

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0928

Reversed
Request to Reopen Allowed

PROCEDURAL HISTORY: On July 30, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$3,096 overpayment, \$464.40 monetary penalty and 23 penalty weeks (decision # 200092). On August 19, 2014, decision # 200092 became final without a timely request for hearing having been filed.

On April 3, 2015, claimant filed a late request for hearing. On June 10, 2015, ALJ Kangas issued Hearing Decision 15-UI-39835, dismissing claimant's request for hearing on decision # 200092 subject to her right to renew the request by responding to an appellant questionnaire within 14 days of the date the decision was mailed. On June 19, 2015, the Department served notice of an administrative decision amending decision # 200092, concluding claimant was not overpaid benefits or liable for a monetary penalty, and assessing a 4 week penalty disqualification based on her failure to report a work separation in April 2014 (decision # 193971).¹ On June 22, 2015, the Office of Administrative Hearings (OAH) received claimant's response to Hearing Decision 15-UI-39835.

On June 25, 2015, OAH mailed a letter canceling Hearing Decision 15-UI-39835 and mailed notice of a hearing scheduled for July 10, 2015 at 10:45 a.m. On July 10, 2015, claimant failed to appear at the hearing. On July 10, 2015, ALJ Holmes-Swanson issued notice of a decision dismissing claimant's request for hearing for failure to appear. On July 20, 2015, ALJ Holmes-Swanson issued notice of an amended decision, Hearing Decision 15-UI-41628, re-dismissing claimant's request for hearing.

On July 24, 2015, claimant filed a request to reopen the July 10, 2015 hearing. On July 28, 2015, ALJ Kangas reviewed claimant's response and issued Hearing Decision 15-UI-42065, denying claimant's request to reopen. On August 3, 2015, claimant filed an application for review of Hearing Decision 15-UI-42065 with the Employment Appeals Board (EAB).

¹ Claimant was not required to file a new request for hearing on the Department's amended decision to preserve her right to contest it. Decision # 193971 amended, but did not cancel, supersede or otherwise resolve the issues presented in decision # 200092, which claimant had already had already contested, thus preserving her rights. If, in further proceedings, claimant's late request for hearing is allowed, and proceedings on the merits scheduled, the merits of decision # 193971, which is the Department's amended decision on #200092, should be adjudicated.

Claimant's written argument to EAB contained information that was not part of the hearing record. EAB may consider parties' new information if it is relevant and material, and if factors or circumstances beyond the party's reasonable control prevented the party from offering the information during the hearing. OAR 471-041-0090 (October 29, 2006). The new information claimant clarified and corroborated her earlier statements about her failure to appear at the July 10, 2015 hearing. Claimant's new information is relevant and material to the issue of whether she had good cause to reopen the hearing. Claimant could not have known of the need to provide that information, or explain the circumstances under which she missed her hearing in such detail, prior to receiving the decision to deny her benefits. We therefore conclude that claimant's new information should be admitted into the record, and considered when reaching this decision. 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 at EAB Exhibit 1.

FINDINGS OF FACT: (1) On approximately June 20, 2015, claimant began living in a homeless shelter. She was told that she was not permitted to have any of her mail sent to the shelter. The shelter customarily allowed residents to have unemployment insurance-related mail sent to the shelter's address, but claimant was not aware that she could do so, or that the information she had been given was incorrect.

(2) Hearing Decision 15-UI-39835, which dismissed claimant's request for hearing subject to claimant's right to renew the request by responding to an appellant questionnaire within 14 days, included a number of OAH forms and an EAB form called "Application for Review." The EAB form included an address change section, including a box claimant could check to specify that she would prefer to communicate by email and a line on which she could provide her email address.

(3) On approximately June 20, 2015, claimant responded to the appellant questionnaire she had been mailed. She wrote on the questionnaire that she was "at a shelter right now." She believed based on the "Application for Review" form that she could rely upon her email address for communication with OAH about her appeal, and spoke with a Department employee who confirmed that she could. She specified on the "Application for Review" form that she would prefer to communicate by email, and provided her email address on the line provided. Thereafter, she checked her email account every day seeking news of her appeal.

(4) On June 30, 2015, the U.S. Postal Service returned the copy of the notice scheduling the July 10, 2015 hearing to OAH. The envelope was labeled by the U.S. Postal Service with a sticker that stated "return to sender" and "unable to forward." On July 10, 2015, claimant missed the hearing because she did not receive the notice of hearing and did not know a hearing had been scheduled.

(5) Unbeknownst to claimant, OAH did not customarily use email to communicate with parties about their unemployment insurance hearings. On July 20, 2015, claimant called OAH to ask about her hearing, and was informed that she had missed it. On that date, claimant was told that OAH and EAB are different offices, and understood for the first time that the form she had used to request communications about her appeal was an EAB form that did not effectively change her address at OAH.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant had good cause to reopen the hearing.

ORS 657.270(5) provides that any party who failed to appear at the hearing may request to reopen the hearing upon a showing of good cause for failing to appear. OAR 471-040-0040 provides that “good cause” means “when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant’s reasonable control.” “Good cause” includes “[f]ailure to receive a document because the Employment Department or Office of Administrative Hearings mailed it to an incorrect address despite having the correct address,” but does not include “[f]ailure 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.”

In Hearing Decision 15-UI-42065, the ALJ concluded that claimant did not have good cause for failing to appear at the July 10th hearing in this matter because she knew her appeal was pending and was responsible to report her address change, or, if she did not have an address, it was within her reasonable control to keep in contact with the Employment Department or OAH to find out when her hearing was scheduled. Hearing Decision 15-UI-42065 at 2-3.

We agree with the ALJ that claimant knew her appeal was pending and was responsible to report her address change to the Department or OAH. We disagree, however, that claimant failed to do so. Claimant notified OAH in her appellant questionnaire response that she was living in a shelter rather than at the address listed on the decision, and she updated her address with a valid email address that she then checked every day for more than a month for news of her appeal. In so doing, claimant made a mistake, as the form she relied upon to communicate her address change was an EAB form rather than an OAH form. The question is, then, whether claimant’s mistake was excusable.

We conclude that claimant’s mistaken belief that she had changed her address was excusable. The EAB form she used to change her address from her old street address to her email address was included with or attached to OAH forms, and the difference between the OAH and EAB forms was only distinguishable to those experienced with the unemployment insurance appeals process. At the time claimant used the EAB form to change her address for purposes of her hearing, she did not know the difference between OAH and EAB, did not know or have reason to know that using the EAB form would not change her address with OAH even if she sent that form to OAH with her questionnaire, and she reasonably believed based on the form and from speaking with a Department employee that she could use her email address to communicate with OAH about her appeal. We agree with claimant that those inexperienced with the unemployment insurance appeals process could easily be confused about the purpose of the EAB form in the midst of the OAH forms she had been mailed, her mistake was reasonable, and should be excused.

For those reasons, we conclude that claimant failed to appear at the July 10, 2015 hearing due to an excusable mistake, and the hearing must, therefore, be reopened. The threshold issue at that hearing will be whether or not claimant had good cause for filing a late request for hearing and is entitled to extend the filing period a reasonable time. Only if claimant meets her burden on that issue would she then be entitled to a hearing on the merits of decision # 193971 (amending decision # 2000092), which assessed

a 4-week disqualification from future benefits otherwise payable as a penalty for her alleged failure to report a non-disqualifying work separation.

DECISION: Hearing Decision 15-UI-42065 is set aside, as outlined above.

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

DATE of Service: August 5, 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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