

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-1186**

*Affirmed ~ Ineligible Weeks 38-21 through 37-22*

*Confirmada ~ No Elegible Desde Semana 38-21 Hasta Semana 37-22*

**PROCEDURAL HISTORY:** On October 8, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work from September 19, 2021 through October 2, 2021 (weeks 38-21 through 39-21) and therefore not eligible for benefits for those weeks and until the reason for the denial had ended (decision # 145927). Claimant filed a timely request for hearing. On November 15, 2022, ALJ Smith conducted a hearing that was interpreted in Spanish, and on November 22, 2022 issued Order No. 22-UI-207942, modifying decision # 145927 by concluding that claimant was not able to work from September 19, 2021 through September 17, 2022 (weeks 38-21 through 37-22) and therefore not eligible for benefits for those weeks. On November 29, 2022, claimant filed an application for review of Order No. 22-UI-207942 with the Employment Appeals Board (EAB).

**HISTORIA PROCESAL:** *El 8 de octubre de 2021, el Departamento de Empleo de Oregón (el Departamento) envió notificación de una decisión administrativa concluyendo que el reclamante no estaba capaz de trabajar desde el 19 de septiembre de 2021 hasta el 2 de octubre de 2021 (semanas 38-21 hasta 39-21) y por esa razón no era elegible de recibir beneficios de desempleo para esas semanas y hasta que terminó el motivo de la denegación (decisión # 145927). El reclamante sometió una aplicación oportuna para una audiencia. El 15 de noviembre de 2022, el juez administrativo Smith llevó a cabo una audiencia que fue interpretada al español, y el 22 de noviembre de 2022, emitió la Orden de la Audiencia No. 22-UI-207942, modificando la decisión # 145927 y concluyendo que el reclamante no estaba capaz de trabajar ni era elegible para recibir beneficios desde 19 de septiembre de 2021 hasta el 17 de septiembre de 2022 (semanas 38-21 hasta 37-22). El 29 de noviembre de 2022, el reclamante presentó una aplicación para revisión de la Orden de la Audiencia No. 22-UI-207942 a La Junta de Apelaciones de Empleo (EAB).*

**FINDINGS OF FACT:** (1) Claimant worked as a cook.

(2) On August 30, 2021, claimant became infected with COVID-19 and was hospitalized. Claimant was released from the hospital on September 23, 2021. However, claimant continued to suffer from severe

lung issues that required him to recover at home while connected to oxygen. These problems “changed [claimant’s] life completely” and caused him to be unable to return to work. Transcript at 17.

(3) On September 27, 2021, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed benefits for the weeks from September 19, 2021 through September 17, 2022 (weeks 38-21 through 37-22). These are the weeks at issue. The Department did not pay claimant benefits for the weeks at issue.

(4) During the weeks at issue, claimant’s severe health problems relating to his COVID-19 infection persisted and claimant remained unable to work.

**CONCLUSIONS AND REASONS:** Claimant was not able to work during weeks 38-21 through 37-22, and is ineligible for benefits for those weeks.

**CONCLUSIONES Y RAZONES:** *El reclamante no pudo trabajar durante las semanas 38-21 a 37-22, y no es elegible para los beneficios de desempleo para esas semanas.*

The Department did not pay claimant benefits for weeks 38-21 through 37-22. Therefore, claimant has the burden to prove that he should 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; by logical extension of that principle, where benefits have not been paid claimant has the burden to prove that the Department should have paid benefits).

To be eligible to receive benefits, unemployed individuals must be able to 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) (August 2, 2020 through December 26, 2020) (temporary rule effective September 26, 2021 through March 24, 2022) (present rule effective beginning March 21, 2022).<sup>1</sup> This standard is subject to two exceptions. First, an individual occasionally and temporarily disabled for less than half of the week is not considered unable to work. OAR 471-030-0036(2)(a). Second, 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).

The record shows that claimant was not physically capable of performing work as a cook during all the week of each of the weeks at issue. For most of week 38-21 (September 19, 2021 through September 25, 2021), claimant was hospitalized and not physically capable of working while in the hospital. Although claimant was released from the hospital on September 23, 2021, he continued to suffer from severe lung issues that required him to recover at home connected to oxygen. These problems “changed [claimant’s] life completely” and caused him to be unable to return work at any point during the weeks at issue. Transcript at 17.

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<sup>1</sup> The language of section (2) of OAR 471-030-0036 remained the same for each of these iterations of the administrative rule, other than a change of pronoun use that is immaterial to the outcome in this matter.

Moreover, neither exception contained in OAR 471-030-0036(2) applies to this matter. As to OAR 471-030-0036(2)(a), the record shows that claimant's severe lung issues were not occasional or temporary in nature since they were ongoing for about a year and, in any event, they rendered claimant unable to work for the entirety of each of the weeks at issue. Further, claimant's health problems were of such severity that they "changed [his] life completely" and made it such that he had "not been able to do anything," which establishes that he would not have been available for some work as is necessary for OAR 471-030-0036(2)(b) to apply. Transcript at 17. Because claimant was not physically capable of performing work as a cook during the weeks at issue and given that OAR 471-030-0036(2)(a) and (b) do not apply, claimant was not able to work for purposes of ORS 657.155(1)(c) and was not eligible for benefits for any of the weeks at issue.

Note that a temporary rule designed to address the COVID-19 pandemic was in effect during the first week at issue in this case, September 19, 2021 through September 25, 2021 (week 38-21). Specifically, 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; or

(C) They are hospitalized, or in other institutionalized care, due to the novel coronavirus, but for less than half of the week, and they did not turn down an offer to work that week.

This rule expired on September 25, 2021, and so was in effect during week 38-21.

However, neither subpart changes the result that claimant was not able to work during week 38-21. Claimant is not deemed unable to work during the days he was home sick because of the novel coronavirus and there is no evidence he turned down an offer of work during that time. However, claimant spent the majority of week 38-21—Sunday, September 19, 2021 through some point on Thursday, September 23, 2021—in the hospital due to the coronavirus. Because claimant was hospitalized due to the novel coronavirus for more than half of week 38-21, he was not able to work that week.

For the above reasons, claimant was not able to work during the weeks at issue. Claimant therefore was ineligible for benefits for those weeks.

**DECISION:** Order No. 22-UI-207942 is affirmed.

***DECISIÓN:** La Orden de la Audiencia 22-UI-207942 queda confirmada.*

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

**DATE of Service:** February 3, 2023

**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.

***NOTA:** Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Vea ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en [courts.oregon.gov](https://courts.oregon.gov). En este sitio web, hay información disponible en español.*

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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**

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**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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