

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0326

Reversed & Remanded

PROCEDURAL HISTORY: On February 24, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work during the weeks including January 10, 2021 through February 13, 2021 (weeks 02-21 through 06-21) and until the reason for the denial had ended (decision # 120813). Claimant filed a timely request for hearing. On April 8, 2021, ALJ Janzen conducted a hearing, and on April 9, 2021, issued Order No. 21-UI-164483, modifying the Department's decision and concluding claimant was not able to work during the weeks including January 10, 2021 through February 20, 2021 (weeks 02-21 through 07-21). On April 23, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

The parties may offer new information, such as those documents referenced in claimant's written argument, which were not considered in reaching this decision, into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.¹

FINDINGS OF FACT: (1) Prior to October of 2020, and through March 25, 2021, Charlie Every Trucking, Inc. employed claimant as a general employee. Claimant performed a variety of duties for the employer, including maintenance, carpentry, painting, building, and irrigating on the employer's properties.

¹ The parties must follow the instructions regarding providing documents to the ALJ and other parties before the hearing even if copies of documents were provided to the parties when submitting written argument to EAB.

(2) In early October 2020, claimant experienced disabling back pain for which he saw his primary care doctor, who excused claimant from work until medical tests were completed. Testing revealed that claimant had back arthritis, a double hernia, and a bulging disk in his back, which might eventually require surgery. On or about October 12, 2020, the employer granted claimant a medical leave of absence.

(3) On October 19, 2020, claimant filed an initial claim for unemployment insurance benefits.

(4) Claimant did not undergo any surgeries. On or about December 16, 2020, claimant's back physician "released" claimant "to go back to work . . . under the condition that [he] do therapy, and get a back brace," if needed, using "pain as a guide." Transcript at 21-22. However, the employer wanted "an official release" before allowing claimant to return to work. Transcript at 21-22.

(5) Claimant believed that by January 2021, he was physically able to return to work for the employer. Although he continued to experience some back pain, he believed he could physically perform at least some of the work duties he did before October 2020. Transcript at 26-28.

(6) Claimant claimed benefits for each of the weeks including January 10, 2021 through February 20, 2021 (weeks 02-21 through 07-21), the weeks at issue. The Department did not pay claimant benefits for those weeks.

(7) In approximately mid-January 2021, claimant began physical therapy. Claimant's physical therapist was unwilling to release claimant to return to work when claimant began his therapy because she was concerned claimant might injure himself further without completing some exercises and training on lifting techniques. On February 20, 2021, claimant's therapist released claimant to return to work stating, "[Claimant] is able to slowly return to work duties. It is recommended that he use pain as a guiding factor and only perform duties that he feels safe and confident with at his own discretion." Transcript at 7.

(8) On March 1, 2021 claimant returned to the employer for six hours driving to pick up a delivery. Claimant did not return to full time work at that time. On March 8, 2021, claimant worked for the employer for one day, but left work early.

(9) On March 25, 2021, claimant returned to work full time for the employer.

CONCLUSIONS AND REASONS: Order No. 21-UI-164483 is reversed and this matter is remanded for further development of the record.

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) (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). Where, as here, 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) (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).

Order No. 21-UI-164483 concluded that claimant was not able to work during the weeks at issue, and was therefore ineligible for benefits, reasoning as follows:

The record established that claimant was medically restricted from working from October 2020 until February 20, 2021. Claimant testified that he felt that he was physically capable of working during the weeks in issue. While claimant may have felt that he was physically capable of working, his medical providers' opinion that he could not physically return to work until February 20, 2021, is more persuasive since they believed he might reinjure himself.

Order No. 21-UI-164483 at 3. However, the record must be developed further to determine if claimant was able and available to work during the weeks at issue.

The record shows that claimant suffered from a double hernia, a bulging disk in his back and back arthritis, which were likely permanent or long-term "physical or mental impairment[s]" as defined at 29 CFR §1630.2(h). For that reason, even if those impairments prevented claimant from working full-time, under OAR 471-030-0036(2)(b), claimant would not be deemed unable to work because he was unable to work full time as long as he remained available for some work. The record must be developed to show if claimant was able to work and available for at least some work during each of the weeks at issue, and if claimant was not able or available for some work during a week at issue, if it was due to claimant's physical impairments, or due to other factors.

On remand, the record needs to be developed to determine what, if any, work activities for the employer claimant was able to perform during the weeks at issue had the employer permitted claimant to work without the medical release. For example, the record fails to show if the employer had light duty or any other work activities claimant could have performed between January 10, 2021 and February 20, 2021. Additionally, given claimant's impairments, claimant should be examined on what basis he believed he could perform any work, even light duty, if it was available. At hearing, claimant testified that on March 1, 2021, he returned to work for the employer for six hours doing delivery work, but due to "some other things going on in [his] life," he could not return to work full-time. Transcript at 22. The record should be developed to determine whether the "other things" claimant referred to in his testimony were related to his impairments or other factors, and why he did not return to work full-time on that date. He also testified that on March 8, 2021, he worked for the employer for one day, but "just wasn't feeling it," so he left work. Transcript at 23. Here too, the record should be developed to determine what claimant meant by "just wasn't feeling it" and whether his reasons for leaving related to his impairments or other factors, and why he did not return to work full-time on that date.

Finally, although the Department's witness testified concerning claimant's labor market and the days and hours typical for claimant's work within his labor market, the record fails to show whether the Department considered any of that evidence in making its determination that claimant was ineligible for

benefits for the weeks at issue. If that evidence was relevant to its determination, the record regarding those issues must be developed at hearing.

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 during the weeks at issue, and is otherwise eligible for benefits, Order No. 21-UI-164483 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-164483 is set aside, and this matter remanded for further proceedings consistent with this order.

S. Alba and A. Steger-Bentz;
D. Hettle, not participating.

DATE of Service: June 1, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-164483 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

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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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