

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0085

Reversed
Eligible Weeks 28-21 through 30-21

PROCEDURAL HISTORY: On July 30, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work during the week of July 11, 2021 through July 17, 2021 (week 28-21) and therefore was not eligible to receive unemployment insurance benefits for that week and until the reason for the denial had ended (decision # 94338). Claimant filed a timely request for hearing. On December 16, 2021, ALJ Scott conducted a hearing, and on December 20, 2021 issued Order No. 21-UI-182278, modifying¹ decision # 94338 by concluding that claimant was not able to work, and therefore ineligible to receive benefits, for the weeks including July 11, 2021 through July 31, 2021 (weeks 28-21 through 30-21). On January 7, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

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 him 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 argument to the extent it was based on the record.

FINDINGS OF FACT: (1) On April 4, 2020, claimant filed an initial claim for unemployment insurance benefits.

(2) Claimant customarily performed work in auto parts sales. The Department determined that claimant's labor market for such work was Milwaukie, Gladstone, and West Linn, Oregon, and that such work was customarily performed from 9:00 a.m. to 9:00 p.m., Monday through Sunday.

¹ The order under review stated that "the administrative decision mailed July 30, 2021 is *affirmed*." Order No. 21-UI-182278 at 3 (emphasis added). However, as the order under review concluded that the weeks for which claimant was denied benefits were different than the weeks found in decision # 94338, the order *modified* the administrative decision.

(3) Around late May 2021, claimant saw “notifications come up to start your work search.” Transcript at 17. At that time, claimant was seeking work with auto dealerships and retailers.

(4) On or around June 10, 2021, claimant had a potential exposure to COVID-19 when an unvaccinated person sneezed near him while he was not wearing a mask. Shortly thereafter, claimant began to experience significant fatigue, as well as body aches, loss of smell, sneezing, cough, and a runny nose. Claimant subsequently tested negative for COVID-19 on July 2, 2021, July 8, 2021, and one other occasion. However, claimant’s fatigue persisted through the end of August 2021. The fatigue was significant enough that claimant was unable to work while it persisted.

(5) Claimant claimed benefits for the weeks including July 11, 2021 through July 31, 2021 (weeks 28-21 through 30-21). These are the weeks at issue. The Department did not pay claimant benefits for the weeks at issue. Claimant did not provide work searches when he claimed the weeks at issue, and did not look for work during those weeks.

CONCLUSIONS AND REASONS: Claimant met the applicable “able” and “actively seeking work” requirements for the weeks at issue, and was therefore eligible for benefits during those weeks.

Able to work. To be eligible to receive benefits, unemployed individuals must be able to work during each week claimed as defined by OAR 471-030-0036(2) (August 2, 2020 through December 26, 2020); ORS 657.155(1)(c). However, during a state of emergency declared by the Governor under ORS 401.165, the Department may waive, otherwise limit, or modify the requirements of OAR 471-030-0036. OAR 471-030-0071 (September 13, 2020).

Paragraph (3)(a) of Oregon Employment Department Temporary Rule for Unemployment Insurance Flexibility (March 8, 2020), <http://records.sos.state.or.us/ORSOSWebDrawer/Recordpdf/7604239> [hereinafter OED Temporary COVID-19 Rule] provides that a person will not be deemed unable to work because:

* * *

(B) They are home sick because of the novel coronavirus or a condition with similar flu like symptoms and they have not turned down an offer of work since they began being at home due to the sickness[.]

* * *

Paragraph (3)(b) of the OED Temporary COVID-19 Rule provides that “a person is unable to work in a week if they are offered suitable work and do not accept it because they are sick with novel coronavirus, or a condition with similar flu like symptoms.”

During the weeks at issue, claimant was not physically capable of performing the work he customarily performed because of the fatigue he was experiencing. The order under review concluded that claimant was therefore ineligible for benefits because he was “not eligible for the exemption to [OAR 471-030-0036(2)] that is available to those who are employer attached and have contracted Covid-19 or have been required to quarantine due to exposure to Covid-19” and because while claimant “had still not

received a definitive diagnosis. . . Covid-19 had been ruled out prior to the weeks at issue.” Order No. 21-UI-182278 at 2. In so concluding, the order under review misstates and misapplies the rule applicable to claimant’s circumstances. The record shows that prior to and during the weeks at issue, claimant experienced symptoms such as fatigue, body aches, loss of smell, sneezing, cough, and a runny nose, many of which constitute “flu-like” symptoms and all of which are associated with infection with COVID-19. Further, the record does not contain evidence that claimant received or turned down any offers of work during the weeks at issue. For that reason, claimant met the requirements of Paragraph (3)(a)(B) of the OED Temporary COVID-19 Rule during the weeks at issue, and was therefore not unable to work during those weeks.

Actively seeking work. To be eligible to receive benefits, unemployed individuals must actively seek work during each week claimed as defined by OAR 471-030-0036(5)(a); ORS 657.155(1)(c). However, during a state of emergency declared by the Governor under ORS 401.165, the Department may waive, otherwise limit, or modify the requirements of OAR 471-030-0036. OAR 471-030-0071. Paragraph (4) of the OED Temporary COVID-19 Rule provides the following:

The federal Families First Coronavirus Response Act permits states to temporarily modify their unemployment insurances laws regarding work search requirements on an emergency basis to respond to the spread of COVID-19 (Section 4102(b)). Because of the vital importance to public health and safety of mitigating the spread of COVID-19, social distancing measures must be maintained. Accordingly, effective the week ending March 28, 2020, notwithstanding OAR 471-030-0036, and unless otherwise notified in writing by the Employment Department, a person will be considered actively seeking work for purposes of ORS 657.155 if they are willing to look for work when state and local emergency declarations related to the coronavirus expire or otherwise are no longer in effect.

Claimant did not look for work during the weeks at issue, nor did he submit work searches when he claimed benefits for any of those weeks. However, the record contains insufficient evidence to show that claimant was required to look for work during those weeks. Because the OED Temporary COVID-19 Rule was still in effect at that time, claimant would only have been required to look for work if the Department had notified him in writing that he was required to do so. Although claimant testified at hearing that he saw “notifications come up to start your work search” around May 2021, neither claimant nor the Department offered evidence either that the Department sent, or that claimant received from the Department, written notification that he was required to look for work. Further, claimant testified that, prior to becoming ill in June 2021, he had been looking for work. Transcript at 17. The preponderance of the evidence therefore supports the conclusions that claimant had not received written notice that he was required to look for work, and that he was willing to look for work when the state or local emergency declarations related to the coronavirus were no longer in effect. As such, claimant met the actively seeking work requirement applicable to his circumstances during the weeks at issue.

For the above reasons, claimant met the applicable “able” and “actively seeking work” requirements during the weeks at issue, and was therefore eligible for benefits during those weeks.

DECISION: Order No. 21-UI-182278 is set aside, as outlined above.

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

DATE of Service: February 16, 2022

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 reverses 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 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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