

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0740**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On July 29, 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 from April 4, 2021 through April 24, 2021 (weeks 14-21 through 16-21), and therefore ineligible to receive unemployment insurance benefits for those weeks and until the reason for the denial had ended (decision # 142013). Claimant filed a timely request for hearing. On August 23, 2021, ALJ Logan conducted a hearing, and on August 24, 2021 issued Order No. 21-UI-173274, modifying decision # 142013 by concluding that claimant was not able to work or available for work from April 4, 2021 through June 5, 2021 (weeks 14-21 through 22-21), and therefore ineligible to receive benefits for those weeks.<sup>1</sup> On September 13, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** Claimant's argument contained an attached email chain that was not part of the hearing record, and claimant did not show that his inability to find the email chain prior to the hearing was a factor or circumstance beyond his reasonable control. 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 the email chain attached to claimant's written argument 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.

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<sup>1</sup> Although Order No. 21-UI-173274 stated that the order affirmed decision # 142013, the order modified that decision by adding the additional weeks claimed and denied by the Department after the date decision # 142013 was issued. Order No. 21-UI-173274 at 3.

**FINDINGS OF FACT:** (1) On March 16, 2021, claimant quit his job as a fundraiser based on his health care provider's advice that the stress from his fundraising work had been a contributing factor to his multiple strokes and heart attack and that he should discontinue the work.<sup>2</sup>

(2) On April 12, 2021, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed benefits for the weeks from April 4, 2021 through June 5, 2021 (weeks 14-21 through 22-21), the weeks at issue. During the weeks at issue, claimant conducted work searches that included seeking work in fundraising, but also included seeking work in areas that were "less stressful." Transcript at 15.

(3) On April 26, 2021, claimant spoke with the Department's adjudicator regarding his benefits claim. Claimant informed the adjudicator that due to his medical conditions, and his health care provider's advice, he had stopped working. The adjudicator did not ask claimant whether his decision to stop working related only to fundraising work or whether it related to work in any field. The Department denied payment of benefits for all of the weeks at issue.<sup>3</sup>

(4) On June 10, 2021, claimant was hired for a job in a less stressful field unrelated to fundraising.

**CONCLUSIONS AND REASONS:** Order No. 21-UI-173274 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). Claimant has the burden to show 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).

**Able to Work.** 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).

The order under review concluded that claimant was not physically and mentally capable of performing the work he was seeking because he had left his prior fundraising job due to his health conditions, and he failed to offer medical evidence for the weeks at issue showing that his health condition had improved such that he was able to work during those weeks. Order No. 21-UI-173274 at 2. Although claimant provided a medical document, dated August 10, 2021, which showed that he was able to work

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<sup>2</sup> On June 23, 2021, an ALJ from OAH issued an order finding that claimant had quit his fundraising job with good cause due to his medical condition.

<sup>3</sup> 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.

as of June 10, 2021, the order under review concluded that the document was insufficient to establish that claimant was able to work during the weeks at issue because June 10, 2021 was after the weeks at issue. Order No. 21-UI-173274 at 2. Likewise, the order under review concluded that neither claimant's work search efforts during the weeks at issue nor his success in obtaining a job after June 5, 2021 established that he was able to work during the weeks at issue. Order No. 21-UI-173274 at 3. The record fails to support those conclusions.

As an initial matter, although the August 10, 2021 medical documentation is not contemporaneous to the weeks at issue, and it does not affirmatively state that claimant was able to work during those weeks, it does not necessarily follow that claimant was unable to perform the work he was seeking during the weeks at issue. While it is possible that claimant may not have been physically or mentally capable of performing full-time fundraising work during the weeks at issue, this does not necessarily mean that claimant was not physically or mentally capable of performing some other type of work during these weeks. However, the record fails to identify what work claimant was actually seeking during each of the weeks at issue. Claimant continued to seek fundraising work during the weeks at issue, but also sought work of a less stressful nature during these same weeks.

On remand, further inquiry is necessary to determine what work claimant was actually seeking each week during the weeks at issue. Likewise, further inquiry should address whether any of the work claimant was seeking during those weeks was of a less stressful nature such that claimant was physically and mentally capable of performing that work because it reduced or eliminated the health-related concerns claimant's previous employment as a fundraiser had created. In making this inquiry, consideration should be given on remand to the applicability of OAR 471-030-0036(2)(b) addressing whether individuals with a permanent or long-term "physical or mental impairment" are able to work. If it is determined that OAR 471-030-0036(2)(b) is applicable, then further inquiry is needed to determine what impact, if any, the provisions of this rule have on claimant's eligibility for benefits.

**Available for work.** OAR 471-030-0036(3) provides, in pertinent part, that for purposes of ORS 657.155(1)(c), an individual shall be considered available for work if, at a minimum, they are:

- (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). However, an individual with a permanent or long-term physical or mental impairment (as defined at 29 CFR 1630.2(h)) which prevents the individual from working full time or

during particular shifts 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).

The order under review concluded that it was “sensible” for the Department to have concluded that claimant was not available for work during the weeks at issue because he had recently quit a job due to his health concerns, because he had told the Department’s representative that his medical conditions affected his ability to work, and because his inability to work in stressful positions was a condition that reduced his opportunities to return to work. Order No. 21-UI-173274 at 2. In addition, the order under review concluded that any work searches that claimant conducted during the weeks at issue did not establish, in and of themselves, that claimant’s health condition made him willing to accept and report for all work assignments in his labor market. Order No. 21-UI-173274 at 3. The record again fails to support those conclusions.

It may be true that claimant’s inability to work in stressful jobs may have reduced his opportunities to return to work at the earliest possible time. However, a conclusion that claimant imposed a condition that substantially reduced his opportunities to return to work at the earliest possible time would only be supported if the record showed that claimant *only* sought work during the weeks at issue in the fundraising field or similar high-stress positions. The record shows that while claimant’s work searches during the weeks at issue included fundraising work, they also included searches for work that was less stressful. Further inquiry is needed to establish the specific, weekly work searches claimant conducted during each week at issue to determine whether claimant’s work searches in each week consisted of only high-stress, fundraising-type work, whether they consisted of only work of a less stressful nature, or whether they consisted of a mix of high-stress work and low-stress work.

Once claimant’s weekly work search efforts during the weeks at issue are established, further inquiry should address whether, in light of claimant’s weekly work search efforts, claimant was imposing conditions that reduced his opportunities to return to work at the earliest possible time. Likewise, further inquiry should address whether, in light of claimant’s weekly work search efforts, claimant was willing to accept and report to any *suitable* work opportunities within his labor market. In making this inquiry, consideration should be given on remand to the applicability of OAR 471-030-0036(3)(e) addressing whether individuals with permanent or long-term “physical or mental impairment” are available for work. If it is determined that OAR 471-030-0036(3)(e) is applicable, then further inquiry is needed to determine what impact, if any, the provisions of this rule have on claimant’s eligibility for benefits.

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 and available for work during weeks 14-21 through 22-21, Order No. 21-UI-173274 is reversed, and this matter is remanded.

**DECISION:** Order No. 21-UI-173274 is set aside, and this matter remanded for further proceedings consistent with this order.

D. Hettle and A. Steger-Bentz;

S. Alba, not participating.

**DATE of Service: October 20, 2021**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-173274 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 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.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
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