

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0713

Affirmed
Ineligible Weeks 15-20 through 33-20

PROCEDURAL HISTORY: On December 30, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was able to work during the weeks including April 5, 2020 through August 15, 2020 (weeks 15-20 through 33-20) and was therefore eligible to receive unemployment insurance benefits for those weeks if otherwise eligible (decision # 160122). The employer filed a timely request for hearing. On May 31, 2022, ALJ Meerdink conducted a hearing, and on June 8, 2022 issued Amended Order No. 22-UI-195282, reversing decision # 160122 by concluding that claimant was not able to work during weeks 15-20 through 33-20 and was therefore not eligible to receive benefits for those weeks.¹ On June 22, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The parties' respective arguments contained information that was not part of the hearing record, and did not show that factors or circumstances beyond each party's reasonable control prevented them 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 each party's respective argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Sherm's Thunderbird Market employed claimant at their Food 4 Less grocery store beginning on September 13, 2004. Claimant worked for the employer most recently as a checkout clerk.

(2) Claimant had severe radiating pain in her back, leg, and hip. On February 10, 2020, claimant began a medical leave of absence from work and underwent a series of chiropractic treatments to address the condition.

¹ Amended Order No. 22-UI-195600 was issued to correct a typographical error in Order No. 22-UI-195282, which had previously been issued on June 3, 2022. Amended Order No. 22-UI-195600 at 1 n.1.

(3) From February 10, 2020 into early 2021, claimant received treatments from her chiropractor and during this period, the chiropractor did not authorize claimant to work. On February 12, 2020, claimant began collecting short-term disability payments. To be eligible for the disability payments, claimant was required to be unable to work. Over the course of the six months following February 12, 2020, claimant's chiropractor provided multiple notes advising that claimant could not work, which the employer forwarded to their disability insurance provider. Claimant claimed 26 weeks of disability through mid-August 2020.

(4) Although claimant's chiropractor did not authorize claimant to work, claimant began looking for work beginning in April 2020. Because of her condition, claimant could not find work she could perform. Claimant looked for work in airport security but she was not capable of performing that work because it involved too much standing. Claimant looked for work as a ride share driver but she was not capable of performing that work because it involved too much sitting. Claimant believed she was capable of working for the employer as someone who screened other workers for COVID-19 at the beginning of their shifts, and asked the employer for work as a COVID-19 screener. The employer did not make that job available to claimant but advised that her checkout clerk position remained available. Claimant was not capable of performing work as a COVID-19 screener or checkout clerk.

(5) On August 19, 2020, claimant filed an initial claim for unemployment insurance benefits. The Department determined claimant had a valid claim for benefits and backdated her claim to March 15, 2020. Claimant claimed benefits for the weeks including April 5, 2020 through August 15, 2020 (15-20 through 33-20). These are the weeks at issue. The Department paid benefits for the weeks at issue.

CONCLUSIONS AND REASONS: Claimant was not able to work during the weeks including April 5, 2020 through August 15, 2020 (weeks 15-20 through 33-20), and is ineligible to receive unemployment insurance benefits for 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). 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; August 2, 2020 through December 26, 2020). 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).

Claimant received benefits for weeks 15-20 through 33-20 and, therefore, the Department had the burden to prove that she should not have been 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).

The preponderance of the evidence shows that claimant was not able to work during the weeks of April 5, 2020 through August 15, 2020 (weeks 15-20 through 33-20), and was therefore not eligible to receive benefits for those weeks. During the weeks at issue, claimant was on a medical leave of absence for severe pain, was not authorized to work by her chiropractor, claimed weekly disability benefits that required her to be unable to work, and conveyed to the employer multiple chiropractor notes advising

that claimant could not work. The record shows that claimant was not physically capable of performing the work she actually sought during the weeks at issue. Claimant looked for work in airport security and as a ride share driver but was not capable of performing either job type because they involved either too much standing or too much sitting. Claimant believed she was capable of working for the employer as a COVID-19 screener and asked the employer for that type of work, which they declined to provide. However, given that claimant's chiropractor had deemed her not authorized to work, had provided numerous letters attesting to same, and that claimant received disability benefits based on the fact she was unable to work during the weeks at issue, the record shows that claimant more likely than not was incapable of performing the screener work she sought.

Further, claimant's inability to perform the work sought, more likely than not, included being incapable of performing it in a part time capacity or only during some shifts. Consequently, the standard of OAR 471-030-0036(2)(b) does not apply in claimant's circumstance. At hearing, claimant testified that her chiropractor did not authorize claimant to do any work whatsoever. Transcript at 16. However, claimant also testified that at some point the chiropractor stated claimant could do some part time work, although claimant was "not sure . . . when and if he said that[.]" Transcript at 16. Because of claimant's lack of certainty, as well as the chiropractor's non-authorization for work, notes attesting to this, and claimant's receipt of disability benefits based on being unable to work, the weight of the evidence supports that claimant was unable to perform the work she sought in a part time or limited shift capacity. Therefore, to the extent that claimant's condition was a permanent or long-term physical impairment, it prevented her from working both full time and part time and during all shifts. Accordingly, the standard set forth by OAR 471-030-0036(2)(b) does not apply.

Claimant was not capable of performing the work she actually sought during the weeks at issue. Therefore, under OAR 471-030-0036(2), claimant was not able to work during the weeks at issue. As a result, claimant was not eligible to receive benefits for the weeks of April 5, 2020 through August 15, 2020 (weeks 15-20 through 33-20).

DECISION: Order No. 22-UI-195600 is affirmed.

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

DATE of Service: September 21, 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.

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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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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 الإستئناف 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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