

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0793

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 available for work for the weeks including May 31, 2020 through August 15, 2020 (weeks 23-20 through 33-20) and was therefore not eligible to receive unemployment insurance benefits for those weeks (decision # 95053). Claimant filed a timely request for hearing. On September 22, 2021, ALJ Frank conducted a hearing, and on September 24, 2021 issued Order No. 21-UI-175536, affirming decision # 95053. On September 29, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant filed written arguments on September 29, 2021 and on October 19, 2021. With respect to claimant's September 29, 2021 written argument, EAB did not consider claimant's argument when reaching this decision because she did not include a statement declaring that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). With respect to claimant's October 19, 2021 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 her 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 October 19, 2021 argument to the extent it was based on the record.

The parties may offer new information into evidence at the remand hearing such as the letter dated August 19, 2021 and signed by claimant's employer, which claimant wished to have admitted as an exhibit but was not admitted because the ALJ did not receive it prior to the hearing.¹ At the remand hearing, 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 See Audio Record at 8:53. The ALJ permitted claimant to read the letter into the record. Audio Record at 16:55 to 18:27. Therefore, the letter's contents are part of the record and were considered by EAB when reaching this decision.

FINDINGS OF FACT: (1) Prior to mid-March 2020, Sandra Galloway DMD PC employed claimant as a dental assistant. Upon the onset of the COVID-19 pandemic in mid-March 2020, the employer closed their office and temporarily laid off all of their employees, including claimant.

(2) On March 20, 2020, claimant filed an initial claim for unemployment insurance benefits.

(3) Claimant had three school-age children who were ages nine, twelve, and fourteen, respectively. In late May 2020, the children completed the school year and, thereafter, needed supervision during the day. Claimant's mother-in-law had typically provided childcare for claimant's children when school was not in session. However, claimant's mother-in-law was out of the country and was not available to care for the children.

(4) Claimant stayed home with her children and cared for them during the period of May 31, 2020 through August 15, 2020 while claimant was temporarily laid-off.

(5) Claimant claimed unemployment insurance benefits for the weeks including May 31, 2020 through August 15, 2020 (weeks 23-20 through 33-20). These are the weeks at issue. The Department paid claimant benefits for all of the weeks at issue. During the weeks at issue, claimant sought work as a dental assistant. This type of work is customarily performed in claimant's labor market Monday through Friday, from 8:00 a.m. until 5:00 p.m. Claimant's labor market area was Gaston, Oregon and the surrounding cities.

(6) In mid-August 2020, the employer requested that claimant return to work. After making childcare arrangements, claimant returned to work on August 27, 2020.

CONCLUSIONS AND REASONS: Order No. 21-UI-175536 is set aside and this matter 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). For an individual to be considered "available for work" for purposes of ORS 657.155(1)(c), they must be:

(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[.]

* * *

OAR 471-030-0036(3) (December 8, 2019).

However, Oregon temporary rules set out unemployment insurance provisions applicable to the unique situations arising due to COVID-19 and the actions to slow its spread. OAR 471-030-0070(5) (effective March 8, 2020 through September 12, 2020) provides that a person will not be deemed unavailable for work because:

* * *

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

* * *

Because the Department paid claimant benefits for the weeks at issue, the Department bears the burden to establish by a preponderance of the evidence that benefits should not have been paid. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

The order under review concluded that claimant was not available for work during the weeks at issue and therefore was not eligible for benefits for those weeks. Order No. 21-UI-175536 at 3. The record as developed does not support that conclusion.

The record shows that claimant's mother-in-law, the person whom claimant had typically relied upon for childcare, was not available to care for claimant's children during the weeks at issue. Although claimant was laid-off during that period, the record shows that even if the employer had had work for her during that time, claimant would not have been capable of working because of her childcare responsibilities. For these reasons, the record suggests that claimant was not available for work during the weeks at issue because, under OAR 471-030-0036(3)(b), she was not capable of accepting and reporting for any suitable work opportunities in her labor market due to her childcare responsibilities.

However, under the temporary COVID-19 "available for work" provision cited above, OAR 471-030-0070(5)(b), claimant would not be considered unavailable for work if she was home caring for her children solely because of a lack of childcare that was due to school or daycare closures or curtailments. Applying that rule to this case, claimant would be deemed available for work if, during the weeks at issue, she sought childcare from a school or daycare as an alternative to having it be provided by her mother-in-law, but was unable to obtain it due to a COVID-19 related closure or curtailment of that school or daycare. If the record on remand shows that the only reason there was not other childcare available to claimant while her mother-in-law was out of the country was because of COVID-19 related closures or curtailments, then the record would show that she was home solely due to such closures or curtailments and OAR 471-030-0070(5)(b) would apply.

Further inquiry is necessary to determine whether the temporary COVID-19 "available for work" provision applies. On remand, the ALJ should develop the record to determine whether claimant sought alternative childcare from a school or daycare while her mother-in-law was out of the country but was unable to obtain it due to COVID-19 related closures or curtailments. To that end, the ALJ should inquire whether claimant sought childcare from a school or daycare during the weeks at issue. If so, the ALJ should further inquire whether she failed to obtain the childcare from the school or daycare because

of a COVID-19 related closure or curtailment or, instead, because of some other reason, such as the inability to afford the childcare services or a preference for having her mother-in-law provide childcare.

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 during the weeks at issue, Order No. 21-UI-175536 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-175536 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: November 5, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-175536 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 الاستئناف 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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