

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0363

Request to Reopen Allowed
Reversed & Remanded

PROCEDURAL HISTORY: On December 8, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not able to work, available for work, or actively seeking work for the weeks of September 10, 2023, through December 2, 2023 (weeks 37-23 through 48-23) and therefore was not eligible to receive unemployment insurance benefits for those weeks and until the reasons for the denial had ended (decision # 63844). Claimant filed a timely request for hearing. On December 21, 2023, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for January 3, 2024. On January 3, 2024, claimant failed to appear at the hearing, and ALJ Amesbury issued Order No. 24-UI-244667, dismissing claimant's request for hearing due to her failure to appear. On January 22, 2024, claimant filed a timely request to reopen the hearing. On March 27, 2024, ALJ Chiller conducted a hearing at which the Department failed to appear, and on April 8, 2024 issued Order No. 24-UI-251737, allowing claimant's request to reopen the January 3, 2024 hearing, canceling Order No. 24-UI-244667, and modifying¹ decision # 63844 by concluding that claimant was not actively seeking work, and therefore not eligible to receive benefits, for the weeks of September 10, 2023 through March 23, 2024 (weeks 37-23 through 12-24). On April 10, 2024, claimant filed an application for review of Order No. 24-UI-251737 with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant submitted written arguments on April 10, 2024, May 5, 2024, and May 16, 2024. Claimant's April 10, 2024, and May 5, 2024, arguments contained information that was not part of the hearing record, and did not show that this information was relevant and material to EAB's determination. 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 April 10, 2024, and May 5, 2024, arguments to the extent they were based on the record. Because claimant's May 16, 2024, argument was not received by EAB within the time period allowed

¹ Although Order No. 24-UI-251737 stated that it affirmed decision # 63844, it modified that decision by changing the dates of ineligibility to include weeks 49-23 through 12-24. Order No. 24-UI-251737 at 6.

under OAR 471-041-0080(1) (May 13, 2019), that argument was not considered by EAB when reaching this decision. OAR 471-041-0080(2)(b).

In her May 5, 2024, argument, claimant stated, “The reason I do not understand which part of my case wasn’t approved is because it says the AAA part which I do not understand. They approved the reason for work separation so I am unsure why benefits cannot be approved.” Claimant’s May 5, 2024, Written Argument at 2. Claimant expressed a similar sentiment in her April 10, 2024, argument.

Claimant should note that the Department initially issued two administrative decisions, each finding her ineligible for or disqualified from benefits for different reasons. One of these cases (UI Case No. 2023-UI-03031) related to claimant’s voluntary resignation from an employer. At the hearing on that case, claimant was found to have voluntarily quit with good cause, and therefore not disqualified on the basis of that work separation. However, the fact that claimant’s work separation did not disqualify her from receiving benefits does not mean that claimant is *eligible* for benefits each week that she claims. Each week claimant claims benefits she must be able to work, available for work, and actively seeking work. If claimant does not meet all three of these requirements for any given week of benefits that she has claimed, she cannot be considered eligible for benefits for that week, regardless of whether she was found to have quit work with good cause. The issue in this case is whether claimant was able, available, and actively seeking work for the weeks at issue.

EAB considered the entire hearing record. EAB agrees with the portion of Order No. 24-UI-251737 allowing claimant’s request to reopen the January 3, 2024, hearing. Pursuant to ORS 657.275(2), that portion of Order No. 24-UI-251737 is **adopted**. The remainder of the decision addresses the merits of decision # 63844.

FINDINGS OF FACT: (1) On September 13, 2023, claimant filed an initial claim for unemployment insurance benefits. Claimant subsequently claimed benefits for the weeks of September 10, 2023, through March 23, 2024 (weeks 37-23 through 12-24). These are the weeks at issue. The Department did not pay claimant benefits during the weeks at issue.

(2) On August 30, 2023, after having experienced delusions and hallucinations, claimant was diagnosed with schizophrenia. On the same night, claimant, while experiencing symptoms of schizophrenia, crashed her car into a tree, causing her serious injuries and damaging her car beyond repair. Claimant was subsequently hospitalized for her injuries for approximately a week and a half.

(3) On September 1, 2023, claimant was prescribed medication to treat her schizophrenia. The medication rendered claimant unable to operate heavy machinery. Additionally, claimant was hospitalized approximately six times after the initial prescription, due to issues caused by incorrect dosages.

(4) In September 2023, due to her medical restrictions and the effects of her new medication, claimant voluntarily quit working for an employer where she had worked as a cook and server.

(5) While she was recovering from her injuries, claimant’s physician restricted her from lifting more than 25 pounds. That restriction ended on October 30, 2023.

(6) As a result of her schizophrenia diagnosis, car accident and related injuries, and becoming unemployed, claimant became homeless and without a vehicle. Claimant subsequently began living in a tent in the Tillamook State Forest. As of March 27, 2024, claimant could not legally drive and could not afford public transit.

(7) During at least some of the weeks at issue, claimant applied for work in foodservice businesses, seeking positions such as cashier and line cook. Claimant reported at least some of these work seeking activities on her weekly claims for the weeks at issue.

CONCLUSIONS AND REASONS: Order No. 24-UI-251737 is set aside and this matter remanded for further development of the record.

The order under review concluded that claimant did not actively seek work for the weeks at issue and, as a result, did not rule on whether claimant was either able to work or available for work during any of those weeks. Order No. 24-UI-251737 at 6–7. However, the record as developed is insufficient to determine whether claimant actively sought work during the weeks at issue. As such, it is necessary to remand this matter to determine, separately, whether claimant was able to work, available for work, or had actively sought work during each of the weeks at issue. On remand, these topics will require a separate week-by-week inquiry for each of the weeks at issue.

Able to work. 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). 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 except that 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).

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.

Claimant’s schizophrenia diagnosis and medication, and her car accident injuries, present potential limitations on claimant’s ability to perform the work that she was seeking during the weeks at issue. The record shows that claimant was restricted from lifting more than 25 pounds through October 30, 2023. However, the extent of claimant’s injuries is not clear from the record and, likewise, it is not clear if claimant faced any other injury-related restrictions on her ability to work during the relevant period. On

remand, the ALJ should clarify these matters in order to determine whether, for each of the weeks at issue, claimant was actually able to perform the work she sought. Additionally, the ALJ should inquire on remand as to whether, for each of the weeks at issue, claimant's schizophrenia or the medications she took to manage the condition would have prevented her from performing the work she sought, including the dates claimant was hospitalized.

Available for work. For an individual to be considered "available for work" for purposes of ORS 657.155(1)(c), they must be:

(a) Willing to work full time, part time, and accept temporary work opportunities, during all of the usual hours and days of the week customary for the work being sought, unless such part time or temporary opportunities would substantially interfere with return to the individual's regular employment; and

(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[.]

* * *

(e) 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.

(f) For the purposes of ORS 657.155(1)(c), an individual is not available for work in any week claimed if:

(A) The individual has an opportunity to perform suitable work during the week and fails to accept or report for such work.

* * *

OAR 471-030-0036(3).

However, notwithstanding the provisions of OAR 471-030-0036(3), an individual with a circumstance which restricts their availability such as, but not limited to, lack of childcare, caring for an immediate family member or another person in their household, lack of transportation, or attendance in school or training to improve their job skills or long-term employment opportunities, will not be deemed unavailable for work if:

(a) The work the individual is seeking or is otherwise willing to seek is customarily performed during other days and hours in the individual's normal labor market area as defined by OAR 471-030-0036(6); and

(b) The individual is willing and capable of working full time during other days and hours for which they could reasonably expect employers to schedule them.

OAR 471-030-0036(4).

Claimant's circumstances also raise questions about her availability for work during the weeks at issue. First, the record shows that for most, if not all, of the weeks at issue, claimant was unable to drive or afford public transportation. Claimant clarified at hearing that if she were offered a job, she would "just find a new place to put [her] tent and get in a commuting distance that [she] can walk to work." Transcript at 14. It is not clear from the record, however, when claimant became homeless, such that she would be able to pick up and move within walking distance of any business who offered her a job. Inquiry on remand should clarify these points and, to the extent that claimant could not have relocated within walking distance of any such business during any of the weeks at issue, determine whether claimant could have found transportation to that area in order to report for work.

Next, the record shows that claimant was hospitalized initially after her car accident, and was also hospitalized on approximately six other occasions due to complications from her schizophrenia while she was attempting to find the correct dosage of medication. This suggests that, during each of these hospitalizations, claimant may have been unable to leave the facility where she was being treated. If so, and if any of those stays coincided with the times that claimant was required to be available to accept work based on the hours and days the work she sought is customarily performed in her labor market, claimant may have been unavailable for work during one or more of the weeks in which each of those hospitalizations fell.² On remand, inquiry should be made to clarify these points, including the exact dates that she was hospitalized.

Finally, the record suggests that claimant may have still been employed during at least some of the weeks at issue, prior to quitting her job, but that she was also hospitalized during at least some of that time period. On remand, inquiry should focus on whether claimant missed any opportunities to perform suitable work for her then-employer due to her hospitalization.

Actively seeking work. 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).

At hearing, claimant offered broad testimony regarding the work she sought during the weeks at issue. See Transcript at 20–25. However, claimant was unable to provide the specifics of what work seeking activities she engaged in for the individual weeks at issue. Because the Department did not appear at the hearing or offer an attestation into evidence which contained that information, the record lacks an accounting of what claimant reported on her weekly claims. On remand, the Department should provide a witness who can testify on this point, or a written attestation which includes records of claimant's

² Subject to the exclusions under OAR 471-030-0036(4).

weekly claims and work searches, or both.³ The Department should also offer into evidence its determination of claimant's labor market during the weeks at issue, and the hours and days that the work claimant sought in that labor market was customarily performed.

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, available for work, and actively seeking work during the weeks at issue, Order No. 24-UI-251737 is reversed, and this matter is remanded.

DECISION: Order No. 24-UI-251737 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: May 30, 2024

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 24-UI-251737 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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³ Claimant may also be able to access this information herself by logging into her Frances Online account. Claimant is advised to contact the Department for assistance with this, if necessary.



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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