

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

CHARLES W. MILLER
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-61
Case No. 69-3917

The claimant appealed from Referee's Decision No. P-5998 which held that the claimant was ineligible for benefits for one week beginning July 6, 1969, under section 1253(c) of the Unemployment Insurance Code. The decision also referred to the department for its consideration the question of whether the claimant thereafter met the requirements of section 1253(c) of the code. The claimant and the Department filed written argument.

STATEMENT OF FACTS

The claimant, aged 19, last worked for eight months ending May 10, 1969, as a counterman in a drug store, selling ice cream cones and performing other miscellaneous duties for about 30 hours a week while attending school. The claimant previously worked full time for six weeks as a gasoline service station attendant.

Since filing his claim for unemployment benefits effective May 11, 1969, the claimant had been interested primarily in obtaining work as an automobile mechanic because he had received training for such work in school. He had also applied for work in gasoline service stations. The claimant had contacted from three to seven prospective employers each week. He was registered for work with the Department Youth Center in Fresno where he was classified as a busboy, which classification would include counter work and is regularly performed seven days a week. The claimant had not looked for work as a counterman and on August 5, 1969 was advised by representatives of the Department to expand his search for work. The claimant testified at the hearing on August 22, 1969 that he could accept full-time work during the summer months but it would be hard to work full time when he returned to school September 10, 1969.

On Monday, July 7, 1969, the claimant spent from approximately 9 a.m. to 4:30 p.m. taking a physical examination in Fresno for the United States Armed Forces. The claimant had not volunteered for duty but was ordered to take the physical examination by his local draft board. Because of a problem with his hearing, the claimant was reclassified 1-Y to be subject to the draft only in time of national emergency.

The Department determined that the claimant was not available for full-time work during the week beginning July 6, 1969 on the ground that he was busy taking a physical examination on Monday, July 7, 1969. However, the Department, at the hearing and in its written argument, now contends that the determination was issued in error and that the claimant did meet the availability for work requirements during that week. The position of the Department is that because military service has been recognized as "employment" in some of the decisions of this Appeals Board, the claimant's physical examination for military service should be considered a form of seeking work. The Department also seeks clarification with respect to the question of when military service does or does not constitute employment.

REASONS FOR DECISION

Section 1253(c) of the Unemployment Insurance Code provides as follows:

"1253. An unemployed individual is eligible to receive unemployment compensation benefits with respect to any week only if the director finds that:

"(c) He was able to work and available for work for that week."

In order to meet the eligibility requirements of section 1253(c) of the code, a claimant must be ready, willing and able to accept suitable employment during the days and hours customarily worked in such employment in a labor market where there is a demand for his services. (Appeals Board Decisions Nos. P-B-1, P-B-17, P-B-18, P-B-28, P-B-32 and P-B-53)

In Benefit Decision No. 6581, as in the present case, the claimant was ordered by his local draft board to undergo a physical examination on a regular working day for individuals in the claimant's work classification. In that case we held the claimant met the availability for work requirements of section

1253(c) of the code because the evidence established he did not miss any opportunities for work on the day he took the physical examination. In Appeals Board Decision No. P-B-32 we overruled Benefit Decision No. 6581 and other prior decisions which applied the "lost work opportunity" concept. In disapproving the use of the "lost work opportunity" concept in those prior decisions, it was not our intention to disapprove the conclusions reached therein under section 1253(c) of the code if they are otherwise validly supportable.

In Benefit Decisions Nos. 6547, 6773 and 6793, we recognized that for some purposes under the Unemployment Insurance Code, military service may constitute employment. Since a physical examination is a usual prerequisite to such service, just as it may be for many other types of governmental service and private employment as well, it is our opinion that undergoing such physical examinations does not in and of itself render an individual unavailable for work; rather such activity should be considered as a necessary part of the process of obtaining employment in certain fields similar to taking civil service examinations or typing or other work proficiency examinations.

Therefore, we hold in the present case that the fact that the claimant was occupied in taking a physical examination pursuant to the instruction of his draft board on a regular working day in his fields of usual employment does not render the claimant unavailable for work for that week since the claimant was merely engaged in a necessary activity preliminary to prospective military service. In so holding, we expressly do not decide whether the taking of the physical examination constituted employment or whether, if the claimant had been accepted, his military service would have constituted employment. The facts and legal issues involved in the record before us do not directly present such questions and it is inappropriate for us to consider them in this case.

As set forth in the referee's decision, however, the facts in the record do raise a question with respect to the claimant's availability for work in view of his limited employment history and search for work, as well as his plans to return to school and desire for future part-time work. That question is referred to the Department for its consideration.

DECISION

The decision of the referee is modified. The claimant met the eligibility requirements of section 1253(c) of the code during the week beginning July 6, 1969, but the issue of his availability for work thereafter is referred to the department for its consideration.

Sacramento, California, December 18, 1969

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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