CHAPTER 5
AVAILABILITY AND CAPABILITY

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2.5.1 INTRODUCTION

Labor Law §591.2 imposes two conditions for eligibility for benefits. First, the claimant must be "capable of work," that is, he or she must possess the physical and mental ability to perform work. Second, the claimant must be "ready, willing, and able to work in his usual employment or in any other for which he is reasonably fitted by training and experience." One who meets the second condition is considered to be "available" for work.

Determinations of unavailability and incapability are ineligibility determinations, not disqualifications. They may not be a total bar to receipt of unemployment benefits. They are determinations of a claimant's eligibility for benefits for a period of one or more days after a claimant has filed a claim and, if the determination contains no ending date, up to the date of a hearing.

TIMELINESS OF HEARING REQUEST ON ELIGIBILITY DETERMINATIONS

Ineligibility determinations are continuing in nature. If the determination does not contain a specific end date, a claimant's hearing request is not untimely with respect to at least part of the period in issue. Under those circumstances, the judge must count back thirty days from the post-marked date of the hearing request and determine the claimant's eligibility from that date until the date of the hearing.[1]

For example, a determination was mailed on May 9, 2016 stating: "You are not eligible for benefits as of March 31, 2016 and until the reason for the ineligibility no longer exists. Reason: You are not capable of work due to a back injury for which your doctor has reported that you are not able to perform any work." The claimant received the determination shortly thereafter but did not request a hearing until July 1, 2016. The hearing is held on July 29, 2016.

As the claimant's hearing request was not made within 30 days of the receipt of the determination, the claimant is not entitled to a ruling on the merits of the determination of ineligibility for the time period of March 31, 2016 until May 31, 2016. However, the judge has jurisdiction to determine the claimant's eligibility for benefits beginning June 1, 2016, thirty days prior to the request for a hearing, up until July 29, 2016, the date of the hearing.

[1] Appeal Board No 591078 ("The initial determination of capability is, however, a continuing determination. As a result, the claimant's hearing request is deemed timely as of the period commencing thirty days prior to date of the request for the hearing")

2.5.2 CAPABILITY

The issue of capability arises whenever the Department of Labor receives information that a claimant may be, or may have been, unable to work due to some physical or mental impairment. The impairment may be a temporary condition caused by a short-term illness or injury, or may result from a chronic or debilitating illness or disability.

In order to be considered capable for unemployment insurance purposes, a claimant must be capable of performing some work, even if he or she cannot perform his or her usual work.[2]

WORK RESTRICTIONS

A claimant who has medical restrictions prohibiting him or her from performing all of his or her usual job duties may still be found capable of employment so long as the restrictions are not so extensive as to render the claimant incapable of any work. For example, restrictions on the amount of weight an individual can lift,[3] on repetitive movements and the amount of time a person can sit, stand, or walk,[4] on performing jobs requiring high levels of memory functioning, multitasking, or very fast processing of work materials,[5] or the lack of the use of one arm,[6] have not been found so restrictive as to render the claimant incapable of any work. Additionally, work restrictions due to pregnancy often do not result in a finding of incapability, so long as the claimant

[2] Appeal Board No. 592307 (citing Appeal Board No. 580660).

[3] Appeal Board No. 591765 (claimant found capable of work despite restriction on lifting any amount of weight); Appeal Board No. 556025 (claimant found capable of work despite lifting restriction of more than 15 pounds and requirement to change physical position every 30 minutes).

[4] Appeal Board No. 568378 (claimant found to be capable of employment despite having the following restrictions: no repetitive or sustained bending or twisting of torso, no repetitive or prolonged climbing up or down stairs or ladders, no repetitive or sustained kneeling, squatting or crawling, no repetitive lifting or lifting of more than 10 pounds, no prolonged sitting or standing of more than ½ hour at a time, and no repetitive or prolonged walking of more than 5 blocks at a time); Appeal Board No. 574661 (claimant was capable of work despite restrictions on lifting, bending and standing because evidence established he was not precluded from doing sedentary work).

[5] Appeal Board No. 550519 (claimant found to be capable of work despite the following restrictions: no operation of motor vehicle or motorized machinery, no work at heights, no jobs that required high levels of memory functioning, multitasking, or very fast processing of work materials, and no working in or near water of greater than three inches deep).

[6] Appeal Board No. 592307 (claimant, a school bus driver, capable of employment even though she was unable to pull, lift or grasp using her right arm).

can perform some work.[7] On the other hand, a claimant with a major depressive disorder,[8] a claimant who suffers from PTSD affecting his ability to travel outside the home,[9] a claimant who suffers from schizophrenic disorder with auditory hallucinations,[10] who has been told to avoid commuting to work and to avoid all stressful situations,[11] who experiences daily flu-like symptoms as side-effects of treatments received for other medical issues,[12] or has been given pain medication and told to rest for a time period,[13] has been found to be not capable of work.

Medical documentation and the claimant's testimony needs to be weighed in making a decision on the claimant's capability. Documentation stating the claimant is not capable of work and / or the absence of a clearance to return to work is merely evidence tending to support or refute the claimant's contention that he or she is capable of work.[14] Additionally, documentation stating that a claimant is "totally disabled," while clearly relevant, is also not dispositive as to whether a

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[7] Appeal Board No. 591067 (claimant, a home health aide, was capable during period of time when her feet were swollen, but her physician did not impose restrictions on her ability to work during her pregnancy so long as she did not have to stand for long periods; claimant was not capable for a subsequent period of time during which she was hospitalized and gave birth via caesarian section, as well as a period of time after she was released from the hospital until her physician released her to return to work without restriction)

[8] *Matter of Mainieri,* 10 A.D.3d 765 (3d Dep't 2004) (claimant was found not capable of work where her physician completed a request for medical information in which he certified the claimant was unable to work due to a major depressive disorder but later submitted conflicting document regarding claimant's capability after initial determination was issued)

[9] Appeal Board No. 560518 (claimant found incapable of work where he was diagnosed with PTSD and although he applied for jobs and went on job interviews, he was unable to do those things without his wife by his side)

[10] *Matter of Jackson,* 206 A.D.2d 727 (3d Dep't 1994) (claimant was incapable of working where evidence established he suffered from schizophrenic disorder with auditory hallucinations; while his psychiatrist testified claimant would likely be able to work after participation in vocational rehabilitation, the claimant had yet to enter any such program)

[11] Appeal Board No. 553338 (claimant who quit his job due to medical restrictions including lost coordination and movement in leg after stroke and who was told to avoid stress and a commute to work and also to avoid extreme temperatures and not climb stairs was found not capable of work based on his restrictions in the absence of evidence that his physician returned him to work)

[12] Appeal Board No. 572008 (claimant found not capable of work where she was required to receive weekly injections, experienced several adverse side effects from the treatment, including flu-like symptoms such as muscle aches, chills, fever, and headaches, difficulty in breathing, lightheadedness, faintness, nausea, insomnia, depression, and anemia; and was in and out of the hospital for the first month of the treatment

[13] Appeal Board No. 561745 (claimant was not capable of work when she went to the emergency room for knee pain, was given pain pills and crutches, was told to rest and was taken out of work for two days).

[14] Appeal Board No. 577334 (in remanding for further hearing, the Board stated "[t]o the extent that the claimant may have lacked medical clearance to return to work, this lack of clearance is evidence of a lack of capability, but is not dispositive").

claimant is capable of performing any work. It must be examined in its proper context, as it relates to the injury or illness and the claimant's ability to perform a specific job versus any work at all.[15]

Conflicting or contrary medical documentation regarding the claimant's overall capability of work creates a credibility issue.[16] Medical documentation containing a physician's opinion with regard to the claimant's capability of work that was created contemporaneously with the claimant's treatment and prior to the issuance of an initial determination may be more credible than documentation created after the issuance of the determination stating the claimant was always capable of work, unless there is evidence in the record explaining the discrepancy.[17] Similarly, there may be circumstances where it would be more appropriate to accord greater weight to documentation from a physician who has been treating a claimant for an extended period of time rather than a one-time evaluation by an independent medical examiner.[18]

DISABILITY BENEFITS AND WORKERS COMPENSATION

Application for and receipt of Social Security Disability Insurance (SSDI) benefits does not automatically preclude a finding that a claimant is capable of employment for unemployment insurance purposes[19] and the date of disability application cannot be mechanically applied to hold that the claimant is automatically incapable of employment as of that date.[20] It is merely one factor to be considered in determining whether the claimant is capable of any employment. A claimant who receives SSDI benefits because he or she is no longer able to perform past relevant work but can still perform sedentary work, is considered capable of employment for unemployment

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[15] Appeal Board No. 592307 (claimant's doctor filled out documentation specifying the claimant was unable to work as a bus driver and stating claimant was temporarily totally disabled; Board stated the note needed to be viewed in its proper context as it was in response only to the claimant's ability to perform the duties of a bus driver).

[16] *Matter of Augustine,* 27 A.D.3d 937 (3d Dep't 2006) (conflicting medical documentation regarding claimant's ability to work created a credibility issue that needed to be resolved); *Matter of Kaminski,* 233 A.D.2d 737 (3d Dep't 1996) (same); Appeal Board No. 562742 (claimant's testimony that was supported by documents from Workers Compensation Board were given greater weight than a separate physician's determination that the claimant was completely unable to work).

[17] Appeal Board No. 558221 (Board gave more weight to prior medical opinion and stated claimant was bound by the doctor's note he submitted to the Department of Labor where subsequent note did not explain the discrepancy between the initial opinion that he was not able to work at all and the subsequent opinion that he was able to work light duty during the same time period).

[18] Appeal Board No. 582156 ("We deem the claimant's personal physician, who had treated him over a lengthy period of time, to be in the better position to know whether the claimant was, in fact, capable of working").

[19] *Matter of Roehsler*, 19 A.D.2d 927 (3d Dep't 1963) (while an application for Social Security Disability benefits is "evidence supportive of a factual determination of disability and consequent disqualification" it is not sufficient evidence to establish that a claimant is not capable of work for unemployment insurance purposes).

[20] *Matter of Katzen*, 111 A.D.2d 1068, 1069 (3d Dep't 1985).

insurance purposes.[21] Additionally, a claimant who is legally blind and receiving SSDI benefits is capable of employment if the evidence establishes he or she can report for work and perform some work duties.[22]

The Social Security Act defines disability as "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or expected to last for a continuous period of not less than 12 months" and further specifies that an individual's physical or mental impairment(s) must be ". . . of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy."[23]

The federal regulations governing Social Security benefits delineate a five-step sequential evaluation process to determine whether individuals who are not considered legally blind should be considered disabled. Under the criteria, an individual is not considered disabled if (1) the applicant is currently doing substantial gainful activity; (2) if the disability is less than one year in duration or is not expected to last for a year or does not rise to a certain level of severity; (3) the disability does not meet certain other severity criteria or listed conditions [in appendix 1]; (4) the resident can perform his past relevant work; or (5) if the applicant can make an adjustment to other work.[24] The United States Supreme Court has found that an "SSA representation of total disability differs from a purely factual statement in that it often implies a context-related legal conclusion, namely, 'I am disabled for purposes of the Social Security.'"[25]

A finding of disability under a Workers Compensation Law benefit award for a permanent total disability may create a strong presumption of a physical inability to work, but it is not conclusive on the question of capability for unemployment insurance purposes.[26] Similarly, a finding that a

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[21] Appeal Board No. 577448 (claimant's receipt of SSDI benefits did not render her incapable of work where evidence established claimant had ability to perform sedentary and light work for the period at issue); Appeal Board No. 568046A (claimant eligible for unemployment benefits where, despite receipt of SSDI, evidence established she was able to perform sedentary work).

[22] Appeal Board No. 540271 (claimant, who was legally blind and received SSDI benefits was found capable of work where he could use a computer with the use of a magnifier, had some vision, had no trouble getting to work and was seeking employment in the kitchen and health industry).

[23] 42 USC §423

[24] 20 C.F.R. §404.1505(a) – (g).

[25] *Cleveland v. Policy Mgmt. Sys. Corp.,* 526 US 795, 802 (1999).

[26] Appeal Board No. 6748-42 ("We cannot accept the contention that such an award for permanent total disability operates to automatically bar a claimant from benefits. While we agree that an award of that nature raises a strong presumption of physical inability to work, we do not believe, that it can be considered conclusive on the question of capability for work within the meaning of the Unemployment Insurance Law. The determination of capability is a question to be decided on the evidence and the fact as present in each particular case. We take notice of the fact that

claimant is only partially disabled under the Workers Compensation Law tends to support a finding that a claimant is capable of some work.[27] It should also be noted that pursuant to Labor Law §591(5), if a claimant is receiving Workers Compensation benefits, the unemployment benefits a claimant may be entitled to will be limited to the difference between the amount of workers compensation benefits and 100% of the claimant's average weekly wage.[28]

A claimant who receives New York State disability benefits may not receive unemployment insurance benefits for the same period because such benefits are mutually exclusive. New York State disability benefits are paid only upon such proof that the claimant was totally disabled for the period of the claim. When the evidence establishes that a claimant is found eligible for New York State disability benefits, he or she is considered incapable of working for unemployment insurances purposes.[29] However, if a claimant is receiving disability benefits from an employer through an independent insurance carrier, it does not necessarily preclude a finding that the claimant is capable of work.[30]

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in workmen's compensation cases any permanent disability in excess of 80 per cent is adjudged to be a permanent total disability for the purposes of a compensation award. It cannot be denied that in many such cases there may remain to the workman powers of labor which are of some value in the labor market").

[27] Appeal Board No. 540388 ("claimant was only receiving benefits for partial disability through her Workers' Compensation claim … which further supports a finding that the claimant was … capable of some employment as of the date she applied for unemployment benefits").

[28] Appeal Board No. 548920 (claimant was entitled to Workers' Compensation benefits and her unemployment insurance benefits were required to be reduced by law despite her contention that she never actually received the Workers' Compensation benefits).

[29] Appeal Board No. 553338 (citing Appeal Board No. 516655).

[30] Appeal Board No. 551749 (claimant's receipt of disability benefits through an independent insurance carrier did not preclude her from receiving unemployment benefits where evidence established that claimant was capable of some work); Appeal Board No. 545417 (same).

Practice Tip:

When developing the record on issues on these matters, the following questions may be helpful:

- When did the claimant file a claim for benefits?
- What was the claimant's previous job?
- What was the nature of the claimant's injury or illness?
- Was the claimant prevented from performing any work because of the injury or illness?
- Did the claimant have any communication with the Department of Labor about his injury and illness and whether that prevented her working?
- Did the claimant file for SSDI, Workers Compensation, or NYS Disability benefits?
- Did the claimant receive any SSDI, Workers Compensation, or NYS Disability benefits?
- If the claimant had received SSDI or Workers Compensation, was there any award for such benefits?
- If the claimant had received Workers Compensation benefits, were the benefits for a partial or total disability?
- What, if any, medical advice/restrictions did the claimant receive concerning his injury or illness impacting her ability to work?
- What, if any medical documentation, does the claimant have concerning his injury or illness impacting her ability to work?
- Has the claimant looked for work during the time for which she was alleged to be not capable, and if so, what type of work.

2.5.3 AVAILABILITY

A claimant who is capable of work must also be available for work to be eligible for benefits. He or she must be ready, willing, and able to work in employment for which he is reasonably fitted by training and experience. A claimant is considered to be available for work if he or she places no unreasonable restrictions on the type or conditions of employment he or she will accept, is making a systematic and sustained effort to obtain work and is prepared to start work without delay upon

securing employment. There is no requirement that a claimant be available to work for a specific employer.[31]

Notwithstanding the requirement of Labor Law §591.2 that a claimant be ready, willing, and able to work, a claimant may not be denied benefits due to unavailability because of such claimant's service on a grand or petit jury of any state or of the United States;[32] nor may a claimant be held ineligible for benefits because of "regular attendance at a program of training which the Commissioner has approved";[33] or because he "is in training approved under the federal trade act of nineteen hundred seventy-four..."[34] Additionally, the Court recently held a claimant who took a short leave of absence from work for reasons related to domestic violence could not be found ineligible for benefits on the basis of an unavailability for work.[35]

A claimant is not available for work, among other reasons, if he or she is incarcerated,[36] completely lacks childcare,[37] has to spend substantial time taking care of an ill family member precluding the ability to work,[38] takes a leave of absence or purposely removes himself from work with an employer for personal reasons and fails to report to work while work remains available,[39] is on vacation,[40] completely lacks the ability to arrange for transportation to a community offering

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[31] Appeal Board Nos. 547261 and 503375

[32] *See* Labor Law §591.1

[33] *See* Labor Law §599.1

[34] *See* Labor Law §599.2

[35] *Matter of Derfert,* 150 A.D.3d 1515 (3d Dep't 2017).

[36] Appeal Board No. 580824

[37] Appeal Board No. 548487 (claimant not available for employment during time period where her babysitter was unable to watch her children so she could go to work); Appeal Board No. 592541 (claimant was unavailable for work where she did not have child care for her son until such time as her older son was able to watch his brother); *but see,* Appeal Board No. 561705 (claimant found available for work despite not currently having child care where she credibly testified that her parents, grandparents, and a private day-to-day childcare provider were available to her when she had interviews and that she could have secured full-time day care if she had obtained employment).

[38] Appeal Board No. 592104 (claimant had good cause to quit his job to take care of his wife who required extensive care but was unavailable for work until his wife was independent enough to be left alone and therefore ineligible for benefits).

[39] Appeal Board No. 541058 (claimant found not available for work during time period she took a leave of absence from her employer for personal reasons, was away from her normal labor market and was studying for an insurance license); Appeal Board No. 566274 (claimant could have returned to work but stayed out of work because he wanted a vacation period).

[40] Appeal Board No. 591455 (claimant who left the state for a personal vacation was not available for employment); Appeal Board No. 572044 (same).

reasonable prospects of employment,[41] or lacks the authority to legally work in the United States.[42]

A claimant who puts unreasonable restrictions on the type of work he or she is willing to accept, the amount of pay he or she is willing to receive, the hours he is willing to work, or who has an unwillingness to work more than one to four days per week,[43] may also be found not available for work.

THE INFORMED CLAIMANT

As a basic principle, when dealing with the issue of a claimant's eligibility for benefits, a claimant's actions can only be measured against the standards of which the claimant has already been informed. Prior to holding a claimant ineligible for benefits on the basis of unavailability, the evidence must establish that the claimant has been provided information or has been counseled by the Department of Labor regarding what would be necessary for him or her to be available for employment and maintain eligibility.[44]

The Claimant Handbook informs a claimant he or she will be denied benefits if he or she is:

- Not ready, willing, and able to work;
- Not prepared to take a job immediately;
- Not physically or mentally capable of employment; or
- Not actively seeking work and keeping a record of work search activities (online or written) for each week that benefits are claimed.

It also informs a claimant that he or she is not available for work while at annual field training for the Army National Guard, or reserves of the Army, Navy, Air Force, Marine Corps, or Coast Guard. The handbook further informs claimants that collecting Social Security will not affect the rights to unemployment benefits so long as the claimant is available and looking for work with no restrictions while collecting benefits.

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[41] *Matter of Langer,* 11 A.D.2d 560 (3d Dep't 1960); *Matter of Kudysch,* 72 A.D. 901 (3d Dep't 1980) *but see,* Appeal Board No. 582280 (exception for claimants who do not have any public transportation available).

[42] Appeal Board No. 576866 ("It is well settled that an alien without current, valid authorization to work from the [USICS] is not legally available for work and not eligible for benefits.") (citing *Matter of Enrique,* 13 A.D.3d 967 (3d Dep't 2004)).

[43] *Matter of Rubin,* 50 A.D.2d 956 (3d Dep't 1976) (claimant found not available for work and unable to accrue effective days because of unwillingness to work more than one day per week); *Matter of Pantel,* 35 A.D.2d 681 (3d Dep't 1970).

[44] Appeal Board No. 573710 (citing Appeal Board Nos. 542373, 542143, and 525754).

There are certain situations in which a lack of advice is immaterial, such as where lack of availability should be self-evident. For example, it should be self-evident that a claimant is unavailable when he or she removes him or herself from the labor market due to retirement,[45] is incarcerated, has a lack of child care, is traveling on vacation, lacks legal authorization to work, or has no transportation.

WORK SEARCH

As part of the requirement that a claimant be ready, willing, and able to work, the Unemployment Insurance Law was amended in 2013, to include a requirement that claimants be engaged in systematic and sustained efforts to find work, and maintain proof of such efforts.[46] The law took effect on January 1, 2014; and, as required by the statute, the Commissioner of Labor subsequently promulgated regulations establishing the elements of a "systematic and sustained effort" to find work and the means by which a claimant may demonstrate compliance with the requirement.[47] A claimant who is not engaged in the required search for work is considered to be unavailable for employment and, consequently, ineligible to receive benefits.

The *Claimant Handbook* advises claimants of the requirement that they make a systematic and sustained effort to find suitable work, and contains information on the elements of that work search. Suitable work is defined as "work for which the claimant is reasonably fitted by training and/or experience".[48]

THE INFORMED CLAIMANT

As with other issues related to eligibility, a claimant must have been made aware of the steps he or she needs to take to maintain eligibility for benefits. The *Claimant Handbook* contains a section devoted to the work search requirements (currently located at pages 24-29), which provides information about what activities a claimant is expected to engage in to demonstrate a systematic and sustained search for work, the requirement to maintain records of the work search, the work search plan, and mandatory appointments which may be scheduled for a claimant at the Career Center.

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[45] Appeal Board No. 541665

[46] Availability, capability, and work search. No benefits shall be payable to any claimant who is not capable of work or who is not ready, willing, and able to work in his or her usual employment or in any other for which he or she is reasonably fitted by training and experience and who is not actively seeking work. In order to be actively seeking work a claimant must be engaged in systematic and sustained efforts to find work. The commissioner shall promulgate regulations defining systematic and sustained efforts to find work and setting standards for the proof of work search efforts (Labor Law § 591 [2]).

[47] The regulations are found at 12 NYCRR § 473 (4).

[48] 12 NYCRR § 473 (4) (d); this is consistent with Labor Law § 593 (2), which provides that a claimant may be disqualified for refusing an offer of employment for which the claimant is suited by training and experience.

Practice Tip:

Evidence must be taken on whether the claimant received the *Claimant Handbook* or was made aware of the existence of the online version of the *Handbook.* If necessary, screen shots from the online claim process or the telephone script for those claimants who filed by telephone rather than online, should be entered into evidence. The hearing file should contain copies of this information.

The relevant pages of the *Handbook* must also be entered into evidence, even if the claimant denies receipt or admits receipt but testifies that he did not read the *Handbook*

SYSTEMATIC AND SUSTAINED EFFORTS TO FIND WORK

The regulations define a systematic and sustained search for suitable work as including "at least three work search activities per week in an effort to obtain suitable work. . . conducted on different days of the week, and include[ing] at least one activity from activities 1-5 listed in subdivision (c)".[49] The activities which are considered acceptable evidence of a systematic and sustained work search consist of the following:

> (c) Work search activities may include, but are not limited to:
>
> (1) Using employment resources available at the local Career Center, such as:
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> (i) meeting with Career Center advisors; (ii) receiving job market information from Career Center staff regarding the availability of jobs from a particular industry or region; (iii) participating in skills assessments for occupation matching; (iv) participating in instructional workshops; (v) obtaining and following up with employers on job referrals and job matches from the Career Center
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> (2) Visiting a job site and completing a job application in person with employers who may reasonably be expected to have openings.
>
> (3) Submitting a job application and/or resume, in response to a public notice or want ad, or to employers who may reasonably be expected to have openings.
>
> (4) Attending job search seminars, scheduled career networking meetings, job fairs, or employment-related workshops that offer instruction in improving individual skills for obtaining employment.
>
> (5) Interviewing with potential employers.
>
> (6) Applying for employment with former employer(s).

[49] 12 NYCRR § 473 (4) (b).

(7) Registering with and checking in with private employment agencies, placement services, unions, and placement offices of schools, colleges or universities, and/or professional organizations
(8) Using the telephone, business directories, internet, or online job matching systems to search for jobs, get leads, request referrals, or make appointments for job interviews.
(9) Applying and/or registering for and taking Civil Service examination(s) for government job openings.

There may be other activities a claimant could engage in to find work, but under the regulation the claimant must, at the very least, utilize one of the activities listed in subsections (1) through (5) once per week.

There are also certain claimants who are exempted from the requirement that they engage in a systematic and sustained search for work. These exemptions include:

- Claimants who have been temporarily laid off or are seasonal workers, as long as those claimants have a return to work date within four weeks.
- Union members who must obtain work through the union.
- Claimants who are on jury duty.
- Claimants who are exempt from the provisions on availability and refusal of employment because of their participation in § 599 training, SEAP, or Shared Work programs.[50]

PROOF OF WORK SEARCH EFFORTS

The regulations also provide the method by which a claimant may establish that he or she has engaged in the required work search. Claimants must make a record which includes:

(1) Names, addresses (mail, e-mail, or web address) and telephone numbers of potential employers contacted and, if available, the names and/or job titles of specific people contacted.

(2) Dates, contact methods used, and if known, the results of contacts.

(3) Position or job title applied for or seeking.

(4) Date, location, and description of other work search efforts. Examples include meeting with an advisor at the local Career Center, attending workshops or job fair at a local

[50] 12 NYCRR § 473 (4) (k).

community college, searching online job listings at the local library, updating resume, etc.[51]

Claimants can retain the information by using a form which is included in the *Claimant Handbook*, by keeping records using their own method, such as a notebook or index cards, or by entering the information directly onto the Department of Labor's website, using an online application called "JobZone". [52] The information entered into the "JobZone" is retained automatically by the Department of Labor. Claimants who maintain their own records must retain the information for at least one year, and be prepared to submit the records to the Department of Labor when requested to do so for the purpose of verifying continued eligibility for benefits, in connection with a claim review or audit, or in connection with a hearing or appeal in which work search is an issue.[53]

The action taken by the Department of Labor in the event that a claimant cannot demonstrate a sustained and systematic search for work will depend on whether the claimant has a Work Search Plan.

THE WORK SEARCH PLAN

The work search plan is intended to provide strategies to finding work which is tailored to a claimant's specific circumstances, skills, training, and experience.[54] The work search plan will also address any limitations a claimant has placed on his or her work search, such as commuting distance, salary requirements, or days on which the claimant is willing to work. The work search plan will list the types of jobs a claimant is expected to look for, together with the prevailing wage information for each job category.

If a claimant has not been engaging in a systematic and sustained search for work and does not have a work search plan, an appointment will be arranged for the claimant to meet with a Department of Labor representative at a Career Center, when a work search plan can be established. If a claimant has not been engaging in a systematic and sustained search for work and does have a work search plan, a determination may be issued finding the claimant ineligible to receive benefits.[55]

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[51] 12 NYCRR § 473 (4) (g).

[52] "JobZone" is not solely for the use of unemployment insurance requirements; it can also be used to look for jobs, seek career guidance, create a résumé, etc.

[53] 12 NYCRR § 473 (4) (h).

[54] 12 NYCRR § 473 (4) (l) (2).

[55] 12 NYCRR § 473 (4) (j).

Practice Tip:

In developing the record on whether a claimant complied with a work search plan, evidence will be needed on the following points:

- Whether and when the claimant filed a claim for benefits.

  DOCUMENT NEEDED: The claim form may need to be entered into evidence if the claimant cannot recall when she filed her claim for benefits. If the claimant recalls, even generally (for example, "I filed in early May 2016"), the claim form may not be needed as an exhibit.

- Whether the claimant received a *Handbook* or was made aware of the online version.
- Whether and when the claimant entered into an agreed work search plan.
- The provisions of the plan

  DOCUMENT NEEDED: A copy of the work search plan

- Whether the claimant followed the work search activities included in the work search plan.

  DOCUMENTS NEEDED: If the claimant contends she followed the work search plan, then her work search records should be entered into evidence.

- If the claimant admits he did not follow the work search plan, the reason(s) for such failure.
- Whether the claimant raised any foreseeable problems with the work search plan with a Department of Labor representative at the time that the work search plan was being created.

FAILURE TO REPORT TO THE CAREER CENTER

In the event that a meeting is scheduled to set up a work search plan for a claimant, but the claimant fails to attend the meeting, the claimant will be held ineligible on the basis that he or she failed to comply with reporting requirements. The appointment letter sent to the claimant should include information that a claimant who fails to attend the meeting may be held ineligible to receive benefits; and the advice that a claimant who is unable to attend the meeting should immediately contact the Career Center to re-schedule the meeting.

Practice Tip:

The record in a case based on a claimant's failure to report in a Career Center for the purpose of entering into a work search plan must contain evidence on the following points:

- Did the claimant file a claim for benefits?
- Did the claimant receive a letter scheduling an appointment at the Career Center?

  DOCUMENT NEEDED: A copy of the appointment letter should be entered into evidence.
- When did the claimant receive the letter?
- If the claimant received the letter after the date of the appointment, what action, if any, did he take upon receipt of the letter?
- Did the letter advise the claimant what to do if she could not attend the meeting and inform the claimant of the consequences for failing to keep the appointment?
- If the claimant contends that he did not receive the letter, is the address on the letter correct?

  If the claimant testifies that he had moved since filing his claim, he should be questioned about whether he advised the Department of Labor of his new address and if not, why not.
- If the address is correct and the claimant had not moved, what evidence is there that the letter was mailed?

  There is a rebuttable presumption that Department of Labor communications were mailed on the date indicated in the correspondence, but the presumption can only exist if there is testimony from a witness for the Department of Labor regarding mailing procedures. If the claimant denies receipt and there is no appearance on behalf of the Department of Labor, an adjournment is not required. However, if a Commissioner of Labor representative is at the hearing and requests an adjournment for a witness to testify to mailing procedures, then the adjournment request should be granted.
- Did the claimant receive an email reminder of the meeting?
- Did the claimant attend the meeting?
- If the claimant did not attend the meeting, what was the reason for such failure?

2.5.4 ALCOHOLISM

A claimant who is an alcoholic may be found ineligible for benefits based on being not capable of, or not available for, employment. The legal issues of capability and availability are sometimes both at issue in the same cases and will be discussed together in this section. As with other illnesses, eligibility rises and falls based on the facts in the individual's situation, as discussed below.

It is well settled that "...the disease of alcoholism does not *per se* render an employee incompetent to work."[56] However, where a claimant is not "sufficiently cured (of alcoholism) or improved to be capable of work," the claimant may be found ineligible for benefits.[57] For example, a claimant who was discharged for reporting to work under the influence of alcohol, with a previous history of alcoholism and treatment, was held to be not capable of work from his date of discharge from employment until he re-entered treatment for his alcoholism more than three months after his discharge.[58] Similarly, a claimant who repeatedly entered and left treatment programs, then was arrested for driving while intoxicated and resumed drinking, was considered "in and out of treatment and sobriety" and therefore not capable of or available for work during the entire "in and out" period.[59]

A claimant is capable of and available for work when he or she has stopped drinking and maintained sobriety for the time period at issue,[60] but complete sobriety may not be necessary to find a claimant capable of work.[61] Claimants have also been found capable of and available for work if they are cleared for work by a medical specialist, counselor, or specialist after being in inpatient treatment for alcohol use,[62] or if they begin outpatient treatment after being evaluated and found not to need rehabilitation treatment.[63] However, failure to complete an outpatient treatment program does not, by itself, establish that the claimant is incapable of work.[64]

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[56] *Matter of Grajales,* 104 A.D.2d 688, 689 (3d Dep't 1984) (citing *Matter of Francis*, 56 N.Y.2d 600, 602 (1982)).

[57] *Matter of Randall*, 25 A.D.2d 473 (3d Dept. 1966).

[58] Appeal Board No. 559736 (claimant was discharged for reporting to work under the influence of alcohol and failed to obtain treatment for alcoholism until approximately 4 months later).

[59] Appeal Board No. 543769 (claimant was not capable of work where she was in and out of alcohol treatment for approximately 2 years).

[60] Appeal Board No. 543893 (claimant who remained alcohol free while in counseling program that was willing to work around claimant's work schedule is capable of employment); Appeal Board No. 580272 (claimant who remains sober and is in treatment may still be able to work).

[61] Appeal Board No. 551676 (claimant was an alcoholic for more than twenty years before separating from his job of more than twenty-eight years; thus, he was capable of work while an active alcoholic, and in the absence of any evidence he was incapable of work at any other time, concluded he was only incapable of work while in an inpatient detoxification program).

[62] Appeal Board No. 556333 (claimant was found capable of work where he was medically cleared to return to work after completing treatment for drugs and alcohol), Appeal Board No. 553563 (claimant found capable of work where notes from her medical providers showed her condition had stabilized and she was expected to be able to work by a certain date); Appeal Board No. 544531 (claimant was found capable of work where her chemical dependency specialist documented she was able to work).

[63] Appeal Board No. 546403 (claimant was found capable of work where he was attending outpatient program and was not found to need rehabilitation treatment).

[64] Appeal Board No. 553563 (citing Appeal Board 550644).

Additionally, if the claimant has actually worked during the period at issue in the matter, or during treatment, the evidence establishes the claimant is actually capable of work.[65]

A claimant's participation in an outpatient rehabilitation program does not necessarily mean the claimant is unavailable for or incapable of work so long as the evidence establishes that the program is either flexible with regard to the hours of attendance or is not so time consuming as to render the claimant unavailable for work.[66]

Generally, a claimant who is in an inpatient treatment program, detoxification program, or hospitalization is not capable of or available for work.[67] Even after leaving a program a claimant may not be capable of work, if the facts show he or she is not "sufficiently cured" as stated above.[68] Requirements to attend after care meetings and appointments do not render someone incapable or unavailable for work.[69]

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[65] *Matter of Grajales, supra;* Appeal Board No. 563508.

[66] Appeal Board No. 543893 (claimant was available and capable during time she participated in outpatient program as she remained alcohol free and program was willing to work around claimant's work schedule); Appeal Board No. 553563 (claimant was capable and available where she was enrolling in a flexible outpatient program so that she would be available to work); Appeal Board No. 549583 ("the mere fact that an alcoholic is receiving outpatient treatment does not render him unable to work"); Appeal Board No. 563508 (claimant found able to work where treatment program was only three hours in the morning, and changed the hours to three hours in the late afternoon/early evening so he could return to work with his previous employer) *but see,* Appeal Board No. 544528 (where claimant admitted he was not capable of working during outpatient treatment, the claimant was not eligible for benefits).

[67] Appeal Board Nos. 549583, 554901, 543893, 551676*, but see*, Appeal Board No. 551676 (claimant found capable of and available for work on his day of discharge from treatment facility and available for work while later in an inpatient rehabilitation program because evidence established he would have left program for a job interview or employment).

[68] Appeal Board No. 553474 (claimant found not capable or available for work where he was in an inpatient program for about six months and was scheduled to enter another inpatient program about three months later and there was no evidence that he was ever released to return to work).

[69] Appeal Board No. 549583 (claimant found capable and available for work where his care plan upon release from inpatient program imposed no restrictions other than attending meetings and appointments).