

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0087

*Hearing Decision 14-UI-07503 Modified, Benefits Allowed in Part
Hearing Decision 14-UI-07504 Modified, Overpayment Assessed*

PROCEDURAL HISTORY: On April 6, 2012, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not conduct a systematic and sustained search for work during the period December 25, 2011 through March 31, 2012 and was disqualified from receiving Extended Benefits (EB) (decision # 81909). On July 15, 2013, the Department served notice of another administrative decision concluding claimant was overpaid \$5,572 in EB based on decision # 81909 which claimant had not appealed. On August 1, 2013, claimant filed a request for hearing on each decision. On September 13, 2013, the Office of Administrative Hearings (OAH) issued notices of separate telephone hearings scheduled for September 26, 2013. On September 26, 2013, ALJ Murdock conducted the telephone hearings at which claimant failed to appear because he was deaf and lacked a necessary teletype (TTY) device, and on September 27, 2013, issued Hearing Decisions 13-UI-01521, dismissing claimant's request for hearing on the July 15, 2013 overpayment decision, and 13-UI-01533, dismissing claimant's request for hearing on decision # 81909 for failure to appear. On October 13, 2013, claimant filed a request to reopen the hearings. On November 26, 2013, ALJ R. Davis conducted a consolidated telephone hearing at which claimant appeared with the assistance of a qualified stenocaptioner, and on January 2, 2014, issued Hearing Decisions 14-UI-07503, concluding claimant demonstrated good cause for reopening the hearing, dismissing Hearing Decision 13-UI-01533, but affirming decision # 81909, and 14-UI-07504, concluding claimant demonstrated good cause for reopening the hearing, dismissing Hearing Decision 13-UI-01521, but affirming the July 15, 2013 overpayment decision. On January 16, 2014, claimant filed applications for review of Hearing Decisions 14-UI-07503 and 14-UI-07504 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 14-UI-07503 and 14-UI-07504. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2014-EAB-0086 and 2014-EAB-0087).

No adversely affected party requested review of those portions of Hearing Decisions 14-UI-07503 and 14-UI-07504 concluding good cause for reopening the hearings had been shown. Consequently, we

confined our decisions to the issues of claimant's disqualification from, eligibility for and overpayment of EB.

EAB considered the records of both hearings, and the claimant's written argument. However, claimant's written argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond his reasonable control prevented him from offering that information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered claimant's argument only to the extent it was based on information received into evidence at the hearing.

FINDINGS OF FACT: (1) Claimant filed an initial claim for unemployment insurance benefits on January 11, 2010. He exhausted his regular benefits and Emergency Unemployment Compensation (EUC) and, beginning in December 2011, filed claims for and was paid benefits under the Extended Benefits program (EB).¹

(2) On or about December 14, 2011, claimant received an "Extended Benefits Work Search Plan" (plan) and "Extended Benefits (EB) Eligibility Conditions" advisement (advisement) from the Department that explained certain requirements for him to qualify for EB. Exhibit 8. The plan required claimant to expand his work search to include jobs, outside of his customary occupation of "research technician", he could physically and mentally perform including "editing", "forestry research" and "teachers aid[e]", provided the jobs paid at least \$9.95 per hour and \$398.01 per week. It stated, "Contact multiple potential employers every week you claim" and required claimant to seek work in his labor market of "Oakridge, Springfield, Eugene and surrounding areas." The advisement required claimant to conduct an active work search which it specifically defined as follows,

"Active Work Search: Extended Benefit Law requires that you make a "systematic and sustained" work search. You must provide evidence of your work search to meet this requirement...A systematic effort means a thorough search for work following the written plan you are being provided...A sustained effort is ongoing work search activity that you perform every week. It means contacting multiple employers and applying for work in each week you claim...EB requires a more diligent and intense effort to find work than claiming regular benefits...Do not limit your work search to just one type of work. Seek other kinds of work you can do or have done."

However, neither the plan nor the advisement notified claimant he was required to maintain "a verifiable written record" of his work search methods, the types of work sought, the dates and places work was sought, and the outcome of the contact, and that he could be "disqualified" from receiving EB if he failed to furnish the required evidence when requested for each week he claimed benefits.

(3) Claimant claimed EB for the weeks December 25, 2011 through March 31, 2012 (weeks 52-11 through 13-12), the weeks at issue. During each of those weeks, claimant contacted five potential

¹ We take notice of these facts, which are contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed facts will remain in the record.

employers seeking work. However, he limited his work search to “office work” and only during the week January 15 to 21, 2012 (week 3-12) did he apply for more than one job within his labor market. Transcript at 21, 23. When claimant filed each of his weekly claims for benefits, he responded affirmatively to the question, “Did you actively look for work last week?” Exhibit 6.

(5) For each of the weeks including December 25, 2011 through January 14, 2012 and January 22 through March 31, 2012 (weeks 52-11 through 2-12 and 4-12 through 13-12), the Department overpaid claimant \$398 per week, totaling \$5,174, in benefits based upon his reports of a single job contact within his labor market and that he had actively sought work during each of those weeks.

CONCLUSIONS AND REASONS: We agree with the ALJ in part. Claimant is ineligible for EB for weeks 52-11 through 2-12 and weeks 4-12 through 13-12 but is not disqualified from receiving future EB under ORS 657.325(6)(b) and (7). Claimant was overpaid \$5,174 in benefits.

Eligibility for EB. EB is governed by ORS 657.321 to ORS 657.329. To be eligible for EB, an individual must satisfy the requirements for the receipt of regular benefits in addition to the stricter EB requirements. ORS 657.323. One of those requirements is that an individual must “actively engage in seeking work” during any week claimed. That requirement is satisfied when the individual “furnishes tangible evidence” that he or she engaged in a “systematic and sustained effort to obtain work.” ORS 657.325(6)(b) and (10). An individual who has been found ineligible for EB for failing to “actively engage in seeking work” as defined by the plan shall be disqualified from receiving future EB until specified conditions are satisfied. ORS 657.325(7).

OAR 471-030-0044(1) (August 1, 2004) defines “systematic effort” and “sustained effort.” A “systematic effort” is a “thorough work search conducted in accordance with a written plan . . . approved by [the Department]” and a “sustained effort” is “ongoing work-seeking activity . . . reasonably calculated to obtain work at the earliest possible time.” OAR 471-030-0044(1)(a) and (b). Both efforts, “systematic” and “sustained” are “more diligent and intense” than the effort needed to satisfy regular benefit eligibility requirements. OAR 471-030-0044(1)(c). OAR 471-030-0044(2) provides:

(2) An authorized representative of the Employment Department must provide written notice, as outlined in **20 CFR Ch. V Part 615.8(h)(1)-(4)**², of the meaning [of] the term

² 20 CFR Ch. V Part 615.8(h)(1)-(4) provides, in relevant part:

(h) *Information to claimants.* The State agency shall assure that each Extended Benefit claimant...is informed in writing—

(1) Of the State agency’s classification of his/her prospects for finding work in his/her customary occupation within the time set out in paragraph (d) as “good” or “not good,”

(2) What kind of jobs he/she may be referred to, depending on the classification of his/her job prospects,

(3) What kind of jobs he/she must be actively engaged in seeking each week depending on the classification of his/her job prospects, and what tangible evidence of such search must be furnished to the State agency with each claim for benefits, and

"systematic and sustained effort to obtain work" to the individual as it applies to the individual's work-seeking activities. The Department must provide this notice prior to any week for which the individual is denied eligibility as a result of the application of this term. (Bold in original).

In Hearing Decision 14-UI-07503, after finding that claimant failed to seek work within his designated labor market, the ALJ concluded that claimant was ineligible for EB for the weeks at issue and disqualified from receiving future EB "until claimant has been employed in each of four subsequent weeks and has earned remuneration in an amount equal to four times [his] weekly benefit amount." Hearing Decision 14-UI-07503 at 2, 4. Although we agree that claimant is ineligible for EB for all but one of the weeks at issue, we disagree that claimant is ineligible for EB for week 3-12 and should be disqualified indefinitely from receiving future EB.

The ALJ failed to consider the requirements of OAR 471-030-0044(2) before concluding that claimant was disqualified from receiving EB for failing to follow the plan. EAB has consistently held that section (2) of OAR 471-030-0044 requires the written notice provided to claimants to include the substance, if not the entire text, of OAR 471-030-0044 (1), as well as section (4) of 20 CFR Ch. V Part 615.8(h), if it is intended to support a disqualification under ORS 657.325(7).³

(4) The resulting disqualification if he/she fails to apply for work to which referred, or fails to accept work offered, or fails to actively engage in seeking work or to furnish tangible evidence of such search for each week for which Extended Benefits...are claimed, beginning with the week following the week in which such information is furnished in writing to the individual. (Italics in original).

³ See *Sheri A. Hale* (Employment Appeals Board, 10-AB-2736, October 19, 2010) (no disqualification based on Department failure to provide written notice per OAR; eligible); *Ly C. Truong* (Employment Appeals Board, 10-AB-3072, October 27, 2010) (no disqualification based on Department failure to provide written notice per OAR; eligible); *Gregory J. Aland* (Employment Appeals Board, 10-AB-3160, October 28, 2010) (no disqualification based on Department failure to provide written notice per OAR; eligible); *Nick A. Bolin* (Employment Appeals Board, 10-AB-2858, November 1, 2010) (no disqualification based on Department failure to provide written notice per OAR; ineligible in part due to inadequate work search); *Todd R. Kingston* (Employment Appeals Board, 10-AB-3281, November 17, 2010) (no disqualification based on Department failure to provide written notice per OAR; ineligible in part due to inability to work); *Jakob J. Akin* (Employment Appeals Board, 10-AB-3132, November 17, 2010) (no disqualification based on Department failure to provide written notice per OAR; eligible due to adequate work search); *Liisa Ivary* (Employment Appeals Board, 10-AB-3278, November 19, 2010) (no disqualification based on Department failure to provide written notice per OAR; ineligible due to unavailability); *Marc A. Lindsay* (Employment Appeals Board, 10-AB-3447, December 3, 2010) (no disqualification based on Department failure to provide written notice per OAR; eligible due to inadequate work search); *Ning B. Moua* (Employment Appeals Board, 10-AB-3474, December 3, 2010) (no disqualification based on Department failure to provide written notice per OAR; ineligible due to inadequate work search); *Charles D. Conner* (Employment Appeals Board, 10-AB-3958, January 11, 2011) (no disqualification based on Department failure to provide written notice per OAR; ineligible due to unavailability); *Patricia C. Barnett* (Employment Appeals Board, 10-AB-3961, January 13, 2011) (no disqualification based on Department failure to provide written notice per OAR; ineligible in part based on inability to work); *Dale W. Sovereign* (Employment Appeals Board, 10-AB-4036, January 14, 2011) (no disqualification based on Department failure to provide written notice per OAR; eligible based on adequate work search); *Dennis Hetland* (Employment Appeals Board, 10-AB-4026, January 18, 2011) (no disqualification based on Department failure to provide written notice per OAR; ineligible due to unavailability); *Kelissa D. Averre* (Employment Appeals Board, 11-AB-0013, January 19, 2011) (no disqualification based on Department failure to provide written notice per OAR; ineligible due to unavailability and inadequate work search); *Kimberly A. Blake* (Employment Appeals Board, 11-AB-0265, February 11, 2011) (no disqualification based on Department failure to provide written notice per OAR; ineligible due to unavailability and inadequate work search); *Jennifer M. Olsen* (Employment Appeals Board, 11-AB-1593, May 24, 2011) (no disqualification based on Department failure to provide written notice per OAR; ineligible in part due to inadequate work search).

Here, the Department failed to provide claimant with written notice of the meaning of the term “systematic and sustained effort to obtain work,” *as outlined in 20 CFR Ch. V Part 615.8(h)(1)-(4)*, before denying claimant benefits, based upon the application of that term, on April 6, 2012. Neither the plan nor the advisement notified claimant that he would be *disqualified* from receiving extended benefits indefinitely if he failed to provide the Department with “tangible evidence” defined as “a written record which can be verified, and which includes the actions taken, methods of applying for work, types of work sought, dates and places where work was sought, the name of the employer or person who was contacted and the outcome of the contact”⁴, of the required work search for each week claimed, as specifically required by 20 CFR Ch. V Part 615.8(h)(4). Exhibit 8. Under OAR 471-030-0044(2), claimant may not be found ineligible for EB under ORS 657.325(6)(b) and disqualified from future benefits under ORS 657.325(7), without first being provided with the written notice required by the rule.

However, claimant may still be denied EB under ORS 657.325(1)(b) if he failed to meet the eligibility requirements for *regular* benefits for the weeks at issue. To be eligible to receive regular benefits, a claimant must be able to work, available for work and actively seek work during each week claimed. ORS 657.155(1)(c). For purposes of ORS 657.155(1)(c), an individual is “actively seeking” work when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity. OAR 471-030-0036(5)(a) (January 8, 2006). Typically, an ordinary and reasonable person seeking to return to work at the earliest opportunity would make multiple job contacts each week with prospective employers within his or her labor market.

Here, during each week at issue, with the exception of week 3-12 during which the Department’s witness testified claimant sought work with two Eugene employers, claimant contacted no more than one prospective employer within his labor market. Transcript at 23. Claimant’s bare assertion that he had a better chance, as a deaf person, of finding “office work” outside of his labor market in locations such as “Washington D.C.,” “Fayetteville, Arkansas,” “Jakarta, Indonesia,” without more, was implausible. Transcript at 32, 33. On this record, viewed objectively, during each week other than week 3-12, claimant failed to do what an ordinary and reasonable person would do to return to work at the earliest opportunity and seek work with multiple employers within his labor market.

In summary, because the Department failed to show that it provided claimant with the written notice required by OAR 471-030-0044(2), claimant is not disqualified from receiving EB under ORS 657.325(7). However, because claimant failed to meet the regular benefit eligibility requirement for actively seeking work for the weeks December 25, 2011 through January 14, 2012 and January 22 through March 31, 2012, claimant is ineligible for EB for those weeks (weeks 52-11 through 2-12 and 4-12 through 13-12).

⁴ 20 CFR Ch. V Part 615.2(o)(9) reads, in relevant part, as follows:

(9) *Tangible evidence* of an active search for work...means a written record which can be verified, and which includes the actions taken, methods of applying for work, types of work sought, dates and places where work was sought, the name of the employer or person who was contacted and the outcome of the contact; (italics in original)

Overpayment. ORS 657.310(1) provides that an individual who received benefits to which the individual was not entitled is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to the individual under ORS chapter 657. That provision applies if the benefits were received because the individual made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of the individual's knowledge or intent. *Id.* Pursuant to Pub. L. 110-252, § 4005(b), 122 Stat. 2356-2357, an individual who was overpaid EUC is also liable to repay those benefits in accordance with state law.

In Hearing Decision 14-UI-07504, after finding that the Department paid claimant \$398 in EB for each of the 14 weeks at issue, the ALJ concluded that claimant was overpaid \$5,572 in benefits. Hearing Decision 14-UI-07504 at 3, 4. Although we agree that claimant is ineligible for EB and was paid benefits to which he was not entitled for 13 of the weeks at issue, we disagree that claimant was not eligible for benefits for week 3-12, as previously discussed. Consequently, claimant's total overpayment was only \$5,174.

Claimant received \$5,174 in EB that he was not entitled to receive for the weeks including December 25, 2011 through January 14, 2012 and January 22 through March 31, 2012. He received those benefits because on this record he falsely reported that he actively sought work during each of those weeks which were facts material to his eligibility for benefits. Regardless of claimant's knowledge or intent when he made those false statements, he is liable to either repay the total amount of the overpayment, \$5,174, or have the amount of the benefits deducted from any future benefits otherwise payable to him under ORS chapter 657.

DECISION: Hearing Decision 14-UI-07504 is modified, as outlined above.

Tony Corcoran and D. E. Larson;
Susan Rossiter, not participating.

DATE of Service: February 18, 2014

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310, or visit the website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

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