment, the record must also be developed about whether claimant remained "available for some work" notwithstanding her injury or inability to work full time at a job that required her to primarily sit at a desk.

Actively seeking work. 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).

The record does not support Order No. 20-UI-144124's conclusion that claimant was not actively seeking work. While there are outstanding questions related to whether claimant was able to work and available for work, which both require further development on remand, the preponderance of the evidence demonstrates that claimant was otherwise "adequately" conducting her weekly work searches and otherwise meeting all of her eligibility obligation.

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 during weeks 50-19 through 04-20, Order No. 20-UI-144124 is reversed, and this matter is remanded.

DECISION: Order No. 20-UI-144124 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: March 23, 2020

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-144124 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 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.

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