

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

AFI EVIGLO

Claimant

**IOWA WORKFORCE DEVELOPMENT
DEPARTMENT**

APPEAL NO. 19A-UI-08978-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/22/19

Claimant: Appellant (5)

Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Afi Eviglo filed a timely appeal from the November 8, 2019, reference 02, decision that denied benefits effective September 29, 2019, based on the deputy's conclusion that Ms. Eviglo was unable to work due to injury. After due notice was issued, a hearing was held on December 9, 2019. Ms. Eviglo participated personally and was represented by attorney Leif Erickson. Mina-English interpreter Miliza Amey of CTS Language Link assisted with the hearing. Exhibit A and Department Exhibits D-1 through D-5 were received into evidence.

ISSUES:

Whether the claimant has been able to work and available for work within the meaning of the law since September 29, 2019.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On September 27, 2019, claimant Afi Eviglo went to the Sioux City IowaWORKS Center and, with the assistance of Iowa Workforce Development staff, applied online for unemployment insurance benefits. Iowa Workforce Development deemed the claim effective September 22, 2019. Ms. Eviglo had applied for benefits in response to her September 26, 2019 discharge from a full-time housekeeping position at Stoney Creek Hotel & Conference Center in Sioux City, Iowa. Once Ms. Eviglo established the unemployment insurance claim, she did not immediately start making weekly claims and the claim lapsed. Ms. Eviglo reopened the claim effective October 6, 2019 and thereafter made weekly claims for the five consecutive weeks between October 6, 2019 and November 9, 2019. Ms. Eviglo then discontinued her claim. For the weeks that ended October 12 and 19, Ms. Eviglo reported that she was able to work and available for work and that she had made two employer contacts for each of those weeks. During the weeks that ended October 26 and November 9, Ms. Eviglo reported that she was not able to work and/or not available work. For each of those two weeks, Ms. Eviglo reported only one job contact. For the week that ended November 2, Ms. Eviglo reported that she was able to work, was available for work and had made one employer contact. Ms. Eviglo did not keep a log of any purported employer contacts. At the time of the appeal hearing, Ms. Eviglo was unable to name a single employer contact she had made during the five-week period.

In April 2017, Ms. Eviglo suffered injury to her right knee. The injury required three surgeries. The most recent surgery occurred at the end of March 2019 or beginning of April 2019. Ms. Eviglo returned to work after a period of recovery that followed each surgery. On April 30, 2019, Ms. Eviglo's doctor provided her with a note that stated "The above is currently under medical care for a condition which does not permit return to work at certain times when she is having knee pain." Once Ms. Eviglo returned to work after her most recent surgery she continued to be absent one to two days per week due to pain and/or swelling in her right knee that prevented her from being able to work. Ms. Eviglo returned to her doctor for subsequent evaluation and treatment of chronic knee pain. These medical appointments included an appointment in September 2019 and another appointment on November 21, 2019. Ms. Eviglo's doctor has told her that her knee condition will not improve. When Ms. Eviglo was still in the Stoney Creek employment, her doctor advised her not to bend, not to reach overhead, to limit the number of guest rooms she cleaned to less than 10, and to perform only light cleaning of guest room bathrooms.

Since Ms. Eviglo established the unemployment insurance claim, and up to the present, Ms. Eviglo has experienced ongoing difficulty with walking, balance, swelling and pain. Ms. Eviglo states that when she walks she feels like she is going to fall. The pain in Ms. Eviglo's knee prevents her from sleeping at night. Since Ms. Eviglo established her claim for benefits, she has taken oxycodone and ibuprofen for the pain and swelling in her knee. Ms. Eviglo's doctor has advised Ms. Eviglo to seek sedentary work. Though Ms. Eviglo is interested in performing sedentary computer-based work, she has no experience with such work and lacks the English language skills necessary to perform such work. Ms. Eviglo is from the Togolese Republic. Ms. Eviglo completed 11th grade in Togo. Ms. Eviglo has been in the United States of America since 2001 and she participated in an 11-session English as a Second Language (ESL) class shortly after arriving in the U.S. Ms. Eviglo has very limited English language skills. Ms. Eviglo can understand some spoken English, but cannot read English.

REASONING AND CONCLUSIONS OF LAW:

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".

Iowa Admin. Code r. 871-24.22(1) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

b. Interpretation of ability to work. The law provides that an individual must be able to work to be eligible for benefits. This means that the individual must be physically able to work, not necessarily in the individual's customary occupation, but able to work in some reasonably suitable, comparable, gainful, full-time endeavor, other than self-employment, which is generally available in the labor market in which the individual resides.

Iowa Admin. Code r. 871-24.22(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Iowa Admin. Code r. 871-24.23(1), (27) and (34) provide:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(1) An individual who is ill and presently not able to perform work due to illness.

...

(27) Failure to report on a claim that a claimant made any effort to find employment will make a claimant ineligible for benefits during the period. Mere registration at the workforce development center does not establish that a claimant is able and available for suitable work. It is essential that such claimant must actively and earnestly seek work.

...
(34) Where the claimant is not able to work due to personal injury.

Iowa Administrative Code rule 871-24.2.(1)(g) provides:

(g). No continued claim for benefits shall be allowed until the individual claiming benefits has completed a continued claim or claimed benefits as otherwise directed by the department.

(1) The weekly continued claim shall be transmitted not earlier than 8 a.m. on the Sunday following the Saturday of the weekly reporting period and, unless reasonable cause can be shown for the delay, not later than close of business on Friday following the weekly reporting period.

Ms. Eviglo is not eligible for unemployment insurance benefits for the weeks between September 22, 2019 and October 5, 2019, when she did not make a weekly claim and thereby did not meet the availability requirement. See Iowa Administrative Code Rules 871-24.23(27) and 871-24.2(1)(g). Likewise, Ms. Eviglo is not eligible for benefits for the period beginning November 10, 2019 and through the benefit week that ended December 7, 2019, when she did not make a weekly claim and thereby did not meet the availability requirement. *Id.* In the absence of weekly claims for those weeks, the administrative law judge need not further consider the able and available issues for those particular weeks and the remainder of this decision will address the five-week period of October 6, 2019 through November 9, 2019, for which Ms. Eviglo made timely weekly claims.

Ms. Eviglo presented insufficient evidence to prove, by a preponderance of the evidence, that she was able to work available for work within the meaning of the law during any of the five weeks between October 6, 2019 and November 9, 2019. Before, during, and after that five-week period in question, Ms. Eviglo suffered from a chronic debilitating serious medical condition involving her right knee. Ms. Eviglo had undergone multiple surgeries for the injury, most recently in April 2019. Before, during, and after the five-week period in question, Ms. Eviglo suffered pain that required a prescribed narcotic pain medication. Despite that medication, Ms. Eviglo was unable to sleep at night due to her pain symptoms. In addition, Ms. Eviglo experienced ongoing difficulty with walking, balance, and swelling that made her feel like she was going to fall when she walks. Though Ms. Eviglo has seen the doctor at least twice recently, in September and November, she elected not to present any medical documentation from those appointments for the administrative law judge's consideration. Instead, she provided an April 30, 2019 medical memo that does nothing to support a conclusion that she is able to work and available for work. Ms. Eviglo desires to pursue sedentary computer work. However, that work cannot be deemed reasonably suitable, given the substantial language barrier and given Ms. Eviglo's complete lack of experience in such work. The Weight of the evidence further indicates that Ms. Eviglo did not demonstrate an active and earnest search for new employment during the five-week period of October 6, 2019 through November 9, 2019. For the last three of the five claim weeks, Ms. Eviglo reported only one employer contact when she made her weekly claim. For two of those weeks she reported that she was not able to work and/or not available for work. At the time of the appeal hearing, Ms. Eviglo was unable to name a single employer contact for any of the five weeks in question. Because Ms. Eviglo did not prove that she was able to work and available for work during any of the five weeks between October 6, 2019 and November 9, 2019, she is not eligible for benefits for any of those weeks.

DECISION:

The November 8, 2019, reference 02, is modified as follows. The claimant did not make weekly claims for the two weeks between September 22, 2019 and October 5, 2019, did not meet the availability requirement for those weeks, and is not eligible for benefits for those two weeks. The claimant did not make weekly claims for the four weeks between November 10, 2019 and December 7, 2019, did not meet the availability requirement for those weeks, and is not eligible for benefits for those weeks. The claimant made weekly claims for the five weeks between October 6, 2019 and November 9, 2019, but was not able to work or available for work during those weeks, and is not eligible for benefits for those weeks.

In order to be considered for benefits for future weeks, the claimant must reactivate her claim for benefits, commence making weekly claims, demonstrate ability to perform full-time work, demonstrate availability for full-time work, engage in an active and earnest search for new employment, and meet all other eligibility requirements. Any future consideration of the claimant's ability to work and availability for work should include consideration of appropriate updated medical documentation.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn