

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0190

Reversed & Remanded

PROCEDURAL HISTORY: On January 5, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from March 29, 2020 through December 26, 2020 and was therefore not eligible to receive unemployment insurance benefits for that period and until the reason for the denial had ended (decision # 120028). Claimant filed a timely request for hearing. On February 24, 2021, ALJ Wyatt conducted a hearing, and on February 26, 2021 issued Order No. 21-UI-161748, modifying¹ decision # 120028 to conclude that claimant was not available for work and had not actively sought work during the weeks from March 29, 2020 through February 20, 2021 (weeks 14-20 through 07-21) and therefore was ineligible for benefits for those weeks. On March 16, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's written argument when reaching this decision.

EVIDENTIARY MATTER: At hearing, the ALJ admitted without objection a 19-page document, submitted by claimant prior to the hearing that was noted as having been marked as Exhibit 1. Audio Record at 3:20 to 4:14. However, the hearing record does not contain a marked copy of that document, and the order under review indicated that "no exhibits were offered or admitted into evidence." Order No. 21-UI-161748 at 1. On remand, the ALJ should mark the exhibit in accordance with the ruling in the original hearing, and note as such in any orders issued as a result of the remand hearing.

¹ The order under review stated that the administrative decision was "affirmed." Order No. 21-UI-161748 at 4. Because the order under review addressed weeks not addressed in the administrative decision, however, the order modified the administrative decision.

FINDINGS OF FACT: (1) Claimant claimed benefits for the weeks from March 29, 2020 through May 2, 2020; July 12, 2020 through July 18, 2020; September 20, 2020 through September 26, 2020; and October 18, 2020 through February 20, 2021 (weeks 14-20 through 18-20, 29-20, 39-20, and 43-20 through 07-21), the weeks at issue.² The Department paid claimant benefits for the weeks of 14-20, 15-20, 29-20, 39-20, and 43-20 through 52-20.

(2) Prior to March 2020, claimant had operated her own business as a shamanic practitioner. Claimant ceased operation of this business in March 2020 due to the COVID-19 pandemic.

(3) In March 2020, claimant began working part-time for Brightstar Healthcare (herein, “the employer”) as a home healthcare worker. The Department determined that claimant’s labor market for this type of work was the Portland Metro Area, and that claimant must be available for this type of work from 6 a.m. to 7 p.m.

(4) Claimant did not submit work searches for any of the weeks at issue. For each of the weeks at issue, claimant indicated on the weekly claim form that she was “temporarily laid off.” Transcript at 6.

CONCLUSIONS AND REASONS: Order No. 21-UI-161748 is set aside and this matter remanded for another hearing and order.

Jurisdiction over weeks 53-20 through 07-21. Under OAR 471-040-0025(8), “[s]ubject to objection by any party, the administrative law judge may . . . hear and enter a decision on any issue not previously considered by the authorized representative of the Director and which arose during the hearing.” However, “in no event shall the administrative law judge accept jurisdiction of a new issue and proceed with hearing on such issue when an interested party to such new issue has not waived right to notice.” OAR 471-040-0025(8).

The order under review stated:

NOTE: With the knowledge of the parties, the Administrative Law Judge took jurisdiction over all the weeks claimed and denied by the administrative decision.

Order No. 2021-UI-161748 at 1. Although the ALJ already had jurisdiction over the weeks claimed and denied by the administrative decision, the order’s apparent meaning was that the ALJ also accepted jurisdiction over all of the weeks claimed *subsequent* to the weeks addressed in decision # 120028. At hearing, the Department’s witness requested that the ALJ take this action, which the ALJ agreed to do without offering claimant the chance to object. Transcript at 4–5. Because claimant did not waive her right to notice of the ALJ’s accepting jurisdiction over the additional weeks as required by OAR 471-040-0025(8), the ALJ acted outside the scope of authority granted under that administrative rule. On remand, the ALJ must offer all interested parties present at the hearing an opportunity to object or waive

² EAB has taken notice of these facts, which are contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). Any party that objects to our taking notice of this information must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the noticed facts will remain in the record.

notice to the acceptance of jurisdiction over additional weeks, or any other issue not previously considered by the Department, before the ALJ may accept jurisdiction.

Actively seeking work. To be eligible to receive benefits, unemployed individuals must actively seek work during each week claimed as defined by OAR 471-030-0036(5)(a) (August 2, 2020 through December 26, 2020); ORS 657.155(1)(c). However, during a state of emergency declared by the Governor under ORS 401.165, the Department may waive, otherwise limit, or modify the requirements of OAR 471-030-0036. OAR 471-030-0071 (September 13, 2020).³ Paragraph (4) of Oregon Employment Department Temporary Rule for Unemployment Insurance Flexibility (March 8, 2020), <https://www.oregon.gov/employ/Documents/Temporary%20Rule-2.pdf> [hereinafter OED Temporary COVID-19 Rule], provides the following:

The federal Families First Coronavirus Response Act permits states to temporarily modify their unemployment insurance laws regarding work search requirements on an emergency basis to respond to the spread of COVID-19 (Section 4102(b)). Because of the vital importance to public health and safety of mitigating the spread of COVID-19, social distancing measures must be maintained. Accordingly, effective the week ending March 28, 2020, notwithstanding OAR 471-030-0036, and unless otherwise notified in writing by the Employment Department, a person will be considered actively seeking work for purposes of ORS 657.155 if they are willing to look for work when state and local emergency declarations related to the coronavirus expire or otherwise are no longer in effect.

The order under review concluded that, because claimant “did not submit a work search for any of the weeks at issue” and did not meet the “temporary layoff” requirements under OAR 471-030-0036(5)(b), she did not actively seek work. Order No. 2021-UI-161748 at 3. However, Paragraph (4) of the OED Temporary COVID-19 Rule, applicable to the entirety of the weeks at issue, serves to waive or modify the eligibility requirements of OAR 471-030-0036, and provides that a person will be considered “actively seeking work” if they are willing to look for work once the COVID-19 emergency declarations expire or are no longer in effect, unless otherwise notified in writing by the Department. The record does not show that the COVID-19 emergency declarations had expired or were no longer in effect at any point during the weeks at issue. Therefore, the issues that remain on remand relating to actively seeking work are whether the Department notified claimant in writing that she was required to seek work during any of the weeks at issue, and, if not, whether claimant was willing to look for work when the emergency declarations are no longer in effect. On remand, the ALJ should develop the record on those two issues.

Availability for work. To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed as defined by OAR 471-030-0036(3); ORS 657.155(1)(c). For an individual to be considered “available for work” for purposes of ORS 657.155(1)(c), they must be:

³ The provisions of *former* temporary rule OAR 471-030-0070(4), effective March 8, 2020 through September 12, 2020, are identical to the current provisions of the OED Temporary COVID-19 Rule. As such, the same provisions regarding actively seeking work apply to the entirety of the weeks at issue in this matter. Herein, “Paragraph (4) of the OED Temporary COVID-19 Rule” refers to both the temporary rule in effect during the period of March 8, 2020 through September 12, 2020 and its adoption via OAR 471-030-0071 commencing on September 13, 2020.

(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.

* * *

OAR 471-030-0036(3). 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.

However, during a state of emergency declared by the Governor under ORS 401.165, the Department may waive, otherwise limit, or modify the requirements of OAR 471-030-0036. OAR 471-030-0071 (September 13, 2020).⁴ Paragraph (5) of Oregon Employment Department Temporary Rule for Unemployment Insurance Flexibility (March 8, 2020), <https://www.oregon.gov/employ/Documents/Temporary%20Rule-2.pdf> [hereinafter OED Temporary COVID-19 Rule], provides that a person will not be deemed unavailable for work because:

(a) They are staying in their home, or are quarantined, due to risk of exposure to, or spread of, the novel coronavirus at the advice of a health care provider or by advice issued by public health officials or by directive of a government official, even if their employer had work for them they could otherwise have performed;

(b) They are home solely because they lack childcare for a child or children due to school or daycare closures or curtailments;

(c) They are home to care for a family member due to the effects of novel coronavirus; or

(d) They normally work less than full-time and are only available for less than full-time work.

The order under review concluded that claimant "did not make herself available for work because she restricted her availability by not seeking suitable work." Order No. 21-UI-161748 at 4. However,

⁴ The provisions of *former* temporary rule OAR 471-030-0070(5), effective March 8, 2020 through September 12, 2020, are identical to the current provisions of the OED Temporary COVID-19 Rule. As such, the same provisions regarding availability for work apply to the entirety of the weeks at issue in this matter. Herein, "Paragraph (4) of the OED Temporary COVID-19 Rule" refers to both the temporary rule in effect during the period of March 8, 2020 through September 12, 2020 and its adoption via OAR 471-030-0071 commencing on September 13, 2020.

claimant testified at hearing that she had not increased the amount of hours she had been working at Brightstar Healthcare because it “is not work that [she was] suited for,” the rate of pay was too low to pay her expenses “even . . . if [she] worked 40 hours a week,” and her “incentive for doing that work is zero.” Transcript at 31. Claimant also testified that she is a single parent with two school-age children who had been having difficulty with remote learning during the pandemic, and that her “focus has been on [her] family” rather than working more hours for the employer. Transcript at 24–25. Claimant’s testimony suggests that she may have had an opportunity to accept additional work for the employer, but that she declined that opportunity both due to the suitability of the work and due to childcare concerns.

On remand, the record should be developed to determine whether claimant was willing to work, capable of reporting for suitable work, and not imposing conditions which substantially reduced her opportunities to work, in accordance with the provisions of OAR 471-030-0036(a), (b), and (c), respectively. To that end, inquiry should also be made as to whether claimant’s work for the employer was “suitable” under ORS 657.190, and, if so, what hours and days the Department required claimant to be available for such work in her labor market. The record should also be developed to determine whether any of the provisions of paragraph (5) of the OED Temporary COVID-19 Rule apply to any of the weeks at issue. A conclusion as to whether claimant was “available for work” for purposes of ORS 657.155(1)(c) should be drawn on the basis of this information.

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 available for work and actively seeking work under the applicable administrative rules, Order No. 21-UI-161748 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-161748 is set aside, and this matter remanded for further proceedings consistent with this order.

S. Alba and D. P. Hettle.

DATE of Service: April 21, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-161748 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 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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