

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0768

Reversed & Remanded

PROCEDURAL HISTORY: On May 7, 2015, the Oregon Employment Department (the Department) served two notices of two administrative decisions, one concluding Kaiser Foundation Health discharged claimant for misconduct (decision # 95859) and the other concluding claimant voluntarily left work with Home Care Workers without good cause (decision # 102152). Claimant filed timely requests for hearing. On June 4, 2015, ALJ Murdock issued Hearing Decisions 15-UI-39552 and 15-UI-39553, concluding claimant withdrew her hearing requests and dismissing both matters. On June 24, 2015, claimant filed applications for review of both decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-39552 and 15-UI-39553. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-0767 and 2015-EAB-0768).

CONCLUSIONS AND REASONS: Hearing Decisions 15-UI-39552 and 15-UI-39553 are reversed as unsupported by the record, and these matters remanded.

ORS 657.270(7)(a)(A) and OAR 471-040-0035 allow an administrative law judge (ALJ) to dismiss a request for hearing when the request is withdrawn by the requesting party. When a party files an application for review of an ALJ's decision, EAB is required by statute to "perform de novo review on the record." ORS 657.275. The standard of review in unemployment insurance matters is the preponderance standard; for EAB to affirm an ALJ's decision to allow a request for withdrawal, the record on review must therefore show that, more likely than not, the requesting party withdrew his or her request for hearing.

In her argument to EAB, claimant stated, "I did not intend to withdrawn [*sic*] my appeal. I have never applied for unemployment before and very confused and that was the reason why I cancel my appealed [*sic*] on June 4. If all possible can I reschedule and also have the time be after 4 PM." The only indication in this case that claimant might have knowingly and voluntarily withdrawn her requests for hearing on the two disqualifying decisions at issue are two documents titled "Memo To File / Telephone

Record," one in each case, which state "From: [] CLM," and "Message: clmt withdrawal." Neither "Memo To File" was marked as an OAH business record or authenticated as such, neither was admitted into the hearing record, and neither was marked or admitted into the record as an exhibit in this matter. Neither document indicated what phone number claimant was supposed to have called, what she said when she called, whether anyone else was on the phone with her, what she asked for during the call, what she told the person with whom she spoke, the context in which the "clmt withdrawal[s]" occurred, or how the person with whom claimant spoke clarified what it was claimant was asking for when she called.

Given claimant's clear statement to EAB that she had not intended to withdraw her hearing requests, her stated confusion and inexperience with the unemployment insurance appeals process, her apparent lack of English proficiency, which we infer from the text and syntax of her argument to EAB, and the absence of information about the manner in which claimant's purported withdrawal occurred, the record fails to show that it is more likely than not, claimant withdrew her requests for hearing in these matters. Because the preponderance of the evidence fails to show that claimant withdrew her requests, these matters must be remanded to OAH for development of a record of her withdrawal. If the record fails to show that claimant knowingly or intentionally withdrew her requests for hearing, the ALJ should develop the record on the merits of the decisions under review.

DECISION: Hearing Decisions 15-UI-39552 and 15-UI-39553 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: June 30, 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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