

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**JANICE PETERS**  
Claimant

**APPEAL NO: 10A-UI-07118-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HCM INC**  
Employer

**OC: 03-28-10**  
**Claimant: Respondent (2R)**

Section 96.4-3 – Able and Available  
Section 96.3-7 – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the May 7, 2010, reference 01, decision that determined the claimant was able and available for work and allowed benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 1, 2010. The claimant participated in the hearing. Sharon Winkle, Administrator and Trina Viles, DON, participated in the hearing on behalf of the employer.

**ISSUE:**

The issue is whether the claimant is able and available for work.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was hired as a CNA by the employer July 6, 2000, and went on FMLA November 16, 2009, because she has cancer and was undergoing chemotherapy treatments. The employer held her job for 26 weeks but when the claimant could not provide a potential return to work date by March 4, 2010, the employer terminated her employment while telling her she had an opportunity to return when she received a full release to work by her physician. The claimant finished chemotherapy March 8, 2010, but is taking chemotherapy pills that make her experience dizziness and weak knees and prevents her from being able to walk across her back yard without feeling exhausted. She stated she was getting ready to quit her job so she could “bow out gracefully” because she cannot do the job the way she used to be able to do it. She had not been released to return to work by her physician because of the dizziness she experiences.

The claimant has claimed and received benefits since her separation from this employer.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

While the claimant would like to work she has not been released by her physician to perform any work at this time because she is experiencing dizziness and although she believes she could perform a job that would allow her a break every two hours, let her keep moving and not require any lifting, that is a very limited area of potential employment, if it exists at all, and does not seem to comport with her dizziness and the fact remains she has not received a full release from her physician. Accordingly, benefits must be denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

**DECISION:**

The May 7, 2010, reference 01, decision is reversed. The claimant is not able to work and available for work effective March 4, 2010. Benefits are denied until such time as the claimant receives a full release from her treating physician and takes it to her local Workforce office to demonstrate she is able and available for work. The claimant has received benefits but was not

eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

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