

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0634

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 18, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work during the weeks including March 15, 2020 through December 12, 2020 (weeks 12-20 through 50-20) and was therefore ineligible to receive unemployment insurance benefits for those weeks and until the reason for denial had ended (decision # 141446). Claimant filed a timely request for hearing. On July 7, 2021, ALJ Frank conducted a hearing, and on July 15, 2021 issued Order No. 21-UI-170350, modifying decision # 141446 and concluding that claimant was ineligible to receive unemployment insurance benefits for the weeks including March 15, 2020 through January 2, 2021 weeks 12-20 through 53-20).¹ On August 4, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) ADP Totalsource I, Inc. employed claimant as a caregiver and medical technician both before and after the weeks at issue, March 15, 2020 through January 2, 2021 (weeks 12-20 through 53-20).

(2) On March 1, 2020, claimant was involved in a car accident and suffered head and wrist injuries. On March 18, 2020, the employer placed claimant on a leave of absence due to her car accident. The employer treated the leave of absence as a personal leave of absence, and not a medical leave of absence, because claimant never provided the employer with any medical paperwork. The employer continued claimant in her leave of absence status as of the date of the hearing.

(3) On July 14, 2020, claimant filed an initial claim for benefits. Claimant indicated in her claim that the employer had discharged her, and in response to a question asking whether there was any reason she could not begin full-time work, indicated that it depended on the nature of the job because she was under doctor's orders to rest and to refrain from lifting no more than ten pounds. During some of the weeks at

¹ Order No. 21-UI-170350 states that the hearing took place on "January 22, 2021." Order No. 21-UI-170350 at 1. This hearing date reference is presumed to be a typographical error in light of the audio record of the hearing which indicates that the hearing took place on July 7, 2021. Audio Record at 11:56.

issue, claimant sought front desk and retail work. During other weeks at issue, claimant performed no work searches or indicated to the Department when she claimed those weeks that she had been temporarily laid off. Claimant wanted to work ten hours per week, not due to a doctor's direction, but because she wanted to see if she could manage that workload in light of her injuries.

(4) The Department determined that the employer had not discharged claimant, but had placed her on a leave of absence. The Department determined that the typical days and hours for a caregiver and medical technician in claimant's labor market was all days of the week and all hours of the day. The Department did not pay claimant for any of the weeks at issue.

CONCLUSIONS AND REASONS: Claimant was not available for work during the weeks at issue.

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, and they must not be imposing conditions which substantially reduce their opportunities to return to work at the earliest possible time. 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" as defined at 29 CFR §1630.2(h) 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).

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).

As a preliminary matter, the record evidence raises a question whether claimant might be entitled to the benefit of the availability exception found in OAR 471-030-0035(3)(e) based on her inability to work full time or during particular shifts because of a long-term physical impairment. Claimant's testimony suggested that she may have suffered long-term injuries from a car accident that made her unavailable to work full time or during particular shifts and required her to work ten or fewer hours per week. Transcript at 17-18. However, absent testimony or medical documentation of a more detailed, reliable, and contemporaneous nature, the record does not show by a preponderance of evidence that claimant's injuries were permanent or long-term in nature and claimant therefore must meet her burden to show that she was available for work under OAR 471-030-0036(3)(a)-(d).

The record evidence establishes that claimant suffered injuries on March 1, 2020 from a car accident and that because of those injuries, claimant limited her availability to perform work during the weeks at issue to ten or fewer hours per week. However, claimant's testimony suggested that it is more likely than not that her hourly work limitations were self-imposed and not a work restriction from a medical provider. Transcript at 17-18. OAR OAR 471-030-0036(3) requires a claimant to be willing to work full time, part time, and accept temporary work opportunities during all of the usual hours of the week customary for the work being sought, and to not impose conditions which substantially reduce their opportunities to return to work at the earliest possible time. Because the customary hours and days for a

caregiver and medical technician in claimant's labor market were all hours and all days of the week, claimant's self-imposed work availability restriction of ten hours per week made her unavailable for work under OAR 471-030-0036(3)(c) because her work availability restriction was a condition which substantially reduced her opportunities to return to work at the earliest possible time.

For these reasons, claimant was not available for work during the weeks at issue and she is not eligible to receive benefits for those weeks.

DECISION: Order No. 21-UI-170350 is affirmed.

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

DATE of Service: September 7, 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 denies payment of your Unemployment Insurance (UI) benefits.

However, you may be eligible for Pandemic Unemployment Assistance (PUA) benefits **for weeks ending September 4, 2021 and prior** as long as you were not eligible for other benefits during that time, and were unable to work, unavailable for work, or unemployed due to the COVID-19 public health emergency. PUA was an unemployment benefits program available through the Oregon Employment Department in response to the COVID-19 pandemic. The program ended on September 4, 2021.

Visit <https://unemployment.oregon.gov> for more information, or to contact the Oregon Employment Department using the "Contact Us" form. You can also call 1-833-410-1004, but please be aware that the PUA staff cannot answer questions about this decision that denies payment of regular Unemployment Insurance (UI) benefits.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



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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