

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0033

Modified
Ineligible Weeks 29-23 through 36-23
Eligible Weeks 37-23 through 39-23

PROCEDURAL HISTORY: On November 8, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work or available for work from July 16 through September 30, 2023 (weeks 29-23 through 39-23) and therefore was not eligible for benefits for those weeks (decision # 65943). Claimant filed a timely request for hearing. On December 11, 2023, ALJ Goodrich conducted a hearing and issued Order No. 23-UI-243120, affirming decision # 65943. On December 27, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider claimant's written argument when reaching this decision because she did not include a statement declaring that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Tan Tan Café & Delicatessen employed claimant as a server and a cashier.

(2) Claimant had a tumor in her spine and needed to have the tumor removed. Claimant's doctor scheduled her for surgery in early August 2023, and advised that claimant needed to stop taking medications starting July 16, 2023, to prepare for the surgery. Because refraining from taking medications during the two weeks before surgery would cause claimant pain and interfere with work, claimant arranged with the employer to take a leave of absence beginning July 16, 2023. Claimant's last day worked was July 15, 2023. On July 16, 2023, claimant began her leave of absence.

(3) On July 16, 2023, claimant filed an initial claim for unemployment insurance benefits.

(4) Claimant was not physically capable of performing her server and cashier work between July 16 and August 2, 2023, because of the pain she experienced due to being off her medications pending the surgery.

(5) On August 2, 2023, claimant underwent the spinal surgery. The surgeon was able to remove some, but not all, of the tumor from claimant’s spine. Claimant remained in the hospital until August 8, 2023, recovering from the surgery.

(6) On August 14, 2023, claimant completed her work registration requirements at a WorkSource office. Claimant thereafter sought cashier or customer service work. Claimant’s labor market area was the Washington County, Oregon area. The cashier or customer service work claimant sought was customarily performed in claimant’s labor market area 8:00 a.m. to 5:00 p.m., Monday through Friday.

(7) Between August 8 and September 15, 2023, claimant experienced numbness and tingling in parts of her body, and had difficulty using her left arm. These symptoms were an after-effect of the surgery. Claimant did not feel capable of performing work due to her physical symptoms during this time.

(8) Between September 16 and September 30, 2023, claimant felt well enough to perform part-time light duty cashier work.

(9) Beginning October 1, 2023, claimant was physically capable of performing full-time cashier and retail work, 40 hours per week.

(10) Claimant claimed benefits for the weeks from July 16 through September 30, 2023 (weeks 29-23 through 39-23). These are the weeks at issue. The Department paid benefits to claimant for the weeks at issue.

CONCLUSIONS AND REASONS: Order No. 23-UI-243120 is modified. Claimant was not able to work or available for work during the weeks from July 16 through September 9, 2023 (weeks 29-23 through 36-23) and was ineligible for benefits for those weeks. However, claimant was able to work and available for work during the weeks from September 10 through September 30, 2023 (weeks 36-23 through 39-23) and therefore was eligible for benefits for those weeks.

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 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).

Furthermore, 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) (March 25, 2022). The Department paid claimant benefits for the weeks at issue and therefore had the burden to prove benefits should not have been paid. *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).

The order under review concluded that claimant was not able to work during weeks 29-23 through 36-23 but was able to work during weeks 37-23 through 39-23. Order No. 23-UI-243120 at 3. However, the order further concluded that claimant was not available for work for all the weeks at issue, weeks 29-23 through 29-23, and therefore was ineligible to receive benefits for all the weeks at issue. Order No. 23-UI-243120 at 4-5. The order under review is modified because the record supports that claimant was not able to work or available for work during weeks 29-23 through 36-23, but was able to work and available for work during weeks 37-23, 38-23, and 39-23.

For the period of July 16 through September 9, 2023 (weeks 29-23 through 36-23), claimant was not able to work or available for work. During the period of July 16 through August 2, 2023 (weeks 29-23 and 30-23, and most of week 31-23) claimant was not physically capable of performing her server and cashier work for the employer because of the pain she experienced due to being off her medications pending surgery. Therefore, claimant was not able to work during that period, per OAR 471-030-0036(2) and was also not available for work under OAR 471-030-0036(3) because the pain due to being off the medications rendered her incapable of accepting and reporting for suitable work opportunities as a server and cashier. Similarly, during the period of August 2 through 8, 2023 (the remainder of week 31-23 and the first portion of week 32-23), claimant underwent the spinal surgery, and then remained in the hospital while recovering. This surgery and subsequent hospitalization rendered claimant not physically capable of working and incapable of accepting and reporting for suitable work opportunities and therefore not able to work and unavailable for work.

Moreover, between August 8 and September 15, 2023 (the remainder of week 32-23, weeks 33-23 through 36-23, and most of week 37-23), claimant experienced after-effects of the surgery that caused numbness and tingling in parts of her body, and had difficulty using her left arm. These symptoms caused claimant to not be physically capable of performing, and incapable of accepting and reporting for, the server and cashier work she had been performing for the employer, as well as the cashier and customer service work she began seeking after August 14, 2023. At hearing, claimant testified that during this time, she undertook an active search for work that she thought was suited to her circumstances. Transcript at 19. The Department's witness similarly testified that claimant completed her work registration requirements at a WorkSource office on August 14, 2023, and had reported applying for retail and cashier jobs on her weekly claim forms. Transcript at 10. Nevertheless, claimant stated at hearing that due to the after-effects of her surgery she did not believe she could perform light duty part time cashier work until September 15, 2023. Accordingly, the record shows that during the period of August 8 through September 15, 2023, claimant was not physically capable of performing the work she was seeking and was incapable of accepting and reporting for suitable work opportunities, and therefore was not able to work and unavailable for work during that period.

Between September 16 and 30, 2023 (the remainder of week 37-23, and weeks 38-23 and 39-23), claimant felt well enough to perform part-time light duty cashier work. The fact that claimant was well enough to perform part-time light duty cashier work during that period has the potential to satisfy

modified able to work and available for work rules that apply to individuals who have a permanent or long-term physical or mental impairment.

Specifically, as to the able to work requirement, “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 unable to work solely on that basis so long as the individual remains available for some work.” OAR 471-030-0036(2)(b). Similarly, as to the available for work requirement, “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.” OAR 471-030-0036(3)(e). 29 C.F.R. §1630.2(h) defines “physical or mental impairment” as:

- (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
- (2) Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The conditions claimant suffered from relating to her spinal tumor and the after effects from the surgery were physical or mental impairments within the meaning of 29 C.F.R. §1630.2(h) in that they were physiological conditions affecting the neurological body system.

Furthermore, the record evidence is sufficient to show that during the weeks at issue, the impairments were long-term in nature. Claimant’s tumor was shown to have affected her body systems prior to mid-July 2023, because prior to July 16, 2023, the tumor condition caused claimant to experience pain that claimant treated through prescribed medications. Beginning on July 16, 2023, claimant began her leave of absence by refraining from taking her pain medications in preparation for surgery. From there, as after-effects of the surgery, claimant suffered numbness and tingling in parts of her body, and had difficulty using her arm. These conditions originated after the August 2, 2023, surgery and continued throughout the remaining weeks at issue. Thus, the record supports an inference that claimant experienced pain from the tumor for weeks or months prior to July 16, 2023, and from the inception of claimant’s leave on July 16, 2023, the period during which the tumor and after-effects affected claimant spanned another two and a half months. Moreover, claimant testified at hearing that as of the hearing date (December 11, 2023), she was still suffering from the numbness and tingling, and that her doctor informed her that those symptoms could be permanent. Transcript at 15. Considering these points collectively, the weight of the evidence shows that claimant’s impairments relating to her spinal tumor were long-term in nature.

As such, the modified able to work and available for work rules apply to the period between September 16 and 30, 2023 (the remainder of week 37-23, and weeks 38-23 and 39-23), when claimant felt well enough to perform part-time light duty cashier work. As to the able to work requirement for those weeks, claimant’s impairments caused her to not be physically capable of performing—full time and

during all of the week—the cashier and customer service work she was actually seeking. However, she remained available for some work because she could perform light duty cashier work on a part-time basis. Therefore, pursuant to OAR 471-030-0036(2)(b), claimant was able to work for the weeks of 37-23, 38-23, and 39-23.

Similarly, as to the available for work requirement for weeks 37-23, 38-23, and 39-23, claimant’s impairments prevented her from being capable of working full time. However, she remained available for some work because she could perform light duty cashier work on a part-time basis. Furthermore, although, under OAR 471-030-0036(3)(c), to be available for work an individual must not “impos[e] conditions which substantially reduce the individual’s opportunities to return to work at the earliest time,” the health consequences of claimant’s tumor condition were not conditions imposed by claimant. Rather, they were physical impairments imposed upon claimant involuntarily because of a health condition over which she had no control. Therefore, pursuant to OAR 471-030-0036(3)(e), claimant was available for work for the weeks of 37-23, 38-23, and 39-23

For these reasons, claimant was not able to work and was not available for work for the weeks of July 16 through September 9, 2023 (weeks 29-23 through 36-23), and therefore is not eligible to receive benefits for those weeks. However, claimant was able to work and was available for work for the weeks of September 10 through 30, 2023 (weeks 37-23 through 39-23), and therefore is eligible for benefits for those weeks, if not otherwise ineligible.

It may be possible for claimant to claim paid leave benefits for some of the weeks at issue in this case for which she was not eligible to receive unemployment insurance benefits. For information regarding eligibility for paid leave benefits, claimant may wish to contact Paid Leave Oregon at paidleave@oregon.gov or by calling 833-854-0166.

DECISION: Order No. 23-UI-243120 is modified as outlined above.

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

DATE of Service: January 30, 2024

NOTE: This decision modifies 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.surveymzmo.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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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