

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

RICHARD L CUNNINGHAM
Claimant

APPEAL 18R-UI-10147-DB-T
ADMINISTRATIVE LAW JUDGE
DECISION

**IOWA WORKFORCE DEVELOPMENT
DEPARTMENT**

OC: 08/12/18
Claimant: Appellant (1)

Iowa Code § 96.4(3) – Able to and Available for Work

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the August 28, 2018 (reference 02) unemployment insurance decision that found claimant was not eligible for unemployment benefits because he was not able to perform work due to injury. The claimant was properly notified of the hearing. A telephone hearing was held on October 23, 2018. The claimant participated personally. Claimant's Exhibit A was admitted.

ISSUE:

Is the claimant able to work and available for work effective August 12, 2018?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant filed an initial claim for unemployment insurance benefits effective August 12, 2018. His base period consists of wages from full-time employment. Claimant was employed for Ryder Integrated Logistics until August 10, 2018. Claimant was working as a truck driver. Claimant injured his back on February 1, 2018 and has a herniated disc. It is unknown whether a worker's compensation claim was filed regarding the back injury.

Claimant was initially treated by Dr. Silva for the back injury. Dr. Silva restricted claimant from working more than two days per week, up to eight hours per day. At the time of separation, claimant had been approved for Family and Medical Leave Act ("FMLA") leave and was working only two days per week, up to eight hours per day. Claimant has not visited with Dr. Silva to determine whether those working restrictions should be changed or removed.

Claimant visited with Dr. Mouw, a back surgeon, regarding whether he should have surgery for the herniated disc. Ultimately, it was determined that claimant would not have surgery for the herniated disc. Claimant was referred by Dr. Mouw to a pain clinic. Claimant received four injections for back pain from the pain clinic.

Claimant also suffers from three other personal medical conditions that include heart disease, diabetes, and sleep apnea. From August 10, 2018 through sometime in the middle of September of 2018, claimant was unable to work due to these personal medical conditions. As of sometime in the middle of September of 2018, claimant changed his medications and has these three personal medical issues under control.

Claimant's Exhibit A includes a note from Dr. Mouw dated August 31, 2018. The return to work date listed on the note is May 24, 2018. The note states "no restrictions from neurosurgical standpoint". There was no doctor note admitted from Dr. Silva stating that claimant no longer has any working restrictions.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant is not able to and available for work effective August 12, 2018.

Iowa Code § 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 § 96.19, subsection 38, paragraph "b", subparagraph 1, or temporarily unemployed as defined in § 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 § 96.5, subsection 3 are waived if the individual is not disqualified for benefits under § 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(1)a 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.

Iowa Admin. Code r. 871-24.23(35) provides:

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

(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

To be able to work, "[a]n 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." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Iowa Admin. Code r. 871-24.22(1). "An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides." *Sierra* at 723. The court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that "[i]nsofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits." *White v. Emp't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* After considering the applicable factors listed above, and using her own common sense and experience, the Administrative Law Judge finds that claimant's testimony regarding his ability to work is not credible.

No documentation or testimony was provided from Dr. Silva that stated claimant is now able to work full-time, with or without restrictions. The last diagnosis from Dr. Silva was that claimant was only able to work two days per week.

The note from Dr. Mouw states that there are no restrictions **from a neurosurgical standpoint**. This would be correct since claimant elected not to have surgery for the herniated disc. Further, the note from Dr. Mouw states that claimant could return to work on May 24, 2018. This is inconsistent with the claimant's testimony that he was under restrictions to only work two days per week up to the date he separated from employment.

The claimant has not established his ability to work full-time. Benefits are denied effective August 12, 2018 and until such time as claimant obtains a medical release to return to some type of full-time work of which he is capable of performing given any medical restrictions.

DECISION:

The August 28, 2018 (reference 02) unemployment insurance decision is affirmed. The claimant is not able to work effective August 12, 2018. Benefits are withheld until such time as the claimant obtains a medical release to return to some type of full-time work of which he is capable of performing given any medical restrictions.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/rvs