

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0363

Modified
Benefits Allowed in Part, Denied in Part

PROCEDURAL HISTORY: On March 4, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work or available for work during the weeks including March 22, 2020 through January 2, 2021 (weeks 13-20 through 53-20) and was therefore ineligible to receive unemployment insurance benefits for those weeks and until the reason for the denial ended (decision # 85152). Claimant filed a timely request for hearing. On April 19, 2021, ALJ Amesbury conducted a hearing, and on April 21, 2021 issued Order No. 21-UI-165214, modifying decision # 85152 and concluding that claimant was eligible for benefits for the weeks including June 28, 2020 through September 19, 2020 (weeks 27-20 through 38-20), but was not eligible for benefits for the weeks including March 22, 2020 through June 27, 2020 (weeks 13-20 through 26-20), September 20, 2020 through November 28, 2020 (weeks 39-20 through 48-20) and December 13, 2020 through January 2, 2021 (weeks 51-20 through 53-20). On May 5, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portions of the order under review concluding that claimant *was not* eligible for benefits for the weeks including March 22, 2020 through June 27, 2020 (weeks 13-20 through 26-20) and that claimant *was* eligible for benefits for the weeks including June 28, 2020 through September 19, 2020 (weeks 27-20 through 38-20) are **adopted**. The remainder of this decision pertains to claimant's eligibility for the weeks including September 20, 2020 through November 28, 2020 (weeks 39-20 through 48-20) and December 13, 2020 through January 2, 2021 (weeks 51-20 through 53-20).

FINDINGS OF FACT: (1) TP Gull employed claimant as a pump attendant during the weeks including September 20, 2020 through January 2, 2021 (weeks 39-20 through 53-20). Claimant had worked for the employer in this role for about 15 years.

(2) Prior to the weeks at issue, claimant had developed high blood pressure, and was advised by his physician that he was at risk of a stroke. Claimant suffered two heart attacks in March 2020, after which he took about three months off from work to recover. In June 2020, claimant gradually began working

for the employer again. For much of his tenure with the employer, claimant typically worked 30 hours per week. During the weeks at issue, claimant was not able to work 30 hours per week due to his heart condition. Claimant also was not willing to work on weekends or during busier shifts where he was the only pump attendant on duty, because he was at risk of collapsing on the job due to his heart condition.

(3) On March 19, 2020, claimant filed an initial claim for benefits. The Department determined that claimant had a valid claim with a weekly benefit amount of \$247. Claimant claimed benefits for the weeks including September 20, 2020 through December 5, 2020, and December 13, 2020 through January 2, 2021 (weeks 39-20 through 49-20, and 51-20 through 53-20). These are the weeks at issue. The Department paid claimant benefits for each of these weeks except for the week of November 29, 2020 through December 5, 2020 (week 49-20), because claimant had earnings in excess of his weekly benefit amount for that week.

(4) The Department determined that claimant's labor market for his work as a pump attendant was Benton County, Corvallis, Falmouth, and Albany, and that the typical days and hours for that type of work in his labor market were all days of the week, from 5:00 a.m. to 12:00 a.m.

CONCLUSIONS AND REASONS: Claimant was able to work, available for work, and actively seeking work during the weeks including September 20, 2020 through December 5, 2020, and December 13, 2020 through January 2, 2021 (weeks 39-20 through 49-20, and 51-20 through 53-20).

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). For an individual to be considered "available for work" for purposes of ORS 657.155(1)(c), they must be, in relevant part, 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. OAR 471-030-0036(3) (August 2, 2020 through December 26, 2020); (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" shall not be deemed unavailable for work solely on that basis so long as the individual remains available for some work. OAR 471-030-0036(3)(e).

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). 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 order under review found that "by September 22, 2020, claimant was again physically able to work 30 hours per week," but that he and the employer agreed that he would work no more than 22 hours per week in order for claimant to maintain income-based eligibility for the Oregon Health Plan (OHP). Order No. 21-UI-165214 at 2 to 3. Based on this finding, the order under review concluded that claimant was not available for work during the weeks at issue because he "was not willing to work all the days and hours customary for the type of work he sought and because he deliberately limited the number of

hours he would work for the purpose of obtaining OHP benefits.” Order No. 21-UI-165214 at 9.¹ The record does not support this conclusion or the findings upon which it is based.

First, the finding in the order under review that claimant’s health conditions no longer limited the number of hours he could work is not supported by the record. The order under review appears to have based this finding on a statement made by claimant’s mother, which indicated both that claimant felt safer working more hours for the employer in Fall 2020 because he had been able to obtain a suitable face mask to protect him from COVID-19, and because the employer’s business began to pick up again around that time. Order No. 21-UI-165214 at 2, n 2; Exhibit 1 at 1. At hearing, however, claimant testified that from March 18, 2020 until January 9, 2021, he was not physically able to return to working 30 hours per week due to his health, even if the employer had requested that he do so. Transcript at 25. Claimant’s explicit testimony that the limitations on the number of hours he was able to work during that time outweighs the contradictory inference drawn from the facts cited to in Exhibit 1. Therefore, the record shows that, more likely than not, claimant was not able to return to work for 30 hours per week during the weeks at issue due to his heart condition. Because that condition constituted a permanent or long-term “physical or mental impairment,” as defined at 29 CFR §1630.2(h), which prevented him from working full time or during particular shifts, and because claimant was still available to perform some work, claimant was considered able to work under OAR 471-030-0036(2)(b) during the weeks at issue.

Second, while both claimant and the employer testified that the two parties agreed to limit claimant’s hours for the sake of claimant’s eligibility for OHP benefits, the record is unclear as to when that actually occurred. When asked when that conversation occurred, claimant testified that he was unsure, but that “by that point [he] was already [getting] enough hours” and was no longer being paid benefits. Transcript at 23–24. Because the Department paid claimant benefits for the weeks at issue, it bears the burden to show that benefits should not have been paid.² The Department has not met its burden to show that the conversation in question occurred during or prior to the weeks at issue. However, even assuming that it did, the record still does not show that claimant was unavailable for work for that reason. Claimant’s heart condition constituted a permanent or long-term “physical or mental impairment” which prevented him from working full time or during particular shifts, as discussed above. Therefore, even if claimant limited his availability to certain shifts, claimant was considered available for work under OAR 471-030-0036(3)(e) because he remained available for some work. For the same reason, claimant’s limitation on which shifts he was willing to work—such as weekend shifts—did not constitute a bar to his availability for work under OAR 471-030-0036(3)(e) because he remained available for some work.

¹ The order under review also concluded that claimant did not actively seek work during the weeks at issue. Order No. 21-UI-165214 at 9. However, this conclusion is at odds with the analysis in the order, which noted that “under the applicable rules, claimant was actively seeking work between June 29, 2020 and the end of the period at issue, January 2, 2021.” Order No. 21-UI-165214 at 8. The later conclusion in the order, that claimant did not actively seek work during the weeks at issue, therefore appears to be a scrivener’s error. Because the record does not otherwise suggest that claimant failed to meet the actively seeking work requirement during the weeks at issue, and because in any case the weeks at issue are covered by the modified work-search requirements of OAR 471-040-0070(4) (through September 12, 2020) and OAR 471-030-0071 (from September 13, 2020 onwards), that issue is not discussed further in this decision.

² See *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).

For the above reasons, claimant was able to work, available for work, and actively seeking work during the weeks at issue, and is eligible to receive benefits for those weeks.

DECISION: Order No. 21-UI-165214 is modified, as outlined above.

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

DATE of Service: June 11, 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 desisyong ito.

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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