

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

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0465

Application for Review Dismissed

PROCEDURAL HISTORY: On December 22, 2014, the Oregon Employment Department (the Department) served two notices of two administrative decisions, one concluding that claimant was discharged from a job for misconduct (decision # 80937), and the other concluding that claimant was not able to work from November 30, 2014 through December 6, 2014, and was ineligible for an indefinite period thereafter "until claimant has given us evidence that the above condition no longer exists" (decision # 70852). On January 8, 2015, claimant filed timely requests for a hearing on both decisions.

On February 5, 2015, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for February 19, 2015 at 9:30 a.m.¹ On February 19, 2015, ALJ Murdock convened a hearing on both issues, during which claimant orally withdrew his request for hearing on decision # 70852.² On February 20, 2015, the ALJ issued Hearing Decision 15-UI-33798, concluding claimant's discharge was not for misconduct, and Hearing Decision 15-UI-33777, allowing claimant's request to withdraw his request for hearing on decision # 70852. On March 12, 2015, both hearing decisions became final without claimant having filed an application for review with the Employment Appeals Board (EAB).

On March 18, 2015, claimant called the Department and orally re-requested a hearing on decision # 70852. On March 19, 2015, the Department transmitted claimant's request to OAH. On March 24, 2015, OAH mailed claimant a letter rejecting his "telephone reopening request" and stating that all reopen requests must be written. On April 2, 2015, claimant faxed OAH a letter that stated,

I had previously requested a hearing which was scheduled the same day as my other hearing, in February. I did not and still do not understand the rules around this injury and what is required.

¹ OAH mailed only one notice of hearing scheduling a single hearing on decision # 80937 (the discharge decision).

² ALJ Murdock noted that the record lacked evidence that OAH issued a notice of hearing on decision # 70852 and asked claimant whether he was prepared to discuss that issue during the hearing. Claimant responded that he was not ready to discuss that issue, had not requested a hearing on that issue, stated "right now I'm not able to work," and said it would be "fine" if the ALJ dismissed his request for hearing on decision # 70852 as withdrawn. *See* February 19, 2015 hearing, Audio Recording at ~4:40.

I told them at the other hearing that I did not need a hearing on the shoulder, but I guess I was incorrect and do need a hearing.³

OAH construed claimant's submission as an application for review, and, on April 22, 2015, transmitted claimant's April 2, 2015 letter to EAB for review. EAB's review is confined to review of Hearing Decision 15-UI-33777.

CONCLUSIONS AND REASONS: Claimant did not establish good cause to file an untimely application for review, and his application for review should be dismissed.

As a preliminary matter, although claimant submitted his April 2, 2015 letter to OAH as a request for a hearing on decision # 70852, we have construed claimant's April 2, 2015 letter as an application for review. The letter cannot be construed as a request for hearing because claimant already requested a hearing, a hearing was convened, during which claimant orally withdrew his request for hearing, and an administrative law judge issued a hearing decision dismissing claimant's request for hearing under ORS 657.270(7)(a)(A). The laws and rules applicable to unemployment insurance cases do not allow parties to repeatedly request a hearing on the same administrative decision after the case has already been adjudicated. Notwithstanding OAH's March 24th instructions to claimant on how to request "reopening," claimant's letter cannot be construed as a request to reopen the February 19th hearing that was held in this matter because only parties who failed to appear at a hearing are entitled to request reopening under ORS 657.270(5)(a), and claimant did not fail to appear at the February 19th hearing. As such, the only administrative review available to claimant given the procedural posture of the case is review by the Employment Appeals Board. ORS 657.270(7)(b). Therefore, we have construed his letter as an application for review.

ORS 657.270(7) required claimant's application for review to be filed no later than March 12, 2015; it was filed on April 2, 2014, as shown by the receipt date stamped on the document claimant submitted. OAR 471-041-0065 (October 29, 2006) (when a document is filed by fax, the filing date is the receipt date stamped on the fax by the public employee who receives the document; here, OAH stamped the document as received on April 2, 2014). OAR 471-041-0070(3) requires that individuals filing late applications for review include with the late application "a written statement describing the circumstances that prevented a timely filing." OAR 471-041-0070(2) (October 29, 2006) provides:

(2) The filing period may be extended a reasonable time upon a showing of good cause as provided by ORS 657.875.

(a) "Good cause" exists when the applicant provides satisfactory evidence that factors or circumstances beyond the applicant's reasonable control prevented timely filing.

(b) "A reasonable time" is seven days after the circumstances that prevented timely filing ceased to exist.

Although claimant's April 2nd statement did not specifically address why he filed when he did, we infer from its content that claimant's late filing was the result of confusion about the effect of decision # 70852 on his claim for benefits. However, claimant did not express any confusion about decision #

³ See Claimant's April 2, 2015 fax.

70852 on the record when he indicated he did not intend to request a hearing on that decision and it would be "fine" to dismiss the request. Nor did he present any evidence in his statement suggesting that that it was beyond his reasonable control to contact the Department, OAH or EAB to request information to resolve his confusion, nor did his letter suggest that any other factor beyond his reasonable control prevented him from doing so.

The record also shows that, on February 20th, OAH mailed claimant notice of a decision allowing him benefits (Hearing Decision 15-UI-33798) concluding he was discharged but not for misconduct) but Department records show that the Department did not pay claimant benefits during the weeks that followed. Department records also show that claimant did not contact the Department about the effect of that decision, or the effect his withdrawal of his hearing request in this case would have, until almost a month later, on March 18th. Even that contact was beyond the 20-day period in which claimant might have filed a timely application for review if he disagreed with the ALJ's decision to withdraw his request for hearing or wanted EAB to review that decision, and the record fails to show the reason for that delay.⁴ Claimant has not shown good cause for a late filing, nor has he shown that he filed his late application for review within a reasonable time.

Because claimant's application for review was filed after the 20-day deadline provided by ORS 657.270(6), and good cause to extend the time allowed has not been shown, claimant's application for review must be dismissed. Decision # 70852 and Hearing Decision 15-UI-33777 must remain undisturbed.⁵

DECISION: The application for review filed April 2, 2015 is dismissed. Hearing Decision 15-UI-33777 remains undisturbed.

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

⁴ We take notice of Department records, which show claimant's non-payment and that claimant called the Department on March 18, 2015 asking about his claim, and stated that he "didn't realize he needed to win both to get benefits." See March 18, 2015 claim comment. 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 fact will remain in the record.

⁵ The merits of decision # 70852, which denied claimant benefits because of his shoulder injury, are not before EAB. However, claimant stated in his application for review that he "did not and still do not understand the rules around this injury and what is required." For informational purposes only, to aid in understanding the effect his injured shoulder has had on his claim, we can explain that unemployment insurance benefits are intended only for individuals who are attached to their labor market. Claimants who cannot work, for example, because of total physical incapacity, are not considered to be attached to their labor market, and are not eligible for benefits. That principle is reflected in unemployment law, which says that claimant must be "able to work" during each and every week he claims benefits in order to be eligible for benefit payments, and if he is physically incapable of performing the work he is seeking every week he claims, he cannot get benefit payments. See ORS 657.155(1)(c); OAR 471-030-0036(2). Claimant's statements to the Department and at the February 19th hearing indicate that his injury prevented him from working or seeking work at least between November 30, 2014 and February 19, 2015, thus making him ineligible to receive any benefit payments. However, claimant is only ineligible to receive benefits during the weeks he is incapable of working. He can end the denial of benefits based on this issue at any time by supplying the Department with evidence that his physical incapacity has ended, he has become able to perform they type(s) of work he is seeking, and he is meeting the Department's other eligibility requirements. If claimant has any questions about how to end the denial of benefits caused by decision # 70852, or about any other matter related to his claim for benefits, claimant may contact his unemployment insurance center by calling (877) 345-3484.

DATE of Service: May 1, 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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