

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0921

Modified
Late Request for Hearing Allowed
Ineligible Weeks 40-21 through 08-22
Eligible Weeks 09-22 through 19-22

PROCEDURAL HISTORY: On October 20, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work during each of the weeks including October 3, 2021 through October 15, 2021¹ (weeks 40-21 and 41-21) and was therefore ineligible to receive unemployment insurance benefits for those weeks and until the reason for the denial had ended (decision # 144339). On November 9, 2021, decision # 144339 became final without claimant having filed a request for hearing. On November 30, 2021, claimant filed a late request for hearing on decision # 144339. ALJ Kangas considered claimant's request, and on February 22, 2022 issued Order No. 22-UI-186971, dismissing claimant's request for hearing as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by March 8, 2022. On March 7, 2022, claimant filed a timely response to the appellant questionnaire. On May 12, 2022, the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 22-UI-186971 was vacated and that a new hearing would be scheduled to determine whether claimant had good cause to file the late request for hearing and, if so, the merits of decision # 144339.

On May 25, 2022, ALJ Monroe conducted a hearing which was continued on June 1, 2022, and on August 12, 2022 issued Order No. 22-UI-200449, concluding that claimant had good cause to file the late request for hearing and modifying decision # 144339 by concluding that claimant was not able or available for work during the weeks including October 3, 2021 through May 14, 2022 (weeks 40-21 through 19-22) and therefore was ineligible to receive benefits for those weeks. On August 31, 2022, claimant filed an application for review of Order No. 22-UI-200449 with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review concluding that claimant had good cause to file the late request for hearing is

¹ This date is presumed to be scrivener's error, as benefit weeks end on Saturdays, and October 15, 2021 was a Friday.

adopted. The remainder of this decision addresses claimant's ability and availability for work during the weeks at issue.

FINDINGS OF FACT: (1) On October 11, 2021, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed benefits for the weeks including October 3, 2021 through May 14, 2022 (weeks 40-21 through 19-22). These are the weeks at issue. The Department did not pay claimant benefits for the weeks at issue. The Department determined that claimant's labor market consisted of Hillsboro, Portland, Beaverton, Aloha, Cornelius, Tigard, and Sherwood, Oregon, and the surrounding vicinity.

(2) The Oregon Clinic, PC employed claimant as a certified medical assistant (CNA) from September 14, 2020 through February 28, 2022.

(3) Claimant last performed work for the employer on September 30, 2021. Shortly thereafter, claimant began a medical leave of absence, primarily because she required hip surgery to correct a condition that made it difficult for her to walk and perform her work. Claimant had also been having a difficult time performing her work due to her grief over the recent loss of her daughter. On October 3, 2021, claimant underwent arthroscopic hip surgery, but the surgery offered claimant inadequate relief. As a result, on February 2, 2022, claimant underwent a total hip replacement.

(4) While she recovered from the surgeries, claimant was not physically capable of performing her duties as a CNA. On February 28, 2022, the employer discharged claimant because claimant had exhausted her available leave, and she remained unable to perform her duties as a CNA.

(5) On March 14, 2022, claimant had a post-surgical follow-up with her physician. Claimant's physician advised her that she could return to work as long as she felt better. The physician also advised her "to take it easy" because there was a possibility that claimant would require another surgery if she "overdid it." June 1, 2022 Transcript at 5. At that time, claimant's symptoms had not resolved, and she was not physically able to return to work as a CNA.

(6) During the weeks at issue while claimant remained employed with the employer, claimant did not seek work other than keeping in touch with her regular employer. During the weeks at issue following her separation from the employer, claimant sought work in customer service and similar fields. Claimant only sought work that could be performed remotely from home, as she was physically capable of performing such work from home, but was not physically capable of performing work outside her home at the time.

CONCLUSIONS AND REASONS: Claimant was not able to work or available for work during weeks 40-21 through 08-22, and was not eligible for benefits during those weeks. Claimant was able to work and available for work during weeks 09-22 through 19-22, and was eligible for benefits during those weeks.

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 occasionally and temporarily disabled for less

than half of the week is not considered unable to work for that week. OAR 471-030-0036(2) (effective March 13, 2022).²

The order under review concluded that claimant was not able to work during the weeks at issue. Order No. 22-UI-200449 at 6. The record does not support this conclusion as to the weeks following claimant's separation from the employer.

Until the employer discharged her on February 28, 2022, claimant did not seek work other than keeping in contact with her regular employer. During that time, claimant remained unable to perform her duties as a CNA because she was still recovering from her hip surgeries. Because claimant was physically unable to perform the work she was actually seeking during that period, claimant was not able to work, for purposes of OAR 471-030-0036(2), during the weeks including September 3, 2021 through February 26, 2022 (weeks 40-21 through 08-22).

However, the record shows that after the employer discharged her, claimant began to seek less physically demanding work (such as customer service work) that she could perform entirely from home. Further, the record shows that claimant was actually physically capable of performing such work. Therefore, for the weeks at issue following claimant's discharge, claimant was able to work for purposes of OAR 471-030-0036(2). Claimant was discharged on a Monday and was only unable to perform the work she was seeking (with her then-employer) for less than half of the week including February 27, 2022 through March 5, 2022 (week 09-22). As such, claimant was able to work for the weeks including February 27, 2022 through May 14, 2022 (weeks 09-22 through 19-22).

Available for work. For an individual to be considered "available for work" for purposes of ORS 657.155(1)(c), they must be:

- (a) Willing to work full time, part time, and accept temporary work opportunities, during all of the usual hours and days of the week customary for the work being sought, 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 any suitable work opportunities within the labor market in which work is being sought, including temporary and part time opportunities; and
- (c) Not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time[.]³

² An earlier version of this rule was effective for some of the weeks at issue in this case. *See Temporary* OAR 471-030-0036(2) (September 26, 2021 through March 24, 2022). For purposes of determining claimant's ability to work, however, the relevant passages of each version of the rule are identical.

³ An earlier version of this rule was effective for some of the weeks at issue in this case. *See Temporary* OAR 471-030-0036(3) (September 26, 2021 through March 24, 2022). The earlier version of the rule does not include the provision, found under subparagraph (3)(c) of this version of the rule, regarding the imposition of conditions which substantially reduce the individual's opportunities to return to work. As discussed herein, that provision is inapplicable to claimant's circumstances, even for the weeks to which that version of the rule is applicable.

* * *

OAR 471-030-0036(3).

The order under review concluded that claimant was not available for work during the weeks at issue because, as she had only been seeking work that she could perform from home, she was not “not capable of accepting and reporting for all suitable work[.]” Order No. 22-UI-200449 at 6. The record does not support this conclusion.

OAR 471-030-0036(3)(b) requires an individual to be capable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought. The order under review apparently premised its conclusion on this provision because claimant was not capable of accepting and reporting for work within her labor market other than remote work. However, the record shows that any non-remote work in claimant’s labor market was not suitable. Because such non-remote work opportunities were not suitable, claimant’s inability to accept and report for them did not render her unavailable for work.

In determining whether any work is suitable for an individual, the Director of the Employment Department shall consider, among other factors, the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual. ORS 657.190. Due to the issues with her hip, and her recovery from surgeries meant to address those issues, claimant was not physically fit for work which required her to leave her home. Similarly, it is reasonable to conclude from the record that attempting to push herself to return to work that required her to walk, before she was capable of doing so safely, would involve a fair degree of risk to claimant’s recovery and could even necessitate another surgery. Any work within claimant’s labor market that was non-remote in nature was therefore not suitable work under ORS 657.190. Because claimant was capable of accepting and reporting for remote work at home without risk of reinjury, such work *was* suitable. As such, claimant was capable of accepting and reporting for all suitable work opportunities within her labor market.

Furthermore, during the weeks in which OAR 471-030-0036(3)(c) was effective, the record shows that claimant’s seeking only remote work did not constitute the imposition of a condition which substantially reduced her opportunities to return to work at the earliest possible time. In order for that provision to apply, claimant would have had to impose the condition herself. Because claimant’s need to work remotely was the result of a medical issue over which she had no control, she did not impose the condition herself. Claimant was therefore not considered unavailable for work by application of OAR 471-030-0036(3)(c).

In sum, claimant was not able to work during weeks 40-21 through 08-22, and was able to work and available for suitable work during weeks 09-22 through 19-22. Therefore, claimant was not eligible to receive benefits for weeks 40-21 through 08-22, and was eligible to receive benefits for weeks 09-22 through 19-22.

DECISION: Claimant's late request for hearing is allowed. Order No. 22-UI-200449 is modified, as outlined above.

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

DATE of Service: November 28, 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.

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