

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-0379**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On September 28, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able, available, and actively seeking work from September 11 through 24, 2022 (weeks 37-22 through 38-22) and was not eligible for benefits for those weeks and until the reason for the denial had ended (decision # 95453). Claimant filed a timely request for hearing. On November 14, 2022, ALJ Blam conducted a hearing, and on November 15, 2022 issued Order No. 22-UI-207312, modifying decision # 95453 by concluding that claimant was not able, available, and actively seeking work for from September 11 through November 5, 2022 (weeks 37-22 through 44-22) and was not eligible for benefits for those weeks. On December 4, 2022, claimant filed an application for review with the Employment Appeals Board.

**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) In 2014, claimant was diagnosed with peripheral arterial disease (PAD). The condition caused claimant severe leg pain and difficulty walking. Following his diagnosis, claimant received treatment and underwent several surgeries to address the condition. Claimant's severe pain and walking difficulties persisted.

(2) Claimant worked as a flagger for D&H Flagging Company. Claimant's labor market was the greater Portland, Oregon and Vancouver, Washington area. Flagger work was customarily performed in claimant's labor market Monday through Friday, from 7 a.m. until 7 p.m.

(3) On August 15, 2022, claimant went on a medical leave of absence from D&H Flagging Company due to claimant's PAD condition.

(4) On September 12, 2022, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed benefits for the weeks from September 11 through November 5, 2022 (weeks 37-22 through 44-22). These are the weeks at issue.

(5) During the weeks at issue, claimant was unable to perform his job for D&H Flagging Company because of his PAD symptoms. Claimant's job required standing and moving and light duty options were not available.

**CONCLUSIONS AND REASONS:** Order No. 22-UI-207312 is reversed, and the matter remanded for further development of the record.

To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seeking 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) (March 21, 2022). However, 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).

As relevant to the facts of this case, for an individual to be considered "available for work" for purposes of ORS 657.155(1)(c), they must be:

\* \* \*

(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[.]

\* \* \*

OAR 471-030-0036(3).

Much like the able for work requirement, however, "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."

Finally, with few exceptions that do not apply here, to be actively seeking work as required under ORS 657.155(1)(c), an individual "must conduct at least five work-seeking activities per week," with two of the five work-seeking activities being a direct contact with an employer who might hire the individual. OAR 471-030-0036(5)(a) (March 25, 2022). "Direct contact" means "making contact with an employer in person, by phone, mail, or electronically to inquire about a job opening or applying for job openings in the manner required by the hiring employer." OAR 471-030-0036(5)(a)(B).

The order under review concluded that claimant's PAD condition was a long-term physical impairment and recognized that claimant therefore would not be deemed unable to work or unavailable for work solely because his impairment prevented him from working full time, so long as he was available for some work. Order No. 22-UI-207312 at 4. Nevertheless, the order concluded that claimant was not available for some work during the weeks at issue because claimant's employer did not have light duty work available and claimant did not seek other work that he was able to perform. Order No. 22-UI-207312 at 4. The record as developed does not support this conclusion because it is unknown from the record whether claimant remained available for some work with employers other than D&H Flagging, and actively sought such work from other employers, during the weeks at issue.

The order correctly recognized that Claimant's PAD condition constituted a long-term physical impairment. PAD is a condition affecting the cardiovascular system, which is a type of physical impairment enumerated under 29 CFR §1630.2(h). The record supports that claimant's PAD was of a long-term or permanent nature given that claimant was diagnosed with the condition in 2014. Thus, OAR 471-030-0036(2)(b) and (3)(e) requires claimant's ability to work and availability for work during the weeks at issue to be evaluated under the relaxed standard set forth by those provisions of the administrative rule.

Remand is necessary to develop the record as to whether claimant was available for *some* work (short of working full time or during particular shifts) for potential employers *other* than D&H flagging company, and therefore may have met the modified able and available standard for the weeks at issue. At hearing, inquiry was not made to develop these facts sufficiently. Testimony was taken only that claimant answered on his weekly claim forms that he was not capable of accepting full-time, part-time, and temporary work. Transcript at 15. This evidence does not inform whether claimant was available for some work because the weekly claim form question was premised on the general rule, not the modified standard applicable to those with permanent or long-term impairments. Otherwise, claimant testified at length about the severity of the pain and walking difficulties caused by his PAD condition, and that it caused him to not be able to work. Transcript at 18. Whether claimant intended this to mean he was unable to perform some work for potential employers other than D&H Flagging for each of the weeks at issue was not clarified.

Clarification is essential because the tenor of the questioning at hearing suggests the ALJ failed to hone in on the modified standard applicable to claimant. This may have led claimant to fail to mention his availability to do some work, if he could, while testifying about the severity of his PAD condition, and thus could have produced a misinformed evidentiary record. Claimant was entitled to an explanation at hearing of the issues pertaining to the able to work, available for work, and actively seeking work requirements, including the modified standard applicable to him, as well as what he was required to prove to meet the standard. ORS 657.270(3) ("When the claimant or the employer is not represented at the hearing by an attorney, paralegal worker, legal assistant, union representative or person otherwise qualified by experience or training, the administrative law judge shall explain the issues involved in the hearing and the matters the unrepresented claimant or employer must either prove or disprove."). It does not appear that claimant offered testimony with the standard applicable to him in mind, which may have skewed the record. Furthermore, claimant's eligibility for benefits is determined on a week-by-week basis. Because of this, it is necessary for the ALJ's inquiry into whether claimant remained available for some work to be tailored to each week claimant claimed, week-by-week. It does not appear that the ALJ inquired as to claimant's availability for some work on a week-by-week basis.

Finally, note that inquiry into whether claimant remained available for some work should extend beyond whether claimant could continue to work part-time or during particular shifts as a flagger. The record shows that claimant's PAD symptoms were of such severity that he was unable to perform his flagging job for D&H Flagging. This means the type of flagging work claimant did for D&H Flagging was unsuitable work for claimant during the weeks at issue, given claimant's lack of physical fitness to perform the work and the risk involved to claimant's health and safety.<sup>1</sup> Since that particular flagging work would be an unsuitable work opportunity for claimant, inquiry into whether claimant remained available for some work during the weeks at issue needs to include other types of work suitable for claimant.

For these reasons, a full and fair hearing requires the ALJ to explain the applicable portions of the able to work and available for work rules to claimant, make a tailored week-by-week inquiry based on them, and also conduct a week-by-week inquiry as to whether claimant actively sought work. Accordingly, the ALJ should inquire, on a week-by-week basis, whether claimant was physically capable of performing *some* work for *other* potential employers during the weeks at issue, to include both flagging and other types of work suitable for claimant. To the extent claimant remained available for some work for potential employers other than D&H flagging company during the weeks at issue, the ALJ should inquire, on a week-by-week basis, whether claimant was actively seeking work with such other employers during the weeks at issue.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant was able, available, and actively seeking work during the weeks at issue, Order No. 22-UI-207312 is reversed, and this matter is remanded.

**DECISION:** Order No. 22-UI-207312 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service:** April 21, 2023

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 22-UI-207312 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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<sup>1</sup> *See* ORS 657.190 (Factors to consider when determining whether work is "suitable" include, in pertinent part, "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.").

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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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