

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0997

Reversed
Eligible Weeks 20-22 through 26-22

PROCEDURAL HISTORY: On June 9, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work and ineligible for benefits from May 15 through June 4, 2022 (weeks 20-22 through 22-22) and until the reason for the denial had ended (decision # 112935). Claimant filed a timely request for hearing. On August 16, 2023, ALJ Messecar conducted a hearing, and on August 25, 2023, issued Order No. 23-UI-234353, modifying decision # 112935 by concluding that claimant was not able to work and ineligible for benefits from May 15 through July 2, 2022 (weeks 20-22 through 26-22).¹ On September 1, 2023, 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.

FINDINGS OF FACT: (1) On May 6, 2022, claimant filed an initial claim for unemployment insurance benefits. The Department determined the claim was monetarily valid. Claimant filed weekly claims for the weeks from May 15 through July 2, 2022 (weeks 20-22 through 26-22). These are the weeks at issue.

(2) Prior to filing his claim, claimant last worked at the drive-thru window of a fast-food restaurant. In March 2022, while working at that job, claimant was diagnosed with a "pinched radial nerve." Transcript at 21. That condition essentially precluded use of his right arm. Claimant continued to perform his usual job duties despite this limitation until approximately early May 2022, when claimant separated from employment due to conflict with a manager at the restaurant.

¹ Order No. 23-UI-234525 was an amended order issued to correct typographical errors involving dates in the original order.

(3) From May 15 through approximately June 4, 2022, claimant sought customer service or fast-food restaurant work within his labor market. Claimant remained unable to use his right arm during this period. When contacting employers during this period, claimant made known that he was precluded from using his right arm.

(4) On May 23, 2022, claimant spoke with an adjudicator regarding his claim. Claimant stated his diagnosis and said, "I can't work at all now unless I work with one hand and it does restrict my ability to work. . . in my usual occupation." Transcript at 18.

(5) By approximately June 5, 2022, claimant regained normal use of his right arm. He continued to seek customer service and fast-food restaurant work, and no longer told employers that he was physically limited in the work that he could perform.

CONCLUSIONS AND REASONS: Claimant was able to work during the weeks at issue.

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) (March 21, 2022).

The order under review concluded that claimant was "physically unable to work" during the weeks at issue based on his May 23, 2022 conversation with the adjudicator. Order No. 23-UI-234353 at 2. The record does not support this conclusion.

Claimant was physically able to perform the work that he was seeking during the weeks at issue. Claimant was seeking fast-food restaurant work, the same work that he had performed for his last employer, as well as customer service work that was similar but presumably less physically demanding. Claimant demonstrated that after his diagnosis in March 2022 and through his work separation in early May 2022, he was capable of performing the duties of fast-food restaurant work despite being unable to use his right arm. Claimant's May 23, 2022 statement to the adjudicator was consistent with this demonstration of his abilities in that he was not physically able to perform a full range of work, but was able to fulfill the duties of his customary work to the level he had done following the diagnosis. The record suggests that claimant intended to convey in this statement that he felt restricted in his ability *to be hired for* work in his usual occupation or customer service occupations, given the nature of his medical condition and potential employers' assumptions about his ability to accomplish work tasks with the use of only one arm. Regardless of whether claimant's condition impacted the likelihood of his being hired for work he sought during the weeks at issue, the record shows that claimant was physically capable of performing such work by his having done so for approximately two months despite his condition.

Further, claimant testified that this medical condition resolved by the first week of June 2022, such that he was "good to go," and stopped telling potential employers about any limitations at that time. Transcript at 26-27. This testimony was not rebutted, and further supports that claimant was able to perform the work that he was seeking during the weeks at issue.

For these reasons, claimant was able to work from May 15 through July 2, 2022 (weeks 20-22 through 26-22), and is not ineligible for benefits for those weeks based on an inability to work.

DECISION: Order No. 23-UI-234353 is set aside, as outlined above.

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

DATE of Service: October 12, 2023

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. 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.

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

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.