

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0269

Affirmed
Eligible Week 42-21
Ineligible Weeks 30-21 through 36-21, 43-21, and 46-21 through 47-21

PROCEDURAL HISTORY: On December 16, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work during the weeks from July 25, 2021 through September 11,¹ 2021 (weeks 30-21 through 36-21), October 17, 2021 through October 30, 2021 (weeks 42-21 and 43-21), and November 14, 2021 through November 27, 2021 (weeks 46-21 through 47-21); and was therefore not eligible for unemployment insurance benefits for those weeks and until the reason for denial ended (decision # 84818). Claimant filed a timely request for hearing. On January 31, 2022, ALJ Meerdink conducted a hearing at which the employer failed to appear, and on February 2, 2022 issued Order No. 22-UI-185390, modifying decision # 84818 by concluding that claimant was able to work during week 42-21 and therefore eligible for benefits for that week, but was not able to work during weeks 30-21 through 36-21, week 43-21, and weeks 46-21 through 47-21; and therefore not eligible to receive benefits for those weeks. On February 22, 2022, claimant filed an application for review of Order No. 22-UI-185390 with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare 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). The argument also 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 as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) During the period at issue, TMS employed claimant as a full-time customer service worker in their call center. Claimant suffers from a long-term or permanent psychiatric condition

¹ Decision # 84818 stated that one of the periods claimant was not available for work was "July 25, 2021 through September 22, 2021." (Emphasis added). At hearing, the Department's witness testified that the reference to "September 22, 2021" was a typographical error and that the actual date was September 11, 2021. Transcript at 4-5.

that requires her to take anti-psychotic medication. Without proper medication to treat her condition, claimant is prone to symptoms that include hallucinations.

(2) On January 25, 2021, claimant filed an initial claim for unemployment insurance benefits.

(3) During the week of July 25, 2021 to July 31, 2021 (week 30-21), claimant worked more than 20 hours for the employer. On July 29, 2021, claimant began to feel ill while at work and left her scheduled shift early. On July 31, 2021, claimant missed her scheduled shift because she continued to feel ill and thought she might have been exposed to COVID-19.

(4) During the week of August 1, 2021 to August 7, 2021 (week 31-21), claimant worked more than 20 hours for the employer. However, during this week, claimant continued to experience COVID-like symptoms, which caused her to miss her scheduled shift on August 4, 2021. On August 5, 2021, claimant tested positive for COVID-19. Claimant missed her scheduled shift on August 7, 2021 because she was ill with COVID-19.

(5) During the week of August 8, 2021 to August 14, 2021 (week 32-21), claimant did not work any scheduled hours for the employer because she was ill with COVID-19.

(6) During the weeks from August 15, 2021 to September 4, 2021 (weeks 33-21 through 35-21), claimant did not work any scheduled hours for the employer because she was ill with COVID-19. On August 19, 2021, claimant tested negative for COVID-19. Nevertheless, claimant continued to experience exhaustion caused by the COVID-19 infection, and therefore was unable to work during those weeks.

(7) During the week of September 5, 2021 to September 11, 2021 (week 36-21), claimant worked approximately 17 hours for the employer, but did not work her scheduled shifts on September 5, 2021 and September 9, 2021 because she continued to experience exhaustion caused by the COVID-19 infection.

(8) During the week of October 17, 2021 to October 23, 2021 (week 42-21), claimant worked 20 hours for the employer, but missed five hours of scheduled work on October 21, 2021, and her entire scheduled shifts on October 22, 2021 and October 23, 2021. Claimant missed these scheduled shifts because the medication she took for her psychiatric condition had become ineffective and claimant began to experience hallucinations. Claimant's medical provider advised her that the medication's ineffectiveness was due to her prior COVID-19 infection. The provider worked to find claimant a new medication that was effective.

(9) Claimant decided to stay home from work until her provider found her a new medication that was effective in treating claimant's psychiatric symptoms. Therefore, during the week of October 24, 2021 to October 30, 2021 (week 43-21), claimant was absent from work on paid sick leave. After October 30, 2021, claimant began taking a new medication that was effective in treating her psychiatric symptoms, including her hallucinations.

(10) During the weeks from November 14, 2021 to November 27, 2021 (weeks 46-21 through 47-21) claimant missed portions of her scheduled work during each week because her brother-in-law exposed her to COVID-19. Claimant did not test positive for COVID-19 despite her exposure.

(11) Claimant claimed and was paid benefits for weeks 30-21 through 36-21, weeks 42-21 and 43-21, and weeks 46-21 through 47-21. These are the weeks at issue.

CONCLUSIONS AND REASONS: Claimant was able to work during week 42-21 and was therefore eligible for benefits for that week. Claimant was not able to work during weeks 30-21 through 36-21 or week 43-21, and therefore is ineligible for benefits for those weeks. Claimant was not available for work during weeks 46-21 through 47-21, and therefore is ineligible to receive benefits during those 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).

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.”

Claimant was not able to work during weeks 30-21 through 36-21. The record shows that during each of those weeks, claimant missed periods of scheduled work due to either her COVID-19 illness or exhaustion that she suffered as a result of her COVID-19 illness. The evidence of claimant’s medical condition and physical symptoms is sufficient to show that claimant missed work during weeks 30-21 through 36-21 because of COVID-19 and the “flu like symptoms” it caused. However, the record also shows that because of these same health conditions, claimant did not accept scheduled, suitable work offered to her by the employer during each of weeks 30-21 through 36-21. Therefore, because claimant was offered suitable work by the employer during each of these weeks—which she did not accept due to

her either being infected with COVID-19 or because she was suffering from lingering exhaustion resulting from the COVID-19 infection—claimant was not able to work during weeks 30-21 through 36-21. As such, claimant is ineligible for benefits for weeks 30-21 through 36-21.

On September 26, 2021, the OED Temporary COVID-19 Rule was withdrawn and replaced by a new temporary rule. The new temporary rule provided that an individual shall be considered able to work in a particular week 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 except that 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. *Temporary OAR 471-030-0036(2), (2)(b)* (effective September 26, 2021 through March 24, 2022). Per this new temporary rule, claimant was able to work during week 42-21 but was not able to work during week 43-21.

The record shows that claimant suffered from a permanent or long-term mental impairment. During week 42-21, claimant did not work certain scheduled shifts, either fully or in part, because the medication she took for her permanent psychiatric condition had become ineffective in treating her psychiatric condition. Further, claimant began to experience hallucinations due to her medication’s ineffectiveness and claimant decided it would be best for her to stay home while her provider looked for a new medication. Because it can be inferred from the record that claimant’s hallucinations derived from her long-term psychiatric condition (now untreated by an effective medication), it follows that claimant’s long-term psychiatric condition prevented her from working certain shifts during week 42-21. However, the record also shows that although her psychiatric condition prevented her from working certain shifts during week 42-21, claimant did remain available for, and completed, some work during that week. As such, claimant was able to perform some work during week 42-21 and, per *Temporary OAR 471-030-0036(2)(b)*, is eligible for benefits for that week.

However, during week 43-21, the record shows that the employer placed claimant on sick leave during the entire week due to the situation with her ineffective medication and attempts to find a suitable alternative medication. As such, claimant was not able to work per the provisions of *Temporary OAR 471-030-0036(2)* and *(2)(b)* because she was not available for *any* work during week 43-21. Claimant was therefore not eligible for benefits for that week.

Available for work. To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed as defined by *OAR 471-030-0036(3)* (December 8, 2019); ORS 657.155(1)(c). However, during a state of emergency declared by the Governor under ORS 401.165, or a public health emergency declared under ORS 433.441, the Department may waive, otherwise limit, or modify the requirements of *OAR 471-030-0036*. *OAR 471-030-0071* (effective September 13, 2020). *Temporary OAR 471-030-0036(3)* (September 26, 2021 through March 24, 2022) provides that a person shall be considered available for work if, at a minimum, the individual is:

* * *

(b) Capable of accepting and reporting for suitable work opportunities within the labor market in which work is being sought, including temporary and part time opportunities[.]

* * *

(f) 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.

* * *

(h) For the purposes of ORS 657.155(1)(c), an individual is not available for work in any week claimed if:

(A) The individual turns down an offer or misses scheduled, suitable work[.]

* * *

Claimant was not available for work during weeks 46-21 and 47-21. The record shows that during these weeks, claimant missed portions of scheduled work during each week because her brother-in-law had tested positive for COVID-19 and she was concerned over her exposure to him. However, claimant was not considered available for work during weeks 46-21 and 47-21 on the basis of a COVID-19 exception because the Temporary OED COVID-19 Rule that had previously allowed certain COVID-19 based exceptions to the availability requirement were no longer in effect as of September 26, 2021. Further, although claimant was available for some of her scheduled work during weeks 46-21 and 47-21, and although she still suffered from her permanent psychiatric condition during these weeks, the record shows that her condition did not prevent her from working the scheduled work she missed. Instead, the record shows that prior to week 46-21 claimant had successfully obtained a new medication that was effective in treating her psychiatric condition, and therefore her condition did not prevent her from working the shifts she had missed. As such, because the record shows that claimant missed scheduled, suitable work during weeks 46-21 and 47-21, claimant is not eligible for benefits for those weeks.

For the above reasons, claimant was able to work during week 42-21 and therefore is eligible to receive unemployment insurance benefits of that week. Claimant was not able to work during weeks 30-21 through 36-21 and week 43-21, and therefore is ineligible to receive unemployment insurance benefits for those weeks. Claimant was not available for work during weeks 46-21 through 47-21 and therefore is ineligible for benefits for those weeks.

DECISION: Order No. 22-UI-185390 is affirmed.

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

DATE of Service: April 27, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymzmo.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 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 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.

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

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