

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0076

Modified
Late Request for Hearing Allowed
Base Year Extended

PROCEDURAL HISTORY: On March 1, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision denying claimant's request to extend the base year of her claim. On March 21, 2023, the March 1, 2023, administrative decision became final without claimant having filed a request for hearing. On August 11, 2023, claimant filed a late request for hearing. ALJ Kangas considered the request, and on November 15, 2023, issued Order No. 23-UI-241197, dismissing claimant's request for hearing as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by November 29, 2023. On November 29, 2023, claimant filed a timely response to the questionnaire. On December 8, 2023, the Office of Administrative Hearings (OAH) mailed a letter to claimant stating that Order No. 23-UI-241197 was vacated and that a hearing would be scheduled to determine whether claimant's late request for hearing should be allowed and, if so, the merits of the March 1, 2023, administrative decision. On December 26, 2023, ALJ S. Lee conducted a hearing, and on December 29, 2023, issued Order No. 23-UI-244436, allowing claimant's late request for hearing and affirming the March 1, 2023, administrative decision on the merits. On January 18, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the portion of the order under review allowing claimant's late request for hearing is **adopted**. The rest of this decision addresses the merits of the March 1, 2023, administrative decision regarding whether claimant is entitled to a base year extension.

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record and, except as discussed below with regard to EAB Exhibit 1, 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, except that information being admitted as EAB Exhibit 1. EAB considered claimant's argument to the extent it was based on the record.

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence consists of two Request for Extension of Base Year forms dated January 18, 2023, and January 26, 2024, and has been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. The January 18, 2023, document was contained in Department records and both the Department and claimant offered testimony regarding its contents at hearing. Circumstances beyond claimant's reasonable control prevented her from offering the January 26, 2024, document at hearing, in that claimant's written argument suggests she was unaware, based on a conversation with a Department adjudicator, that she could submit an additional form signed by a different doctor after the Department found the January 18, 2023, form insufficient. Additionally, claimant was prevented from offering it at hearing because her doctor delayed filling out the January 26, 2024, form because the doctor did not understand the form and needed to set an appointment with claimant for clarification. Claimant's Written Argument at 1-2. The documents are therefore admitted under OAR 471-041-0090(1)(a) as necessary to complete the record. Any party that objects to our admitting EAB Exhibit 1 must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the exhibit will remain in the record.

FINDINGS OF FACT: (1) On March 28, 2021, claimant was injured at work. The injury involved claimant's head, spine, and shoulders. Among other symptoms, claimant suffered a "nonstop, constant migraine" from the time of the injury until November 2021. Transcript at 20.

(2) Claimant filed a workers' compensation claim based on the injury. For the weeks including April 4, 2021, through October 4, 2021, claimant received temporary disability payments on that claim.

(3) In connection with the workers' compensation claim, claimant's medical providers periodically gave written opinions about her physical abilities including those relevant to performing work. At least one such opinion included that claimant could perform "no lifting or pushing [and] no twisting or bending," that she had to "change positions frequently," and could make "no use of affected extremities." Transcript at 35.

(4) Claimant's employer was a large state agency that had numerous jobs available which could be performed at various levels of physical ability, including sedentary work "answering phones." Transcript at 29. Claimant underwent two trial work periods during the time she was receiving temporary disability payments but was unable to continue. The employer ended the first trial after concluding that claimant was unable to perform assigned tasks, and the other trial prompted claimant's doctor to amend their written opinion about claimant's abilities to include "no reaching, no standing, and a one-pound weight restriction[.]" Transcript at 26. Because of these restrictions, the second trial was ended.

(5) On November 3, 2021, claimant underwent spinal surgery. Within two weeks, claimant had recovered sufficiently to return to work with some restrictions, and by the following week was able to work without restriction.

(6) On November 8, 2022, claimant filed an initial claim for unemployment insurance benefits. The claim was determined to be monetarily valid with a weekly benefit amount of \$559 and a base year of July 1, 2021, through June 30, 2022 (the third quarter of 2021 through the second quarter of 2022).

(7) On January 18, 2023, one of claimant's treating doctors was presented with a Request for Extension of Base Year form from the Department on which they were asked to "check [the] appropriate box and provide dates claimant was unable to perform any work during each period shown[.]" EAB Exhibit 1 at 1. The doctor checked the "Unable to work" box corresponding to the third quarter of 2021 and wrote that this inability to work applied from "9/2021" through "11/2021." EAB Exhibit 1 at 1. The form also contained an option for noting a "Partial release for work," which the doctor did not select. The form was filed with the Department on or before January 25, 2023.

(8) On January 26, 2024, another of claimant's treating doctors completed a Request for Extension of Base Year form, indicating claimant was "unable to perform any work" from April 14, 2021, through November 12, 2021. EAB Exhibit 1 at 2.

CONCLUSIONS AND REASONS: Claimant was incapable of work during the greater part of the third quarter of 2021 and is entitled to a base year extension of a calendar quarter.

ORS 657.170 provides, in relevant part:

(1) If the Director of the Employment Department finds that during the base year of the individual any individual has been incapable of work during the greater part of any calendar quarter, such base year shall be extended a calendar quarter. Except as provided in subsection (2) of this section, no such extension of an individual's base year shall exceed four calendar quarters.

* * *

OAR 471-030-0023 (January 11, 2018) provides, in relevant part¹:

(1) As used in ORS 657.170, "incapable of work" means inability to engage in any gainful occupation solely because of physical or mental defect, disease or injury as verified in writing by a licensed medical or therapeutic practitioner, or other evidence satisfactory to the Director.

* * *

The order under review concluded that "claimant's doctor never provided documentation establishing that claimant was unable to perform **any** work as provided in OAR 471-030-0023" and that therefore "she was not incapable of performing any gainful occupation for more than half of a calendar quarter[.]" Order No. 23-UI-244436 at 5 (emphasis in original). The record does not support this conclusion.

Claimant contended at hearing that she was unable to engage in any gainful occupation, solely due to an injury, for a period including July 1, 2021, through September 30, 2021. Transcript at 21. On January 26, 2024, one of claimant's treating doctors verified in writing to the Department that claimant was unable to perform any work from April 14, 2021, through November 12, 2021. EAB Exhibit 1 at 2. Per

¹ Both ORS 657.170 and OAR 471-030-0023 contain additional provisions relating to the extension of the base year when a claimant receives certain workers' compensation benefits, however they are not relevant to claimant's extension request because the provisions are only applicable when an extension is "necessary to establish a valid claim." ORS 657.170(2). Claimant established a monetarily valid claim utilizing the regular base year.

OAR 471-030-0023(1), this verification of claimant's testimony is sufficient to establish that claimant was "incapable of work" for purposes of ORS 657.170 during the entire third quarter of 2021.

Furthermore, evidence aside from the January 26, 2024, Request for Extension of Base Year form, which was created after the hearing in this matter, otherwise supports that claimant was unable to perform any work during the third quarter of 2021. Another of claimant's doctors verified in writing to the Department prior to the issuance of the March 1, 2023, administrative decision that claimant "was unable to perform any work" for a period of time due to "severe neck pain." EAB Exhibit 1 at 1. This verification, provided on the January 18, 2023, Request for Extension of Base Year form, was somewhat ambiguous regarding the timeframe to which the doctor's opinion applied, but is understood to include September 1, 2021, through September 30, 2021. This verification, consistent with claimant's testimony that she was not able to perform any type of work, was sufficient under OAR 471-030-0023(1) to establish that claimant was incapable of any work for at least those 30 days.

The circumstances regarding claimant's unsuccessful attempts to return to work are probative of her ability to work during July and August 2021. It is unclear from the record exactly when claimant's two attempts to return to work occurred. Records of claimant's temporary disability payments note whether wages were offset during the period for which each payment was made, and the only wage offset entry from July 1, 2021, through September 6, 2021, was during the period of August 12, 2021 through August 25, 2021 in the amount of \$301.20. Exhibit 1 at 7. This suggests that one or both attempts may have occurred during this period, and that claimant did not work at all during July 2021 and worked less than a week in August 2021.

The record is also unclear as to exactly what tasks claimant was assigned during the two work attempts and the physical requirements of that work. Claimant testified, "Even on [workers' compensation] benefits if you are not able to do your regular job, they will find you an office job to do . . . they have several different offices you can work at . . . where you can just answer phones all day, if needed. So it wasn't a matter of not being able to do my job. I could not do any job that [the employer] had, including just sitting there answering phones." Transcript at 21-22. This testimony suggests that the employer had a wide range of work available to claimant, including sedentary positions requiring the least level of physical ability at which gainful employment opportunities are likely to exist, and that claimant was assigned work at that level. Both the employer and claimant's doctor concluded, after the first and second work attempts, respectively, that claimant was physically unable to perform the work assigned. It can therefore reasonably be inferred that, more likely than not, claimant's doctor ultimately believed claimant had been incapable of engaging in any gainful occupation during July and August 2021, even if the doctor had believed her capable of doing so before the unsuccessful work attempts demonstrated otherwise.

Moreover, a letter from the workers' compensation insurer stated that claim decisions were "based in part on an insurer medical examination." Exhibit 1 at 5. The insurer's decision to consider claimant temporarily disabled and pay her benefits, despite the availability of work from the employer requiring the lowest levels of physical ability found in gainful employment, suggests that the insurer's examining doctor also may have ultimately concluded that claimant was incapable of performing any work during July and August 2021. The workers' compensation payment records serve as written corroboration of other evidence in the record sufficient to satisfy the verification requirements of OAR 471-030-0023 that claimant was "incapable of work" within the meaning of ORS 657.170 for the entirety of those months.

For these reasons, claimant was incapable of work for the greater part of the third quarter of 2021 and is entitled to an extension of the base year on her November 8, 2022, initial claim, such that the base year consists of the second, third, and fourth quarters of 2021 and the first and second quarters of 2022.

DECISION: Order No. 23-UI-244436 is modified, as outlined above.

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

DATE of Service: February 22, 2024

NOTE: 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/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

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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.

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

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