

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0906

Modified
Ineligible Weeks 32-21 and 35-21

PROCEDURAL HISTORY: On September 15, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work from August 8, 2021 to August 14, 2021 (week 32-21) and therefore was ineligible to receive unemployment insurance benefits for that week and until the reason for denial had ended (decision # 74009). Claimant filed a timely request for hearing. On October 13, 2021, ALJ Ramey conducted a hearing, and on October 14, 2021 issued Order No. 21-UI-177208, modifying decision # 74009 by concluding that claimant was not able to work, and therefore was ineligible to receive benefits, from August 8, 2021 through September 4, 2021 (weeks 32-21 through 35-21).¹ On October 28, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) During 2021, Multnomah County employed claimant as a social worker.

(2) On July 29, 2021, claimant took a leave of absence from the employer to “take care of [her] health” after she was advised by her medical provider that she should not be working due to her depression and anxiety. Transcript at 7. Claimant’s leave was originally scheduled to end on August 6, 2021. However, after returning to work for one day, claimant determined that her medical condition still prevented her from working, and the employer extended her leave until September 1, 2021.

(3) On August 10, 2021, claimant filed an initial claim for unemployment insurance benefits.

(4) On August 16, 2021, the Department contacted claimant and asked her whether, in light of her medical provider’s instructions, there was any work she was physically or mentally capable of performing. Claimant responded, “No, I don’t think so,” and stated that her medical provider “does not want me to work right now at all.” Transcript at 7.

¹ The order under review stated that it affirmed decision # 74009. Order No. 21-UI-177208 at 3. However, the order under review modified decision # 74009 by concluding that claimant was ineligible for benefits for additional weeks.

(5) Claimant claimed benefits for the weeks of August 8, 2021 through August 14, 2021 (week 32-21), and August 29, 2021 through September 4, 2021 (week 35-21). The Department did not pay claimant for either of those weeks.

(6) On September 7, 2021, claimant's medical provider gave claimant a full release to return to work.

CONCLUSIONS AND REASONS: Claimant was not able to work during weeks 32-31 and 35-21 and was therefore ineligible to receive unemployment insurance benefits for those two weeks.

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 occasionally and temporarily disabled for less than half of the week is not considered unable to work. OAR 471-030-0036(2)(a). 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).

As a preliminary matter, the order under review concluded that claimant had claimed weekly benefits from August 8, 2021 *through* September 4, 2021 (weeks 32-21 *through* 35-21), and that she was ineligible for benefits for all four of these weeks because she was not physically or mentally capable, and therefore not able, to perform any work during these four weeks. Order No. 21-UI-177208 at 1, 3-4. However, while the record supports the order under review's conclusion that claimant was not able to work from August 8, 2021 through September 4, 2021, the record fails to support the order under review's finding that claimant claimed benefits for weeks 32-21 *through* 35-21. Rather, the testimony of both claimant and the Department's representative shows that claimant only claimed benefits for the weeks 32-21 and 35-21. Transcript at 4-5. Therefore, weeks 32-21 and 35-21 are the only two weeks at issue in this case.

Because the Department did not pay claimant benefits for 32-31 or 35-21, claimant has the burden to prove that the Department should have paid benefits for those weeks. *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).

Claimant was not able to work during weeks 32-21 and 35-21. The record shows that during these two weeks claimant was on an approved medical leave of absence for depression and anxiety. The medical leave of absence was recommended by claimant's medical provider, who did not believe claimant should be working during this time period. The record also shows that claimant believed that she was not mentally or physically capable of performing any work during this time period. Claimant's medical provider did not release claimant to return to work until September 7, 2021, which was after the two weeks at issue. As such, the record does not show by a preponderance of evidence that claimant was able to work during weeks 32-21 and 35-21 and eligible to receive benefits for those two weeks.

DECISION: Order No. 21-UI-177208 is modified, as outlined above.

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

DATE of Service: December 2, 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.

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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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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