

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1304

Reversed
Request to Reopen Allowed

PROCEDURAL HISTORY: On April 17, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 110045). Claimant filed a timely request for hearing. On May 9, 2014, the Office of Administrative Hearings mailed notice of a hearing scheduled for May 21, 2014 at 9:30 a.m. On May 22, 2014, ALJ R. Davis issued Hearing Decision 14-UI-18238, dismissing claimant's request for failure to appear. On May 29, 2014, claimant filed a request to reopen. On July 24, 2014, ALJ R. Davis conducted a hearing, and on August 1, 2014 issued Hearing Decision 14-UI-22688, denying claimant's request to reopen. On August 4, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On May 21, 2014, claimant was prepared to participate in the 9:30 a.m. hearing by telephone.

(2) At 9:15 a.m., claimant received a telephone call from a medical specialist to discuss claimant's ongoing serious medical issues. The call lasted between 20 and 25 minutes.

(3) At 9:35 or 9:40 a.m., claimant disconnected from the call with the doctor and prepared to call in to participate in his unemployment insurance hearing. At 9:40 a.m., ALJ R. Davis dismissed claimant's request for hearing for failure to appear at the 9:30 a.m. hearing.¹

(4) After claimant disconnected from his physician's call, and before he could call in for the hearing, claimant's phone rang. Claimant answered the call, which was from a prospective employer, and he engaged in a discussion about a job interview. The call likely ended after 9:40 a.m. Claimant left his home after ending that call to fax a resume to the prospective employer.

¹ Hearing Decision 14-UI-18238 at 1.

(5) At 10:38 a.m., claimant called the Office of Administrative Hearings to inquire about the hearing he had missed.

CONCLUSIONS AND REASONS: Claimant has shown good cause to reopen the hearing, and is entitled to a hearing on the merits of decision # 110045.

ORS 657.270(5) provides that a hearing may be reopened if the party shows, among other things, good cause for failing to appear at the hearing. OAR 471-040-0040(2) (February 10, 2012) provides that “good cause exists when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant’s reasonable control,” and further provides:

(a) Good cause includes but is not limited to:

(A) Failure to receive a document because the Employment Department or Office of Administrative hearings mailed it to an incorrect address despite having the correct address;
(B) For telephone hearings, unanticipated, and not reasonably foreseeable, loss of telephone service.

(b) Good cause does not include:

(A) Failure to receive a document due to not notifying the Employment Department or Office of Administrative Hearings of an updated address while the person is claiming benefits or if the person knows, or reasonably should know, of a pending appeal;
(B) Not understanding the implications of a decision or notice when it is received.

In Hearing Decision 14-UI-22688, the ALJ concluded that claimant’s failure to attend the May 21, 2014 hearing was not the result of an excusable mistake or a factor or circumstance beyond his reasonable control, reasoning that while it was “understandable” that claimant would take the 9:15 a.m. call from his doctor, “after that call ended claimant should have immediately called in for his hearing” but instead “took another call and then left home to fax a resume to a potential employer,” and because it was within claimant’s reasonable control to call in for the hearing immediately after finishing the call from his doctor, it was “claimant’s own poor choice that caused him to miss the hearing.” Hearing Decision 14-UI-22688 at 2. We disagree.

Claimant testified that after hanging up with his physician, “I was getting ready to call and I got another phone call for a potential job interview,” and after that, it was too late to call in for the hearing. Audio recording at ~8:50. The ALJ questioned why claimant did not call in to the hearing immediately after disconnecting with his physician, given that ALJs customarily wait 10 minutes after the scheduled start time of a hearing before dismissing a request for hearing. Audio recording at ~9:15. However, there is nothing in this record showing that claimant knew or should have known of the 10-minute grace period, especially given that the notice of hearing specifies that requests for hearing are dismissed if parties do not call in at the scheduled time, and advise parties to contact the Office of Administrative Hearings if five minutes has passed after their scheduled start time.

Moreover, the relevant period to examine in this case is what occurred before 9:40 a.m., since the ALJ dismissed the hearing request by that time. Because of claimant’s call with his physician, which the ALJ considered understandable, claimant could not possibly have called in to the hearing until 9:35 a.m. at the very earliest, and likely 9:40 a.m., by which time the hearing had already been dismissed.

Claimant's failure to disconnect from a phone call his physician initiated to discuss claimant's ongoing serious medical condition was, at worst, an excusable mistake.

Given that it is possible, if not likely, that the call with claimant's physician did not end until 9:40 a.m., the record fails to show it is more likely than not that the events that occurred thereafter had much, if any, effect on claimant's non-appearance at the hearing. To any extent claimant's decision to answer the phone when it rang sometime after 9:35 a.m. might have been a factor in his non-appearance, we conclude that the conduct was also the result of an excusable mistake. Assuming *arguendo* that claimant made a mistake in answering the call, at the time he did so, he had just disconnected from a call his physician initiated about his health, he was job seeking, and he was late for a scheduled hearing. Practically speaking, claimant could not necessarily have known at the time he answered the call whether his physician was calling again, whether the ALJ or someone from the Office of Administrative Hearings was calling about the missed hearing, or whether a potential employer was calling about a job opportunity.

Finally, the fact that claimant left after receiving the call from the prospective employer to fax a copy of his resume is of no import to this decision. Whether claimant had called at 9:41 a.m. to inquire about his hearing or waited until 10:38 a.m. to call the Office of Administrative Hearings, his hearing had already been dismissed by the ALJ at 9:40 a.m., and the timing of that call would have no practical effect on claimant's rights or interests.

Because claimant was prevented by excusable mistake from participating in the May 21, 2014 hearing, he has shown good cause for failing to appear, and is entitled to have the hearing reopened.

DECISION: Hearing Decision 14-UI-22688 is set aside, as outlined above.

Tony Corcoran and J. S. Cromwell;
Susan Rossiter, not participating.

DATE of Service: September 15, 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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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