



**APPEAL TRIBUNAL DECISION**

**Docket No.** 21 0880 **Hearing Date:** November 3, 2021

**CLAIMANT:**

Kevin Cyr

**CLAIMANT APPEARANCES:**

Kevin Cyr

**CASE HISTORY**

The claimant timely appealed a May 7, 2021, determination that denied benefits under AS 23.20.378 and 8 AAC 85.350. The issue is whether the claimant was/is able and available for suitable full-time work.

**FINDINGS OF FACT**

The claimant established an unemployment insurance claim effective July 19, 2020. He last worked in mid-June 2020, when he was separated from his position as an engineer for non-health related reasons. The claimant was also on the dispatch list as a union pipefitter until he removed his name sometime in early 2021.

The claimant has several long-term health issues that have affected him for many years. In 2016, he began receiving disability payments from the Veteran's Administration (VA) due to the nature of the health issues. However, he continued to work full-time.

After being admitted to the hospital for two days in May of 2020, the claimant began a series of tests that ultimately determined his condition was getting worse. However, the claimant returned to work after a few days of recovery and continued to work full time.

From the time the claimant established his claim in July 2020, he remained on the work call list for the union as a pipefitter, and he was actively seeking full time work without restriction. He contacted different businesses, inquired about work with various companies, and made reasonable efforts find work.

In November 2020, the claimant underwent a CT scan, which led to a colonoscopy in December 2020. The claimant received the results of the colonoscopy on December 30, 2020, which indicated a much more serious medical issue.

In January 2021, the claimant began the long process of applying for an unemployability status through the VA. This process involved coordination of medical diagnoses from physicians and providing copious amounts of documentation of his conditions. On April 29, 2021, the VA issued a determination acknowledging the claimant's unemployability status retroactively to January 6, 2021. In May 2021, the claimant received disability payments covering the entire period back to January 2021.

The claimant argued that although he applied for unemployability status in January 2021, the VA did not make a decision or issue payment until months later, and he should not be considered unable to work until the decision was issued on April 29, 2021. Furthermore, the claimant argues that in hindsight, he would have accepted full time employment through April 29, 2021.

### **PROVISIONS OF LAW**

#### **AS 23.20.378 provides, in part:**

- (a) An insured worker is entitled to receive waiting-week credit or benefits for a week of unemployment if for that week the insured worker is able to work and available for suitable work....

#### **8 AAC 85.350 provides:**

- (a) A claimant is considered able to work if the claimant is physically and mentally capable of performing work under the usual conditions of employment in the claimant's principal occupation or other occupations for which the claimant is reasonably fitted by training and experience.
- (b) A claimant is considered available for suitable work for a week if the claimant
  - (1) registers for work as required under 8 AAC 85.351;
  - (2) makes independent efforts to find work as directed under 8 AAC 85.352 and 8 AAC 85.355;
  - (3) meets the requirements of 8 AAC 85.353 during periods of travel;
  - (4) meets the requirements of 8 AAC 85.356 while in training;
  - (5) is willing to accept and perform suitable work which the claimant does not have good cause to refuse;
  - (6) is available, for at least five working days in the week, to respond promptly to an offer of suitable work; and
  - (7) is available for a substantial amount of full-time employment.

## CONCLUSION

8 AAC 85.350 provides that a claimant is considered able to work if the claimant is physically and mentally capable of performing work under the usual conditions of the employment in the claimant's principal occupation or other occupation for which the claimant is reasonably fitted by training and experience.

*A Hearing Officer must base his decision on a "preponderance of evidence." See e.g. Patterson, Comm'r Dec. 86H-UI-233, 1C Unemp. Ins. Rptr. (CCH), AK ¶8121.28, 10/16/86. "Preponderance of evidence" has been defined as "that evidence which, when fairly considered, produces the stronger impression, and has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition thereto." Adelman, Comm'r. Dec. 86H-UI-041, 1C Unemp. Ins. Rptr. (CCH), AK ¶8121.25, 5/10/86, citing S. Yamamoto v. Puget Sound Lumber Co., 146 P. 861, 863 (WA).*

The claimant has established that regardless of his medical situation, he was able to work and willing to accept full time work from July 2020 until he began the process of seeking an unemployability status in early January 2021. He was on the union call list, and he made reasonable efforts to find work during that time.

However, regardless of the claimant's argument to the contrary, the Tribunal is unconvinced of the claimant's ability and/or willingness to seek and accept full time employment beginning in January 2021. To obtain a finding of unemployability from the VA and to subsequently receive disability payments retroactively to cover that time, the claimant went through an intensive process to establish his unemployability in January of 2021. Therefore, the claimant did not establish that he was able and willing to work full time once he began that process.

## DECISION

The determination issued on May 7, 2021 is **MODIFIED**. Benefits are **ALLOWED** for the weeks ending July 25, 2020 through January 2, 2021, if otherwise eligible. Benefits remain **DENIED** beginning with the week ending January 9, 2021.

## APPEAL RIGHTS

This decision is final unless an appeal is filed to the Commissioner of Labor and Workforce Development within **30 days** after the decision is mailed to each party. The appeal period may be extended only if the appeal is delayed by circumstances beyond the party's control. A statement of appeal rights and procedures is enclosed.

Dated and Mailed on November 4, 2021.

*Kimberly Westover*  
Kimberly Westover, Appeals Officer