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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0432

Affirmed
Request to Reopen Denied
Ineligible Week 3-15

PROCEDURAL HISTORY: On February 6, 2015, the Oregon Employment Department (the Department) served two notices of two administrative decisions concluding claimant voluntarily left work without good cause (decision # 82600) and claimant was not able to work from January 18 through January 24, 2015 (week 3-15) (decision # 85407). Claimant filed a timely request for hearing. On March 9, 2015, the Office of Administrative Hearings (OAH) mailed two notices of hearing, one scheduling a hearing on decision # 82600 for March 23, 2015 at 9:30 a.m. and the other scheduling a hearing on decision # 95407 for March 23, 2015 at 10:45 a.m. On March 23, 2015, ALJ R. Davis issued Hearing Decision 15-UI-35576, dismissing claimant's request for hearing on decision # 82600 for failure to appear at the 9:30 a.m. hearing. On March 23, 2015, ALJ R. Davis also held the 10:45 a.m. hearing on decision # 85407, at which claimant appeared. On March 30, 2015, claimant filed a request to reopen the 9:30 a.m. hearing on decision # 82600. On March 31, 2015, the ALJ issued Hearing Decision 15-UI-36052, affirming the Department's decision # 85407. On April 9, 2015, ALJ Kangas issued Hearing Decision 15-UI-36598, denying claimant's request to reopen. On April 17, 2015, claimant filed applications for review of Hearing Decisions 15-UI-36052 and 15-UI-36598 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-36052 and 15-UI-36598. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-0431 and 2015-EAB-0432).

EAB considered claimant's arguments to the extent they were relevant and based on the record.

FINDINGS OF FACT: (1) In December 2014, claimant's physician restricted claimant from working through January 23, 2015 and provided claimant with a medical release that stated this restriction. The medical release from work was to allow claimant to recover from a displacement of his lumbar intervertebral disc, which was causing him to experience severe pain.

(2) Claimant provided the medical release to his then-employer, but the employer's owner refused to accept the note or excuse claimant from work. Claimant then submitted a resignation letter to that employer in which he cited as one of his reasons for quitting the employer's failure to accept his medical release. (Exhibit 3)

(3) Claimant filed an initial claim for unemployment insurance benefits on January 18, 2015, and a weekly claim for the week of January 18, 2015 through January 24, 2015 (week 3-15), which is the week in issue. During the week in issue, claimant sought physically demanding work including warehouse, truck driving and maintenance work. The medical release he obtained from his doctor restricted claimant from working during this week. On February 5, 2015, shortly after the week in issue, claimant reported to the Department that he could not work at that time due to the severity of his back pain.

(4) OAH mailed claimant notice of the hearing scheduled for March 23, 2015 at 9:30 a.m. The notice informed claimant that his request for hearing could be dismissed if he failed to participate in the hearing, and instructed claimant to call an alternate number if not connected to the hearing within 5 minutes of the scheduled start time.

(5) Claimant received that notice of hearing and planned to attend. Claimant did not call into the hearing on time. Instead, he was putting together materials for his case and trying to make sure that his information had successfully transmitted. The ALJ dismissed the hearing at 9:40 a.m.¹ Claimant attempted to call approximately 12 minutes after the hearing began and was unable to connect. He then spoke with an OAH employee and was told that the hearing was dismissed.

CONCLUSIONS AND REASONS: We agree with the ALJs that claimant's request to reopen should be denied, and he was not able to work January 18, 2015 through January 24, 2015.

Request to Reopen: A party whose request for hearing was dismissed for failure to appear may request that the hearing be reopened, but the request will only be allowed if the party shows good cause for failing to appear. ORS 657.270(5)(c); OAR 471-040-0040(1) (February 10, 2012). "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. OAR 471-040-0040(2). Examples of "good cause" include failure to receive a document because, although the Department or OAH had the party's correct address, the document was mailed to an incorrect address, or when an individual experiences an unanticipated and not reasonably foreseeable loss of telephone service, but not instances in which an individual has, under certain circumstances, failed to provide an updated address or failed to understand a decision or notice when it was received. OAR 471-040-0040(2)(a) and (b).

In this case, at the time claimant failed to appear at the 9:30 a.m. hearing, he was putting materials together for his case and trying to make sure his materials were transmitted correctly. As a result, he did not call until approximately 12 minutes after the scheduled start time, by which time the ALJ had already dismissed his request for hearing. Claimant did not assert or show that his conduct was the

¹ See Hearing Decision 15-UI-35576 at 1, which states that the ALJ dismissed the hearing 10 minutes after its scheduled start time.

result of a mistake, for example, being mistaken about the hearing process, the hearing time, the number he was supposed to dial, or the instructions printed on the notice of hearing. The record also fails to show that claimant's failure to appear was the result of factors or circumstances beyond his reasonable control. The notice of hearing instructed claimant that his request for hearing would be dismissed if he did not attend the hearing at 9:30 a.m., and instructed him that if he was unable to connect to the hearing within 5 minutes of the scheduled start time that he needed to call an alternate number in order to connect to the hearing. Claimant did not explain why it was outside of his control to assemble his materials and verify their transmission prior to 9:30 a.m., or why it was outside of his control to keep track of the time and call in at 9:30 a.m. even if he felt his materials were not ready. On this record, it appears claimant's failure to appear was the result of neglect or an inadvertent error, neither of which amount to good cause under the applicable administrative rule. Claimant's request to reopen is, therefore, denied.

Able to Work: To be considered eligible to receive benefits, unemployed individuals must be able to work during each week claimed. ORS 657.155(1)(c). An individual is considered able to work for purposes of ORS 657.155(1)(c) if, in pertinent part, he is physically capable of working during the week in issue. OAR 471-030-0036(2) (February 23, 2014).

Claimant argued at the hearing that he was physically capable of performing some light duty work, but his argument was not believable. Claimant's physician deemed it necessary to restrict claimant from work until January 23, 2015, and did not limit the restriction to light duty or certain types of work or make any other types of exceptions. The record shows that claimant resigned from employment that he had held for several months, in part because that employer had refused to accept his medical release from work; and, shortly after the week in issue, claimant self-reported to the Department that he was incapable of working due to the severity of his pain. None of those events are characteristic of an individual who is physically capable of performing even light duty work during the week in issue, particularly not the physically demanding work claimant sought. Given those factors, we conclude that it is more likely than not that claimant was physically incapable of performing the types of work he sought during the week in issue. Accordingly, he cannot be considered "able to work," and is ineligible for benefits during the week of January 18, 2015 through January 24, 2015, the week in issue.

DECISION: Hearing Decisions 15-UI-36052 and 15-UI-36598 are affirmed.

Susan Rossiter and J. S. Cromwell;
D. H. Hettle, *pro tempore*, not participating.

DATE of Service: June 11, 2015

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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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