

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0257

Affirmed
Ineligible

PROCEDURAL HISTORY: On October 11, 2013 the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work during the week of September 29, 2013 through October 5, 2013 (decision # 124404). On October 31, 2013, decision #124404 became final without a request for hearing having been filed. On November 1, 2013, the Department construed a telephone call from claimant as a late request for hearing. On November 20, 2013, ALJ Kangas issued Hearing Decision 13-UI-08843, dismissing claimant's request for hearing as untimely, subject to claimant's "right to renew" the request by submitting a response to the "Appellant Questionnaire" attached to the hearing decision within fourteen days of the date the decision was mailed¹. On November 23, 2013, claimant submitted his response to the Appellant Questionnaire. On December 31, 2013, ALJ K. Monroe conducted a hearing, and on February 6, 2014 issued Hearing Decision 14-UI-09979, allowing claimant's request for hearing and concluding claimant was not available for work during the weeks of September 29, 2013 through October 26, 2013. On February 12, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant accompanied his application for review with certain documents that were not offered into evidence at the hearing, including an annotated page of the hearing decision and a copy of a "Chinese Visa." Claimant did not show that factors or circumstances beyond his reasonable control prevented him from offering this new information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) On May 13, 2013, claimant filed an initial claim for benefits. Claimant's claim was determined valid. Claimant claimed, but was not paid, benefits during the weeks of September 29, 2013 through October 26, 2013 (weeks 40-13 through 43-13), the weeks at issue.

¹ Hearing Decision 13-UI-08843.

(2) During the weeks at issue, claimant sought work as an artist. Claimant's labor market was West Linn, Clackamas, Lake Oswego, Portland, Milwaukie, Gladstone and Canby, Oregon.

(3) After May 13, 2013, claimant worked as an artist at Carol Wilson Fine Arts, Inc. In May 2013, claimant received an offer from the Shanghai Institute of Technology to teach art at its campus in Shanghai, China from October 7, 2013 through October 23, 2013. Claimant did not accept that job offer. September 28, 2013, was claimant's last day working at Carol Wilson Fine Arts, Inc. At that time, Carol Wilson Fine Arts planned to cease all business operations and thereafter claimant and "no future opportunity" to work for that company. Transcript at 36.

(4) On October 1, 2013, during week 40-13, claimant left his labor market and traveled to Shanghai, China. The Department's records showed that on October 5, 6, 9, 10, 13, 14, 16, claimant's claim account was accessed by someone in China and showed no access from anyone in the United States. Exhibit 1 at 8, 11.

(5) During each of the weeks at issue, when he filed his claim reports, claimant answered "No" to the question "Were you away from your permanent residence for more than 3 days last week?" Exhibit 1 at 19; Transcript at 33. For the claim he filed for week 40-13, claimant listed his only work search contact as Carol Wilson Fine Arts, Inc. in Portland. For the claim he filed for week 41-13, claimant listed his only work search contact as Carol Wilson Fine Arts, Inc. in Portland. For the claim he filed for week 42-13, claimant listed his only work search contact as Duke University Art History. For the claim he filed for week 43-13, claimant listed his only work search contact as Hallmark in Portland.

(6) On October 7, 2013, the Department mailed a questionnaire to claimant about his possible absence from his labor market. On October 11, 2013, the Department received claimant's response. In his response, claimant stated that he had traveled to Seattle and then Shanghai, China on October 1, 2013 to look for work. In response to a question about when he had returned to his labor market, claimant stated, "Still in the search of professional job." Exhibit 1 at 6.

(7) On October 25, 2013, claimant returned to Oregon from China. On approximately that day, claimant received and read decision # 124404.

(8) On October 28, 2013, claimant called a Department claims center about decision # 124404. Claimant spoke to a claims center representative and told the representative the decision was incorrect and "insisted" he had never left his labor market to travel to China. Transcript at 33. The claims center representative transferred claimant to the adjudicator who had issued decision #124404. Claimant also told the adjudicator that decision #124404 was incorrect. After some conversation, claimant told the adjudicator that he had returned to Oregon from China on October 7, 2013. The adjudicator told claimant that up until at least October 16, 2013 someone had been accessing his claims account from China. Claimant told the adjudicator that his sister in China must have been doing it. Claimant told the adjudicator he had documents that could prove decision #124404 was incorrectly decided and he was going to take those documents to a local WorkSource Center so she could see them. The adjudicator told claimant that if he disagreed with decision # 124404 he should request a hearing. The adjudicator further told claimant that decision # 124404 was going to become final on October 31, 2013 and there was no guarantee that his documents would cause her to reverse that decision. Claimant "kept going

‘round and ‘round on the same issues” and insisted that misunderstandings had led to decision # 124404 and they would be resolved when he took his documents to the WorkSource Center. Transcript at 9, 24. The adjudicator thought that claimant did not “quite understand” her, but claimant refused the assistance of an interpreter when she offered one. Transcript at 9. During that conversation, Claimant never specifically asked the adjudicator for a hearing on decision # 124404. On October 28, 2013, claimant faxed to the adjudicator a document that was in Chinese and she needed to have the document translated into English before she could review it. Exhibit 1 at 12.

(9) On November 1, 2013, claimant called the adjudicator to inquire whether she had received the document he had faxed to her on October 28, 2013. The adjudicator told claimant that she had needed to send the document for translation and that, in the interim, decision #124404 had become final without a request for hearing having been filed. In further discussion with the adjudicator, claimant denied he had ever told the adjudicator he did not want a hearing on decision #124404. The adjudicator interpreted claimant’s denial as making late request for hearing and she processed it as such.

CONCLUSIONS AND REASONS: Claimant timely filed a request for hearing. Claimant was not available for work during the weeks of September 29, 2013 through October 26, 2013.

Late Request for Hearing. ORS 657.269 states that a decision becomes final unless a party files a request for hearing within 20 days after the decision is mailed. A request for hearing may be filed on forms provided by the Department, but use of a form is not required if the party “specifically requests a hearing or otherwise expresses a present intent to appeal.” OAR 471-040-0005(1) (July 14, 2011).

Although claimant and the adjudicator disagreed about some of the details of their conversation on October 28, 2013, both stated that in that conversation claimant expressed strong disagreement with decision # 124404. Transcript at 13, 15, 24. EAB has repeatedly held that parties expressing disagreement with an administrative hearing to a Department representative are expressing a present intent to appeal and are thereby requesting a hearing, whether or not the representative recognizes the communication as such. *See David J. Hill* (Employment Appeals Board, 13-AB-1421, September 27, 2013); *Kevin P. Johnson* (Employment Appeals Board, 13-AB-0074, January 17, 2013); *Wesley D. Balda* (Employment Appeals Board, 12-AB-3117, December 12, 2012); *Karen A. Jones* (Employment Appeals Board, 12-AB-2377, September 5, 2012); *Robert J. Greers* (Employment Appeals Board, 12-AB-1076, April 28, 2012). Because claimant expressed disagreement with decision #124404 to the adjudicator within the 20 day time limit, he timely requested a hearing.

Availability. To be eligible for benefits, unemployed individuals must be able to work, available for work and actively seek work during each weeks claimed. ORS 657.155(1)(c). An individual who leaves the individual’s labor market for the major portion of any week is presumed to be unavailable for work. ORS 657.155(2). This presumption may be overcome if the individual establishes that the individual conducted a *bona fide* search for work and was reasonably accessible to suitable work in the labor market in which he spent the major portion of the week. *Id.* To be considered “actively seeking work,” an individual must do what an ordinary and reasonable person would do to return to work at the earliest opportunity, which the Department typically construes as making multiple new employment contacts during each week. OAR 471-030-0036(5)(a) (August 1, 2004).

As the evidence developed at hearing, claimant's credibility was suspect. Claimant admitted at hearing that he was in China from October 1 until October 25, 2013, yet he told first told the Department on October 28, 2013 that he had not left his labor market to travel to China and he certified in the weekly claim reports that he filed during the weeks at issue that he had not left his permanent residence. Transcript at 8, 33. Claimant stated he had made a "mistake check, I think" when he completed those four weekly claim reports. Transcript at 46. Claimant testified that he had no realistic employment opportunities with Carol Wilson Fine Arts, Inc. after September 28, 2013, yet in his claims reports for week 40-13 (the week ending October 5, 2013) and week 41-13 (the week ending October 12, 2013) he listed only that company as his sole employment contact. Transcript at 32, 36. Claimant also testified he had contacted three employers to search for work while he was in Shanghai, China, but he was vague on the dates when he saw those potential employers. Claimant testified that he saw the Shanghai Institute of Technology on October 3 and 7, 2013, Fudan University on approximately October 6 or 9, 2013 and Jiao Tong University on approximately October 15 or 18, 2013.. Transcript at 48. Claimant did not list any of those three supposed employment contacts in Shanghai when he filed his weekly claims with the Department, which undercuts his contention that he actually contacted those employers for work. Transcript at 32, 47. Although the Department's witness testified that the Department never received a written request for a hearing from claimant, claimant insisted he had mailed in such a written request in late October 2013. Transcript at 19, 20, 22, 23. If claimant's assertion were true, there was no reason for him to call the Department on October 28, 2013, as he testified he had done. Claimant's testimony was internally inconsistent and cannot be reconciled with evidence that was not disputed.

During the weeks at issue, claimant admitted he was in Shanghai for the major portion of each of those weeks. Transcript at 38. Given the general inconsistencies in claimant's testimony, the lack of specificity with which claimant testified about the employer contacts in he made while in Shanghai, and his failure to list those employment contacts in his weekly claim reports it is doubtful that he actually made those contacts. In addition, since claimant testified that the Shanghai Institute of Technology had offered him a job in May 2013 which he did not accept, it is not abundantly clear why he would travel to Shanghai to interview with the same institution so near in time to the rejected offer. Transcript at 39. Even if we accept that claimant actually made three employer contacts over the entire time he was in Shanghai, that number of contacts he made per week is insufficient to demonstrate the "sincere and wholehearted" efforts needed to constitute a *bona fide* search for work. *See Joanne S. Wiitala* (Employment Appeals Board, 13-AB-0844, June 18, 2013). When the Department has not otherwise informed an individual of an acceptable number of employment contacts to satisfy work search requirements, it generally assumes that at a minimum an individual will make at least two contacts per week. *See Memorandum from George Berriman, Manager, UI Programs and Methods, "EB Work Search Review,"* May 28, 2010 (Even in a bad economy, an adequate work search consists of at least two employer contacts each week seeking the type of work suitable for the individual). Claimant did not meet his burden to show that he conducted a *bona fide* search for work in Shanghai, China and did not overcome the presumption that he was not available for work when he was in Shanghai from October 1, 2013 through October 25, 2013, as required under ORS 657.155(2).

Claimant was not available from work from October 1, 2013 through October 25, 2013. Claimant therefore is not eligible for benefits for the weeks of September 29, 2013 through October 26, 2013 (weeks 40-13 through 43-13).

DECISION: Hearing Decision 14-UI-09979 is affirmed.

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

DATE of Service: March 13, 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>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.