

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LAURA AYALA
Claimant

APPEAL NO. 13A-UI-08866-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA WORKFORCE
DEVELOPMENT DEPARTMENT**

**OC: 06/23/13
Claimant: Appellant (1)**

Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Laura Ayala filed a timely appeal from the July 25, 2013, reference 02, decision that denied benefits effective June 23, 2013, based on an agency conclusion that she was not able to work and available for work. After due notice was issued, a hearing was held on September 5, 2013. Ms. Ayala participated personally and was represented by Attorney Andrew Bribriesco. Spanish-English interpreter Ike Rocha assisted with the hearing. The hearing in this matter was consolidated with the hearing in Appeal Number 13A-UI-08867-JTT. Exhibits One and Two were received into evidence at the time of the hearing. Department Exhibits D-1 through D-4 were received into evidence. Exhibits Three and Four were submitted after the hearing, but on the same day as the hearing, and were received into evidence.

ISSUE:

Whether Ms. Ayala has been able to work and available for work within the meaning of the law since she established her claim for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Laura Ayala is a non-English speaking person whose native language is Spanish. Ms. Ayala established a claim for unemployment insurance benefits that was effective June 23, 2013. Ms. Ayala has continued the claim since that time. Ms. Ayala received \$1,092.00 in benefits for the four-week period of June 23, 2013 through July 20, 2013.

Ms. Ayala's most recently employer was West Liberty Foods. Ms. Ayala had started that employment in 2010 as a molder. Ms. Ayala suffered a workplace injury to her left shoulder in November 2011. Ms. Ayala underwent surgery on her left rotator cuff. Ms. Ayala was off work from November 2011 until September 2012.

On September 10, 2012, Ms. Ayala met with Dr. Tuvi Mendel, M.D., an orthopedist for an evaluation of her ability to return to work at that time. Dr. Mendel questioned the validity of Ms. Ayala's responses during the evaluation. Dr. Mendel released Ms. Ayala to return to her

molder duties, but cautioned that lifting could place Ms. Ayala “at significant medical risk.” Dr. Mendal concluded that Ms. Ayala “qualifies at light work duties with specific weight restrictions as noted on the chart submitted by the FCE [Functional Capacity Evaluation] test.” Dr. Mendel recommended that Ms. Ayala lift no more than twelve pounds on an occasional basis, not more than six pounds on a frequent basis, and not more than two pounds on a constant basis.

Ms. Ayala returned to work with medical restrictions in September 2012. The employer assigned Ms. Ayala to work as a boxer. Ms. Ayala suffered another workplace injury, to her back, in October 2012. Ms. Ayala returned to the boxer duties and last performed that work on February 19, 2013.

Ms. Ayala suffered a second workplace injury, this time to the right side of her back, in October 2012.

In February 2013, Ms. Ayala commenced an approved medical leave under the Family and Medical Leave Act to undergo a hysterectomy.

While Ms. Ayala was off work, Ms. Ayala sought a second opinion regarding her ongoing back pain. On April 1, 2013, Ms. Ayala was evaluated by Dr. Connie Pieper, M.D., a neurologist with the University of Iowa Hospitals and Clinics. At that time, Ms. Ayala reported to her doctor that, “Her pain was increased with sitting for longer periods of time.” The doctor assessed Ms. Ayala as having “right side back pain which may be radicular.” The plan of treatment included an MRI of Ms. Ayala’s spine, a prescription for the muscle relaxer Flexeril, a return to the clinic in three months, and possible referral at that time to a pain management clinic.

On May 6, 2013, Ms. Ayala underwent an MRI. The MRI revealed “Multilevel degenerative changes of the cervical spine, most severe at C5-C6” and “Mild degenerative changes of the thoracic spine without significant spinal canal or neuroforaminal stenosis at any level.” The MRI revealed “Small disc bulges ... at T2-T3, T6-T7 and T-7-T8 ...”

On May 24, 2013, Ms. Ayala met with Dr. Bernadette Borte, M.D., a neurologist at the University of Iowa Hospitals and Clinics (UIHC). Ms. Ayala was experiencing back pain. Ms. Ayala requested a note releasing her to return to work. On May 24, 2013, Dr. Borte provided a note that states as follows:

To Whom it May Concern (West Liberty Foods):

Laura Ayala is released to return to work as she feels able. She has requested to return to work by June 3, 2013.

Ms. Ayala attempted to return to work at West Liberty Foods in June 2013. The doctor designated by the employer declined to release Ms. Ayala to return to her duties at West Liberty Foods.

On June 26, 2013, Ms. Ayala had an additional radiology consult at the UIHC. Ms. Ayala was evaluated by Neurologist Robert Rodnitzky, M.D., the same day at the UIHC. Dr. Rodnitzky’s notes from that appointment include the following:

When last seen in April, the patient was started on Flexeril 4 mg daily. The patient was also advised to refrain from carrying heavy materials, which she did, as she has not been working since. The patient also underwent a cervical and thoracic spine MRI,

which showed only multiple degenerative changes of the cervical spine, most severe at C5-C6, and a mild degenerative change of the thoracic spine with no significant spinal canal or neural foraminal stenosis at any level. The patient also underwent physical therapy, per patient, with minimal improvement in her symptoms that has [sic] returned worse after stopping physical therapy.

The doctor's assessment indicated as follows:

A 42-year-old female patient who presented for evaluation of back pain. Given description of the pain after a fall and location of pain, suspicion arose for a possible rib fracture. The patient is currently on Flexeril with minimal improvement in her pain.

The plan of treatment was as follows: "1. We will do a right rib x-ray for evaluation of possible fracture. 2. We will refer patient to Pain Clinic after results of x-ray for a possible TENS unit and further management for her pain."

Ms. Ayala commenced her search for new employment during the second week of her claim, the week that ended July 6, 2013. During each week since, Ms. Ayala has made two job contacts with the assistance of an English-speaking friend.

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".

871 IAC 24.22(1)a and (2) provide:

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.

(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.

871 IAC 24.23(1) provides:

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.

The administrative law judge concludes that Ms. Ayala has presented insufficient evidence to establish that she has been able to work and available for work within the meaning of the law since she established her claim for benefits. The evidence indicates a significant ongoing medical issue concerning Ms. Ayala's back. The medical issues include ongoing pain requiring multiple neurological evaluations, ongoing use of a muscle relaxant, trouble sitting, physical therapy without improvement, and referral to a pain clinic. Much of the evaluations and treatment followed the May 24, 2013, equivocal note from Dr. Borte that provides no medical opinion as to whether Ms. Ayala should be released to return to work, but instead reflects a request from Ms. Ayala that she be released to return to work on June 3, 2013. Ms. Ayala has not met the able and available requirements since she filed her claim for benefits and is not eligible for benefits. Benefits are denied effective June 23, 2013. The claimant's ineligibility continued as of the September 5, 2013, appeal hearing.

DECISION:

The Agency representative's July 25, 2013, reference 02, is affirmed. The claimant has not been able and available for work since establishing her claim for benefits. Accordingly, the claimant is not eligible for benefits. Benefits are denied effective June 23, 2013. The claimant's ineligibility continued as of the September 5, 2013, appeal hearing.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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