

## **NON-SEPARATION ISSUES (January 17, 2024) - Mark C. Franceschini**

### I. Intro

To be eligible for UI, in addition to qualifying by not being at fault for their separation, claimants have a continuing obligation to the State in order to be eligible for benefits.

Employer/Agency involvement in hearing as a party (sometimes).

## **PART ONE - AGENCY ISSUES - PARTY OBLIGATIONS**

### II. A&A (&A)

The biggest obligation of a CL while filing for benefits is to be ABLE to work, AVAILABLE to work, and ACTIVELY seeking work.

Sect 8-903 sets forth this criteria.

#### A. ABLE to work:

1. Ability issues come in two types - Physical and Personal limitation.
2. Physical - 8-903(b) - creates an exception for disability such that it cannot be used as a bar to benefits. What qualifies as a disability is a factual issue to be determined during the hearing. If a party is claiming a physical disability exception, they must provide medical documentation to support the position.

a. See sample [medical form](#).

b. See Precedent Manual for types of exceptions allowed.

PRECEDENTS: <https://sites.google.com/site/appealsmd/summary-of-useful-precedent>

1. A claimant is able to work if he is physically and mentally capable of working. A claimant must be able to work at the time he initially files for benefits. A claimant with a temporary medical restriction, who then becomes able to work, can be eligible for benefits if he submits a physician's note verifying that the restriction is lifted.

The claimant does not necessarily need to be able to perform his or her past work in order to be considered able to work. If a claimant can no longer perform former work, an assessment will be made of the claimant's ability to work based on the following factors: (1) the type of work formerly done by the claimant; (2) the type of work the claimant is capable of performing at the time the claims in issue were filed; (3) the type of work sought in light of the medical restrictions on the claimant; and (4) the existence of a market for the kind of work done by the claimant.

2. BUT SEE: The claimant, who suffered from chronic low back pain and fibromyalgia, restricted her prior work to twenty to thirty hours per week as an administrative office worker. The claimant **was not under a physician's medical restriction** and was not "disabled" within the Americans with Disabilities Act. The Board found that the claimant **"self-restricted"** and had not sought full-time work. The Board did not find the Motor Vehicle Administration's granting a "Persons with a Disability" license plate to the claimant persuasive or dispositive. **Carpenter v. Family and Nursing Care Inc.**, 2315-BH-2007.

3. Pregnancy - not a disability. Not a bar to benefits. UNTIL - the CL is medically advised not to work either pre- or postpartum. Again - must provide medical clearance postpartum to be considered ABLE again.

Flight Attendants: Grounded by airlines but can still work - even though ERs never have alternative work available.

B. AVAILABLE for work: Generally, must be available during all days/hours of the week of your chosen field. TECHNICALLY not required, but realistically it is.

1. It is inaccurate to say that a claimant **must be willing** to work any and all shifts. The relevant question is whether a claimant is reasonably available for work to the extent that a person **actually desiring to work and making it the highest priority** in his or her life would be. **Harwell**, 1861-BR-92.

- a. Childcare. Restricting your hours due to lack of child care - DENIED  
BUT - need only secure it for when back at work.
- b. Self- employment - must be secondary to finding a FT job or DENIED
- c. Illness of child/elder care - DENIED  
- So while this may get you benefits under 1001, not here.
- d. School - If it interferes with legit work hours in field - DENIED  
PT school, online course, willingness to change schedule/drop classes - GRANTED

C. ACTIVE SEARCH- "honest and active search".

1. Generally "at least three job contacts". But case-by-case, "OFFICIALLY".

D. Transportation - need not own car. Just need to show your ability to get to a job. Public transportation - Can restrict geographic search zone IF it is reasonable and a significant number of jobs are available.

E. Exceptions

- 1. 10 week layoff - no need to search - still need Able/Available.
- 2. 26 week layoff - rare, strict criteria.
- 3. Agency approved training program - exempt from work search.
- 4. Part-time -a PT worker need not look for FT work if PT for injury/disability.  
Again, medically justified.

F. The Hearing

- 1. Can be just ACTIVE, but mostly A&A&A.
- 2. Can be indefinite or # of weeks. If latter, confirm they want to go forward.
- 3. Ask (non-leading) questions - At least 3 contacts, Days/hours/ school/med/ child/elder care.
  - a. I check determination to see what dinged them.
  - b. I ask all others first, then ask about what dinged them.
  - c. Then let them provide whatever RELEVANT info they wish.
  - d. If E/R - don't let case go beyond the issue at hand.
- 4. Penalty - Until restriction no longer exists.

III. Job Refusal/Suitable Work.

A. Sect 8-1005 - Review criteria in (b)(1) and (2).

B. The Hearing - NOTE: ER is a party.

- 1. BYB, WBA, Prior Salary.

2. CL usually worked for ER (who is a party to case) previously.  
-Often a Temp agency situation.
3. Is new offer similar enough under statute to justify job offer?
4. Why did CL refuse offer? What was wrong with it this time?  
-If CL just looking for something new - DENIED.  
-If good cause for refusal - GRANTED.

C. 15 Day rule - Under COMAR 09.32.01.15-1 - ER must notify Agency of refusal within 15 days or no denial.

#### IV. Second Benefit Year/Wage Certification

A. Sect 8-910 - “an individual who has received benefits in a benefit year is not eligible for benefits in a subsequent benefit year unless, after the beginning of the first benefit year, the individual earns wages for covered employment under this title that equal at least 10 times the weekly benefit amount for the subsequent benefit year.”

B. The HEARING: Just Math.

Ask your questions: 1st BYB. 2nd BYB. WBA (2nd yr). Any Earnings?

#### V. Proper Claims (8-901)

A. Traditionally this was a request to back-date a claim - which we don't allow - unless it is due to Agency error – which is more common since BEACON

B. The HEARING: Ask BYB, WBA, why didn't you file before?

C. Alternatively, this is a Proof Of ID case.

1. Get BYB, verify if they recall being asked for ID docs by Agency.

2. I ask, “What did you provide?”

3. I then ask if they have/ can upload or email docs per the **I-9, Employment Eligibility Verification, [List of Acceptable Documents](#)**.

4 corners & front and back of doc.

#### VI. Reporting Requirements (8-902)

A. A claimant must appear at DUI if required to do so. This usually involves being sent to a workshop (such as how to find a job, resume writing, etc.).

B. If you FTA, without good cause, benefits denied. If you reschedule, penalty lifted from that date.

C. The HEARING: Ask BYB, WBA, Did you appear? Why not?

## PART II - OTHER PAYMENTS/ISSUES

#### VII. Reasonable Assurance

A. Section 8-909 - Basically - If you worked last school year/semester/break and (1) the ER offered you a new CONTRACT for the next year/term; OR (2) the ER offers you “REASONABLE ASSURANCE” that you will likely return next year, then earnings from this ER don't count.

B. Section B deals with teachers, Sect C with non-teachers. But treated the same.

C. Note: Substitute teachers get it bad in this section.

D. The HEARING:

1. ER testifies 1st.
  - a. Get FDW/LDW of prior school year & FDW of next year.
  - b. Get date of Reasonable Assurance (letter? email?)
2. Let CL testify - usually not dispositive
3. Likely denying benefits/affirming decision

#### VIII. Severance Pay (and the like):

- A. Sect 8-1009 Covers Severance pay along with COMAR 09.32.02.12
- B. DEFINITION: the gross amount of severance pay, dismissal pay, pay instead of notice of termination, wage continuation, or other remuneration paid or payable to the claimant upon separation from employment.
- C. At HEARING: FDW/LDW Salary/Position. WBA. TOTAL amount of Severance received, representing # of days.
- D. We're doing MATH again.
  1. Calc Daily Wage: weekly wage/7
  2. Calc # of days: Total severance/ Daily Wage.
  3. Apply severance to days immediately following LDW.
- E. if final week is less than WBA - Claimant gets the difference.
- F. EXCEPTION:
  1. Not severance if part of Sep agreement where CL giving up legal rights.

#### IX. Pensions/Retirement Pay

- A. Sect 8-1008 - Straightforward If/then application:
  1. Did CL get retirement payment? If yes, was it from a base period ER? If no - not disqualifying.
  2. If yes, did the CL contribute to the retirement/pension plan?
    - a. If yes, in any amount, only 50% of payments is deductible.
    - b. If no, 100% of payments is deductible.
- B. If there is a deduction - reduce the WBA. If WBA greater, CL gets the difference.
- C. If the payment is a "Lump Sum" payment -
  1. Divide the CL's Gross weekly salary into the Lump Sum = The Number of Weeks for which it is deductible.
  2. If A.2.a, above, Calculate # of weeks the same, but deduct 50% of last gross weekly wage from benefits.

#### X. Holiday Pay/Vacation Pay

- A. Sect 8-1007 - No benefits for any weeks where CL receives holiday/vacation pay that has been accumulated or earned by the CL as long as they have a definite return to work date.