

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1230

Reversed & Remanded

PROCEDURAL HISTORY: On September 19, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work during the weeks including July 16, 2023 through September 2, 2023¹ (weeks 29-23 through 35-23) and was therefore not eligible to receive unemployment insurance benefits for those weeks and until the reason for the denial had ended (decision # 93619). Claimant filed a timely request for hearing. On October 23, 2023, ALJ Frank conducted a hearing, and on October 26, 2023 issued Order No. 23-UI-239659, modifying decision # 93619 by concluding that claimant was not able to work during the weeks including July 16, 2023 through October 14, 2023 (weeks 29-23 through 41-23) and was therefore not eligible to receive benefits for those weeks. On November 2, 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 her 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.

The parties may offer new information, such as the documents attached to claimant's written argument, into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

FINDINGS OF FACT: (1) On November 23, 2022 claimant sustained an injury that resulted in her developing three bulging discs in her back and a sprained ankle.

¹ Decision # 93619 stated that claimant claimed benefits for the period of July 16, 2023 through September 1, 2023. At hearing, the witness for the Department confirmed that the reference to September 1, 2023 was a typographical error, and the administrative decision should have stated September 2, 2023. Audio Record at 8:02.

(2) On May 22, 2023, claimant's doctor determined that claimant's back injury restricted her from lifting 35 pounds or more and that claimant's sprained ankle restricted her from walking on uneven surfaces.

(3) On July 21, 2023, claimant filed an initial claim for unemployment insurance benefits. A question on the initial claim form asked claimant "Is there any reason you cannot begin full time work now?" to which claimant marked "yes" and wrote "work within my limitations due to my work injury." Audio Record at 9:46 to 10:05.

(4) Claimant claimed benefits for each of the weeks including July 16, 2023 through October 14, 2023 (weeks 29-23 through 41-23). These are the weeks at issue. The Department did not pay claimant benefits for the weeks at issue.

(5) Each week claimant claimed, she reported her work search activity on her weekly claim forms. For one or all the weeks, claimant reported that she sought work as a front desk agent, caregiver, house manager, package handler, housekeeper, floor maintenance clerk, automotive sales, tire service technician, housekeeper, and oil technician.

(6) The housekeeper jobs claimant applied for indicated that any lifting would not exceed 25 pounds. The caregiver jobs claimant applied for did not indicate that lifting more than 35 pounds was necessary. In claimant's experience, such jobs involved moving loads of laundry, groceries, and garbage cans, none of which involved lifting over 35 pounds. Claimant believed that the tire service technician and oil technician jobs she applied for would involve either lifting more than 35 pounds or walking on uneven surfaces.

(7) Following review of claimant's "yes" answer and statement "work within my limitations due to my work injury" in response to the question "Is there any reason you cannot begin full time work now?", the Department assigned the issue of claimant's eligibility for benefits to an adjudicator. Audio Record at 10:02. On September 15, 2023, the adjudicator called claimant and left a voicemail requesting additional information by September 19, 2023. Claimant did not receive the voicemail.

(8) On September 19, 2023, the adjudicator issued decision # 93619 concluding that claimant was not able to work. The decision was based on available information, which was claimant's "yes" answer and statement "work within my limitations due to my work injury" in response to the question "Is there any reason you cannot begin full time work now?" Audio Record at 10:22 to 10:37.

CONCLUSIONS AND REASONS: Order No. 23-UI-239659 is reversed and this matter is remanded for further proceedings consistent with this order.

To be eligible to receive benefits, unemployed individuals must be able to work during each week claimed. ORS 657.155(1)(c). 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. OAR 471-030-0036(2) (March 25, 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).

The order under review concluded that claimant was not physically capable of performing the work she sought during the weeks at issue, and therefore was not able to work for each of the weeks and was ineligible for benefits for those weeks as a result. Order no. 23-UI-239659 at 2-3. The record as developed does not support this conclusion.

As an initial matter, the record evidence indicates that the Department adjudicator issued decision # 93619 concluding that claimant was not able to work based solely on claimant's "yes" answer and statement "work within my limitations due to my work injury" in response to the question "Is there any reason you cannot begin full time work now?" Audio Record at 10:22 to 10:37. Thus, the administrative decision in this case that initially concluded claimant was not able to work was based on the premise that claimant was not able to work because she could not work full time. However, claimant's inability to work full-time during the weeks at issue did not render her unable to work for purposes of ORS 657.155(1)(c). This is because OAR 471-030-0036(2)(b) provides, in pertinent part, that an individual prevented from working full time due to a long-term physical impairment shall not be deemed unable to work on that basis so long as the individual is available for some work. Here, claimant sustained the injury that caused the sprained ankle and bulging discs some eight months prior to filing her initial claim. The sprained ankle and bulging discs, physiological conditions of the musculoskeletal body system, meet the 29 CFR §1630.2(h) definition of a physical impairment, and the fact that the impairment dates from approximately eight months prior to the filing of the initial claim is sufficient to conclude it is long-term in nature. Moreover, claimant was available for some work during the weeks at issue, such as the housekeeper jobs for which she applied. Therefore, claimant's inability to work full time, as she disclosed on her initial claim form, is not a basis to deem her to be unable to work.

Turning to the evidence developed at hearing, the record was not sufficiently developed as to whether claimant was physically capable of performing the work she actually sought during each of the weeks at issue. At hearing, the ALJ elicited a list from the Department witness of the types of jobs claimant sought during the weeks at issue. Audio Record at 11:09 to 11:36. The ALJ then asked about claimant's general physical capability to do some of those job types, such as caregiver, housekeeper, tire service technician and oil technician. Audio Record at 16:39 to 20:17. This approach failed to develop a sufficient record. First, the ALJ failed to ask about the front desk agent, house manager, package handler, and floor maintenance clerk jobs for which claimant applied. Second, the inquiry produced evidence suggesting that claimant was physically capable of performing the housekeeping and caregiver jobs for which she applied.² However, claimant also testified "no" when asked if her medical restrictions would have accommodated performing the tire service technician and oil technician jobs. Audio Record at 18:56, 19:20. Based, apparently, on this testimony relating to the tire service technician and oil technician jobs, which lacked follow up questioning and did not identify which types of work were sought during which weeks, the order under review concluded that claimant was incapable of performing the work she actually sought during *all* of the weeks at issue. Order No. 23-UI-239659 at 2.

² This is so because claimant testified that the housekeeping jobs for which she applied indicated that any lifting would not exceed 25 pounds. Audio Record at 19:27. Likewise, claimant testified that the caregiver jobs claimant applied for did not indicate that lifting more than 35 pounds was necessary and, in her experience, such jobs involved moving loads of laundry, groceries, and garbage cans, none of which involved lifting over 35 pounds. 17:01 to 18:35.

On remand, the record must be developed on a week-by-week basis as to what work was actually sought each week and whether claimant could physically perform that work. Taking the first week at issue for example, this means the ALJ should elicit testimony as to the precise jobs claimant applied for during the week of July 16, 2023 through July 22, 2023. Then, the ALJ should ask questions to develop whether claimant was physically capable of performing the work called for by those jobs during that week. To this end of developing evidence of claimant's physical capability to perform the work in the particular week, the ALJ should develop evidence of how, if at all, claimant's bulging discs made certain types of work she sought impossible as well as which, if any, work she sought involved any significant walking on uneven surfaces.

The inquiry should then progress to the next week at issue, the week of July 23, 2023 through July 29, 2023, and so on until a complete inquiry relating to all the weeks at issue, the weeks of July 16, 2023 through October 14, 2023 (weeks 29-23 through 41-23) has been conducted. The ALJ should direct these inquiries to both parties. This should include asking the witness for the Department to testify regarding claimant's work search activities tied to each week, on a week-by-week basis.

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 to work during the weeks at issue, Order No. 23-UI-239659 is reversed, and this matter is remanded.

DECISION: Order No. 23-UI-239659 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: December 19, 2023

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 23-UI-239659 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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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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