

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0704

Reversed & Remanded

PROCEDURAL HISTORY: On April 7, 2015, the Oregon Employment Department (the Department) served two notices of two administrative decisions, one concluding claimant was not able to or available for work from February 15, 2015 to April 4, 2015 (decision # 122427), and the second concluding that claimant was discharged for theft and canceling benefit rights based on wages earned prior to the date of her discharge (decision # 135911). On April 11, 2015, claimant filed timely requests for hearing. On April 16, 2015, the Office of Administrative Hearings (OAH) mailed two notices of two hearings scheduled for April 30, 2015. On April 30, 2015, ALJ R. Davis issued Hearing Decisions 15-UI-37728 and 15-UI-37732, dismissing claimant's requests for hearing for failure to appear. On May 20, 2015, Hearing Decisions 15-UI-37728 and 15-UI-37732 became final without claimant having requested reopening. On May 26, 2015, claimant filed late requests to reopen. On June 5, 2015, ALJ Kangas issued Hearing Decisions 15-UI-39602 and 15-UI-39609, dismissing claimant's requests. On June 10, 2015, claimant filed applications for review of Hearing Decisions 15-UI-39602 and 15-UI-39609 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-39602 and 15-UI-39609. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 15-EAB-0703 and 15-EAB-0704).

CONCLUSIONS AND REASONS: Hearing Decisions 15-UI-39602 and 15-UI-39609 should be reversed, and these matters should be remanded for additional information.

ORS 657.270(7) provides that a party's request for hearing may be dismissed for failing to appear at the time of the hearing. However, ORS 657.270(5) provides that the hearing may be reopened if the request is filed within 20 days of the decision in the case and the party shows good cause for failing to appear. ORS 657.875 provides that the period for requesting reopening may be extended a reasonable time upon a showing of good cause. OAR 471-040-0040 and OAR 471-040-0041 define good cause, whether for missing a hearing or filing a late request to reopen, to include "an action, delay or failure to act" that "arises from an excusable mistake or from factors beyond an applicant's reasonable control." OAR 471-040-0041 defines a "reasonable time" to file a late request to reopen as "seven days after the

circumstances that prevented a timely filing ceased to exist." The party requesting reopening must "set forth the reason(s) for missing the hearing in a written statement" that is then considered in determining whether good cause exists. OAR 471-040-0040(3). However, nothing in the rule that requires the written statement be provided "prevents the OAH from scheduling a hearing if in the sole judgment of the OAH testimony is required." OAR 471-040-0040(7).

Claimant missed her April 30th hearings because she was incarcerated and filed late requests to reopen. The ALJ denied claimant's late requests, reasoning that claimant did not provide any information why she was incarcerated, and, therefore, failed to show that an excusable mistake or factors beyond her reasonable control caused her to fail to request reopening within the time allowed. Hearing Decisions 15-UI-39602 and 15-UI-39609 at 3. We conclude that additional information is required.

Because claimant did not file a timely request to reopen, she must first establish that an excusable mistake or factors beyond her reasonable control prevented her from filing her request to reopen by the May 20th filing deadline, then that she filed her request to reopen with seven days of the date those factors ceased to exist. Only if she establishes good cause for the late filing would she be allowed to prove good cause to reopen the April 30th hearings.

Claimant was incarcerated from April 25, 2015 until May 21, 2015, which presumptively establishes that she was incapable of attending the April 30th hearings or filing her requests to reopen by the May 20th deadline, and she filed her late requests within five days of her release from jail. The record does not show, and claimant was not asked, whether the circumstances that prevented her from filing a timely request to reopen, or attend the hearing, specifically, her incarceration, were beyond her reasonable control. However, we think the information claimant provided raises a substantial question about whether she had good cause for filing late requests to reopen, and for missing the hearings, establishing facts that require further development. The ALJ abused her discretion in dismissing claimant's requests to reopen without a hearing.

DECISION: Hearing Decisions 15-UI-39602 and 15-UI-39609 are set aside, and these matters remanded for further proceedings consistent with this order.

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

DATE of Service: July 7, 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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