

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0094

Order No. 21-UI-159532 Modified ~ Benefits Allowed in Part, Denied in Part
Order No. 21-UI-159461 Affirmed ~ Benefits Denied

PROCEDURAL HISTORY: On December 4, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work during each of the weeks including June 7, 2020 through August 29, 2020 and September 20, 2020 through October 31, 2020 and was denied unemployment insurance benefits for those weeks and until the reason for the denial had ended (decision # 154518). Also on December 4, 2020, the Department served notice of an administrative decision concluding that claimant was not able to work during each of the weeks including November 1, 2020 through November 21, 2020 and was denied benefits for those weeks and until the reason for the denial had ended (decision # 70134). Claimant filed timely requests for hearing on decisions # 154518 and # 70134. On January 19, 2021, ALJ Murdock conducted a consolidated hearing on both administrative decisions. On January 20, 2021, ALJ Murdock issued Order No. 21-UI-159532, modifying decision # 154518 to conclude that claimant was unable to work during each of the weeks including June 7, 2020 through August 29, 2020 and October 18, 2020 through October 31, 2020. Also on January 20, 2021, ALJ Murdock issued Order No. 21-UI-159461, affirming decision # 70134. On February 8, 2021, claimant filed applications for review of Orders No. 21-UI-159532 and 21-UI-159461 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 21-UI-159532 and 21-UI-159461. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2021-EAB-0094 and 2021-EAB-0093).

WRITTEN ARGUMENT: Claimant did not declare that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

Based on a *de novo* review of the entire consolidated record in these cases, and pursuant to ORS 657.275(2), Order No. 21-UI-159461 is **adopted**. Additionally, the portions of Order No. 21-UI-159532 concluding that claimant was not eligible for benefits for the weeks including June 7, 2020 through July 11, 2020 (weeks 24-20 through 28-20), and that claimant was eligible for benefits for the weeks including September 20, 2020 through October 17, 2020 (weeks 39-20 through 42-20), are **adopted**. The remainder of this decision addresses claimant's eligibility for benefits for the weeks including July 12, 2020 through August 29, 2020 (weeks 29-20 through 35-20).

FINDINGS OF FACT: (1) In February 2020, claimant began working for the employer as a warehouse worker.

(2) The position required claimant to work ten-hour shifts, during which she would repetitively lift boxes weighing up to 40 pounds and load them onto trucks. By March 2020, claimant began to experience problems with her right elbow. Claimant was diagnosed with a pinched nerve and treated with physical therapy. Due to her injury, claimant was at the time restricted from performing repetitive movements or lifting, pushing, or pulling more than five pounds. These restrictions were limited to her specific position with the employer. Claimant tried to continue working, but the repetitive nature of the work continued to aggravate claimant's injury. By May 2020, claimant began losing gripping function in her right hand. The loss of function could last for up to eight hours at a time.

(3) In June 2020, claimant began a full leave of absence from work due to continuing issues with her right hand. By July 2020, claimant felt that she had recovered enough that she could return to light-duty work for the employer. However, the employer would not permit claimant to return to work until she had been examined by an independent medical examiner. In July 2020, claimant still had some difficulty gripping with her right hand. By August 2020, the issue had resolved.

(4) Claimant claimed benefits for the weeks including July 12, 2020 through August 29, 2020 (weeks 29-20 through 35-20). The Department paid claimant benefits for each of these weeks.

(5) During week 29-20, claimant sought work as a delivery driver. During week 30-20, claimant sought work as a driver and a lot attendant. During week 31-20, claimant sought work as an inventory associate and lube tech. During week 32-20, claimant sought work as a seasonal harvest worker and a grocery store merchandiser. During week 33-20, claimant sought work as a retail merchandiser and a school bus driver. During week 34-20, claimant sought work as a supported living program coordinator and a retail team lead. During week 35-20, claimant sought work as a videographer and a direct support professional. Claimant believed that she was physically capable of performing all of the work she sought during these weeks. Claimant had limited experience in performing the types of work she sought during these weeks.

CONCLUSIONS AND REASONS: Claimant was able to work and actively sought suitable work during the weeks including July 12, 2020 through August 29, 2020, (weeks 29-20 through 35-20).

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). 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) (August 2, 2020 through

December 26, 2020). Where the Department has paid benefits, it has the burden to prove benefits should not have been paid; by logical extension of that principle, where benefits have not been paid, 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).

The order under review concluded that “the record is not persuasive that [claimant] would have been able to perform” the work she sought during weeks 29-20 through 33-20, “given that most jobs of that kind require heavy lifting” and that claimant was “restricted to lifting no more than five pounds” during that time. Order No. 21-UI-159532 at 3. The record does not support this conclusion. Claimant testified that she had been restricted to lifting no more than five pounds around March 2020, when she initially sought treatment. Transcript at 9. However, claimant did not testify that the lifting restriction had continued through July 2020. Instead, she testified that she had believed that she had sufficiently recovered by July 2020 that she could return to light-duty work. Transcript at 10. Claimant also testified that she believed she would have been able to perform all of the jobs she applied for. Transcript at 30. The Department’s witness testified that he understood that claimant was “still unable to grab anything or hold anything with her hand” as of mid-July 2020, and that the five-pound lifting restriction still applied through August 2020. Transcript at 6. However, the record indicates that the Department’s witness did not have first-hand knowledge of the events at issue in this matter. The balance of the evidence on the record therefore does not show that claimant was unable to perform the work she sought during weeks 29-20 through 33-20. The Department bears the burden to prove that benefits that were paid should not have been paid. Because the Department has not met their burden here, the record shows that claimant was able to work during weeks 29-20 through 33-20.

The order under review also concluded that claimant was ineligible for benefits during weeks 34-20 and 35-20 because she “sought work in the care giving industry and as a retail lead worker” but did not have experience in those types of work, and therefore did not seek suitable work during those weeks. Order No. 21-UI-159532 at 3. The record does not support this conclusion.

In order to be eligible for benefits, ORS 657.155(1)(c) requires an individual, in pertinent part, to be “actively seeking and unable to obtain suitable work.” For purposes of determining eligibility under ORS 657.155(1)(c), the Department may require an individual to actively seek the type of work the individual is most capable of performing due to prior job experience and training. OAR 471-030-0036(1). Factors to consider when determining whether work is “suitable” include, in pertinent part, “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.

By its text, ORS 657.190 does not require prior training and experience in order to conclude that a particular job is suitable for an individual. Rather, the statute merely lists those as factors to weigh when making such a suitability determination. The record does not show that any of the other factors listed in ORS 657.190 would function to render those jobs unsuitable for claimant. Therefore, the Department has not met its burden to prove that claimant did not actively seek suitable work during weeks 34-20 and 35-20. Further, while the Department is permitted under OAR 471-030-0036(1) to require a claimant to seek a particular type of work, the record contains no evidence that the Department imposed such a requirement on claimant before she actually sought the work during those weeks. To retroactively

impose such a requirement upon claimant without meaningful prior notice would violate claimant's right to due process. As a result, claimant was not ineligible for benefits during weeks 34-20 and 35-20 on the basis of the types of work she sought during those weeks.

For these reasons, claimant was eligible for benefits during weeks 29-20 through 35-20.

DECISION: Order No. 21-UI-159461 is affirmed. Order No. 21-UI-159532 is modified, as outlined above.

S. Alba and D. P. Hettle.

DATE of Service: March 18, 2021

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 '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.

NOTE: This decision modifies an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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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 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 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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