

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0432**

*Affirmed*  
*Ineligible Weeks 50-19 to 4-20*

**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 for 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). On March 23, 2020, EAB issued Appeals Board Decision 2020-EAB-0140, reversing Order No. 20-UI-144124 and remanding the case to the Office of Administrative Hearings (OAH) for further proceedings. On May 14, 2020, ALJ Shoemake conducted the remand hearing, and on May 20, 2020 issued Order No. 20-UI-150044, adopting Order No. 20-UI-144124. On May 29, 2020, claimant filed an application for review of Order No. 20-UI-150044 with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) On December 18, 2018, claimant was injured in a car accident. Her injuries included a concussion and a back injury.

(2) At the time of the accident, claimant was working for her then-employer as a front desk office worker. Claimant's job duties included activities like patient registration, phone calls, faxing, mailing, office work, and assisting patients. Claimant had to take several months off work to recover from her injuries. In April 2019, claimant's medical provider released her to full duty, and claimant subsequently resumed working for her then-employer.

(3) Claimant continued to have post-concussion symptoms including bad migraines and difficulty concentrating. She also continued to experience back pain, and continued to receive medical care. Claimant's then-employer provided claimant with a sit-stand desk to help accommodate her injuries, but claimant's injuries continued to affect her ability to do that job. During the week of December 1, 2019 to December 7, 2019 (week 49-19), claimant quit her then-job.

(4) On December 9, 2019, claimant filed an initial claim for unemployment insurance benefits. She filed weekly claims for benefits each week from December 8, 2019 to January 25, 2020 (weeks 50-19 to 4-20), the weeks at issue. The Department did not pay claimant benefits for those weeks.

(5) During the weeks at issue, claimant's labor market included the Portland, Oregon and Vancouver, Washington metro area. She sought clerical office work.

(6) During the week ending December 14, 2019 (week 50-19), claimant applied for jobs at a medical front desk and in patient access. During the week ending December 21, 2019 (week 51-19), claimant applied for two dentist office front desk reception jobs. During the week ending December 28, 2019 (week 52-19), claimant applied for work at an eye center's front desk, and as an urgent care health specialist.

(7) During the week ending January 4, 2020 (week 1-20), claimant applied for work as an optician; she was not a certified optician. Claimant also applied for work as a residential counselor; she was not a certified counselor. During the week ending January 11, 2020 (week 2-20), claimant applied for a job as a CNA; she was not certified to work as a CNA. She also applied for a job as a patient administration specialist.

(8) During the week ending January 18, 2020 (week 3-20), claimant applied for jobs as a Medicaid eligibility specialist and a winter hospitality overflow and on-call case worker. During the week ending January 25, 2020 (week 4-20), claimant applied for jobs as a data entry/accounts payable worker, and a call center representative.

(9) Each of the jobs claimant applied for were similar to the job she had to leave, involved primarily sedentary duties she was not physically capable of performing, or required certifications she did not have. At the time she applied for those jobs, claimant hoped, but did not know, whether any of those jobs involved duties that would allow her to walk around instead of sitting or standing in one place all day. Claimant thought she would not learn whether prospective jobs were sedentary or involved walking around unless she was invited to interview for the jobs. She also applied for jobs that required certifications she did not have because she thought that some employers would allow her to either become certified after she was hired or would possibly pay for her to become certified.

(10) As of approximately February 2020, claimant had received additional medical treatment for her injuries and is doing better. May 14, 2020 hearing, Transcript at 33.

**CONCLUSIONS AND REASONS:** Claimant was not available for work from December 8, 2019 to January 25, 2020 (weeks 50-19 to 4-20), and is therefore ineligible for benefits for those weeks.

To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed. ORS 657.155(1)(c). Because the Department did not pay claimant benefits for the weeks at issue, she has the burden to prove that she was able to work, available for work, and actively sought work during 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).

As a preliminary matter, the record from the May 14<sup>th</sup> remand hearing included evidence that, as of February 2020, claimant had received additional treatment for the injuries she received in the 2018 car accident, and that she was feeling better. There is nothing in the record suggesting that claimant has not, as of February 2020, fully recovered from her injuries. However, the only weeks at issue in this case are December 8, 2019 to January 25, 2020 (weeks 50-19 to 4-20), all of which pre-date the time frame during which claimant felt better recovered from her injuries.

At issue in this case is whether claimant was available for work from December 8, 2019 to January 25, 2020 (weeks 50-19 to 4-20). For an individual to be considered “available for work” for purposes of ORS 657.155(1)(c), they must be, among other things:

- (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

\* \* \*

OAR 471-030-0036(3) (December 8, 2019). Claimant did not prove that she was available for work during the weeks claimed.

During the weeks at issue, claimant almost exclusively sought work that required certifications she did not have, involved primarily sedentary duties that she could not perform, or involved physical activities similar to the work that she had recently quit because she could not continue to perform her duties without experiencing pain and a lack of concentration. By making herself available only for work she almost certainly could not perform, claimant imposed conditions that substantially reduced her opportunities to return to work at the earliest possible time.

Claimant testified at the May 14<sup>th</sup> hearing that she applied for jobs that she thought she could do, thought she could become certified to do, or thought might allow or require her to sometimes walk around while performing her duties, rather than always having to sit, or stand in one place. However, the record also shows that claimant did not actually know whether or not the jobs she applied for would hire her without certification and possibly pay her to obtain the certification needed to do the job, and did not know whether the jobs required her to be sedentary or to walk around to perform some of her duties. Claimant testified, “So once I was able to land an interview that’s what I would ask and see. Okay. Do you guys meet these requirements? Or – and sometimes they don’t give you that exact information in the job description of whether you’re going to be going from room to room.” May 14, 2020 hearing, Transcript at 34.

Although claimant clearly wanted to obtain a job that would involve a combination of walking around and being sedentary at various times, which she was physically capable of doing, she did not actually know whether she was physically capable of performing the jobs she applied for. Because claimant made herself available for jobs she did not know, and could not know until interviewed, if she could perform, she was not available for work during the weeks at issue. Because claimant was not available for work during the weeks at issue, claimant is not eligible for benefits from December 8, 2019 to January 25, 2020 (weeks 50-19 to 4-20).<sup>1</sup>

To any extent claimant continued claiming after January 25<sup>th</sup>, and has evidence that either her physical condition has improved to the extent that she is physically capable of performing sedentary work or has begun making herself available to jobs that did not involve sedentary work or certifications she does not possess, claimant should contact the Department directly to report her changed circumstances and request that the Department reinvestigate whether she is eligible for benefits.

**DECISION:** Order No. 20-UI-150044 is affirmed.

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

**DATE of Service:** June 29, 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](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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<sup>1</sup> Having concluded that claimant was ineligible for benefits during the weeks at issue under ORS 657.155(1)(c) based on her unavailability for work, we need not and do not address whether she was also ineligible for benefits under ORS 657.155(1)(c) because of her ability to work or work search activities during those same weeks.



# 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

**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.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
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