

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0326**

*Reversed*  
*Eligible Week 51-21*

**PROCEDURAL HISTORY:** On January 19, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work during the week of December 19, 2021 through December 25, 2021 (week 51-21) and therefore was not eligible for unemployment insurance benefits for that week (decision # 162149). Claimant filed a timely request for hearing. On February 28, 2022, ALJ Murdock conducted a hearing, and on March 1, 2022 issued Order No. 22-UI-187542, affirming decision # 162149. On March 10, 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) Claimant has suffered from Attention-Deficit/Hyperactivity Disorder (ADHD) since childhood.

(2) In approximately December 2016, claimant began working full-time for a credit union (the employer). Claimant's work shifts began at 9:00 a.m. and ended at 5:00 p.m.

(3) In November 2021, the employer approved claimant for an Americans with Disabilities Act (ADA) accommodation to his work schedule, which allowed him to work from 10:00 a.m. to 5:00 p.m. Due to the accommodation, claimant worked one hour less every day—and fewer than 40 hours per week—but the employer still “coded” claimant as a full-time employee and allowed him to retain his full-time status. Transcript at 24.

(4) On December 23, 2021, the employer discharged claimant. Claimant had been in negotiations with the employer to extend his approved accommodation into calendar year 2022 “[a]ll the way up until the point that [he] was fired.” Transcript at 23.

(5) On December 29, 2021, claimant filed an initial claim for unemployment insurance benefits. Claimant indicated on his initial claim that was willing to work full-time during all the hours and days customary for his occupation. Claimant claimed benefits for the week of December 19, 2021 through December 25, 2021 (week 51-21), the week at issue. The Department determined that the customary days and hours for claimant's work was Monday through Saturday, 9:00 a.m. to 6:00 p.m. The Department did not pay claimant benefits for week 51-21.<sup>1</sup>

**CONCLUSIONS AND REASONS:** Claimant was able to work and available for work during week 51-21 and was therefore eligible for benefits for that week.

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).

**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:

(a) Willing to work full time, part time, and accept temporary work opportunities, 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 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 of or misses scheduled, suitable work[.]

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<sup>1</sup> EAB has taken notice of this fact, which is 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 fact will remain in the record.

\* \* \*

The order under review concluded that claimant was not available for work during week 51-21 because he was not willing to work full time for the employer, as evidenced by the fact that he sought and was granted an accommodation; and that he was not available for work because his medical condition was a “temporary health situation.” Order No. 22-UI-187542 at 2. The record does not support this conclusion.

Claimant was available for work during week 51-21. Contrary to the order under review’s conclusion that claimant’s ADHD was a “temporary health situation,” the record shows that claimant had suffered from ADHD since childhood. As such, the record supports the conclusion that claimant’s ADHD was a permanent or long-term physical or mental impairment. Moreover, the preponderance of the evidence suggests that claimant worked his modified shift for the days leading up to his December 23, 2021 discharge. Thus, to the extent claimant’s work during those days is deemed to have been less than full time, claimant was prevented from working full time due to a permanent or long-term physical or mental impairment. However, because claimant remained available for some work during week 51-21, claimant was eligible for benefits for that week. Furthermore, although claimant worked a few hours short of full-time as a result of his ADA accommodation, there is nothing in the record to suggest that claimant turned down an offer of work or missed scheduled, suitable work. Rather, the record supports the conclusion that claimant worked the modified shift the employer approved for him. As such, claimant was available for work during the week at issue.

**Able to work.** 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) (September 26, 2021 through March 24, 2022).

As previously noted, the record shows that during the week at issue, claimant was prevented from working full time for the employer as a result of his ADHD, which was a permanent or long-term “physical or mental impairment.” However, because claimant remained available for some work during week 51-21, claimant is deemed to be able to work, and was therefore eligible for benefits for that week.

For the above reasons, claimant was both able to work and available for work during week 51-21 and is therefore eligible to receive unemployment insurance benefits for that week.

**DECISION:** Order No. 22-UI-187542 is set aside, as outlined above.

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

**DATE of Service:** May 20, 2022

**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.

**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](https://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

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## 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.

**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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