

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1124

Reversed
Request To Reopen Allowed

PROCEDURAL HISTORY: On June 10, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 142638). The employer filed a timely request for hearing. On August 4, 2015, ALJ Shoemake conducted a hearing at which claimant did not appear, and on August 6, 2015 issued Hearing Decision 15-UI-42660, concluding that claimant voluntarily left work without good cause. On August 11, 2015, claimant filed a request to reopen the hearing to allow her to present evidence on the work separation. On August 11, 2015, ALJ Triana conducted a hearing, and on September 17, 2015 issued Hearing Decision 15-UI-44478, denying claimant's request to reopen and leaving Hearing Decision 15-UI-42660 undisturbed. On September 24, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument but failed to certify that she provided a copy of that argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). For this reason, EAB did not consider claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Claimant lived in a mobile home park on Silverton Road, NE in Salem, Oregon. Although there were several residents in the park, their mail was all directed to the park's general address of 4490 Silverton, NE, Salem, Oregon 97305. Park staff sorted the mail after it was received from the United States Postal Service (USPS) at the main address and placed it in the mail box of the resident to whom it was addressed. Sometimes the mail was not correctly sorted, and claimant received mail in her box that was addressed to other residents and other residents sometimes received mail addressed to claimant. When such errors occurred, claimant took the mail that had been wrongly

placed in her box and asked the staff who did the sorting to place it in the correct resident's box and to be more careful in the future.

(2) In approximately May 2015, claimant filed a claim for unemployment insurance benefits after she separated from employment with Mobile Pet Grooming. The Department communicated with claimant about her claim at the address 4490 Silverton Road, NE, Salem, Oregon 97305-2060. The Department mailed an administrative decision on claimant's claim for unemployment benefits to the Silverton Road, NE address. Record Document, June 10, 2015 Administrative Decision. Claimant received the administrative decision in her mail box.

(3) After claimant received the administrative decision, she regularly checked her mail box to determine if she had received any further communications from the Department about her claim. Audio at ~28:33. On June 30, 2015, the Office of Administrative Hearings (OAH) mailed claimant a notice scheduling a July 14, 2015 hearing on her claim for unemployment benefits. The notice was sent to 4490 Silverton Road, NE, Salem, Oregon 97035-2060. Record Document, June 30, 2015 Notice of Hearing. Claimant did not receive this notice in her mail box. On July 6, 2015, OAH mailed a notice changing the scheduled hearing from July 14, 2015 to August 4, 2015. This notice was also sent to claimant's address on Silverton Road, NE. Record Document, July 6, 2015 Notice of Hearing. Claimant did not receive this notice in her mail box and was not aware that a hearing was scheduled on her claim. Around this time, claimant called the Department about a different matter involving her and the employer, spoke to a representative in the tax division and was told that a hearing was not yet scheduled.

(4) Claimant did not participate in the August 4, 2015 hearing because she did not know it had been scheduled. Sometime around August 8 or 9, 2015, claimant received Hearing Decision 15-UI-42660 in her box at 4490 Silverton Road, NE. That decision was mailed on August 6, 2015. Upon receiving the decision, claimant called OAH to see there was some way that she could still present her own evidence on the issue of the work separation. On August 11, 2015, claimant faxed to OAH a request to reopen the hearing.

(5) On August 14, 2015, OAH mailed to claimant a notice scheduling an August 31, 2015 hearing on her request to reopen and, if appropriate, on the work separation. The notice was sent to 4490 Silverton Road, NE and claimant received it in her box. Record Document, August 14, 2015 Notice of Hearing. On August 19, 2015, OAH mailed a notice changing the hearing from August 14, 2015 to September 14, 2015. Record Document, August 19, 2015 Notice of Hearing. This notice was sent to claimant's address on Silverton Road, NE and she received it in her box.

(6) At the hearing on September 14, 2015, claimant was very nervous. Before the hearing, claimant had taken some valium to control her anxiety and anti-depressant drugs. During the hearing, claimant became confused about questions that were asked of her about the several notices scheduling hearings, some of which she received and some of which she did not.

CONCLUSIONS AND REASONS: Claimant showed good cause for reopening the hearing. Claimant's request to reopen is allowed.

ORS 657.270(5) states that a party who failed to appear at the hearing may have the hearing reopened if the party files a request to reopen within twenty days after the hearing decision is mailed and has good

cause for failing to appear at the hearing. “Good cause” exists when the requesting party’s failure to appear at the hearing arose from an excusable mistake or from factors beyond the party’s reasonable control. OAR 471-040-0040(2) (February 10, 2012).

Claimant filed her request to reopen on August 11, 2015, which was within twenty days after the August 6, 2015 date that Hearing Decision 15-UI-42660 was mailed. While claimant’s request to reopen met this first prong of the test for reopening the hearing, the ALJ denied the request in Hearing Decision 15-UI-44478 on the ground that claimant did not show good cause for failing to appear at the hearing. The ALJ reasoned that claimant’s testimony that she did not receive the notice originally scheduling for July 14, 2015 and the notice changing the hearing date to August 4, 2015 was not persuasive since the ALJ perceived that her testimony was “internally inconsistent” because she initially gave confused testimony over whether she did nor did not receive the original notices of hearing. Hearing Decision 15-UI-44478 at 4. The ALJ also doubted the credibility of claimant’s testimony that she did not receive the original notices because she disclosed her nervousness during the hearing and that she had taken prescription drugs before the hearing only after the ALJ pointed out certain “inconsistencies” in her testimony and she was questioned about it by her attorney. Hearing Decision 15-UI-44478 at 4. The ALJ further noted that claimant’s failure to remember the precise dates that she received certain notices of hearing also called into question the reliability of her testimony and it “was highly improbable” that claimant did not receive the notices mailed to her about the initial hearing while receiving the administrative decision, Hearing Decision 15-UI-42600, and the notices of hearing scheduling the hearing on her request to reopen, which were addressed identically to the original hearing notices. We disagree with the ALJ that claimant did not show good cause to reopen the hearing.

From claimant’s testimony at hearing, it was obvious that she was not familiar with the paperwork, details and procedures that accompany a contested hearing. Audio at ~23:01. In this case, at the time of the hearing on her request to reopen, an administrative decision, four notices of hearing, and a hearing decision had been mailed to claimant. Around this time, it also appears that claimant was receiving communications from the Department or another state agency about contested matters with the employer involving tax withholding and a worker’s compensation claim. Audio at ~44:16, ~45:19; Exhibit 1 at 1; Record Document, June 10, 2015 Administrative Decision. It appears understandable, and not surprising, that claimant was unable to pinpoint when she received a particular notice of hearing in this deluge of paperwork. While claimant’s initial testimony about the two initial notices of hearing, one scheduling a hearing for July 14, 2015 and one for August 4, 2015, might have appeared deceptive to the ALJ, from a review of the full audiotape of the hearing, it appears most likely that claimant was confused with all the papers she was shuffling through during the hearing, all the references to different hearing dates and constrained by her lack of familiarity with the contested case process. *See* Audio at ~21:46, ~3:01, ~31:45, ~43:48. During the hearing, for example, claimant and then her attorney referred repeatedly to a “notice” that she had received on June 10, 2015, when no such notice is in the case record and the only relevant communication dated June 10, 2015 is the administrative decision. Audio at ~22:00~31:45, ~32:39, ~33:02, ~34:24. The rapidity of the references to the various hearing notices was likely bewildering to claimant and her testimony became occasionally muddled. However, after claimant’s initially confused testimony, she clarified what she had intended her earlier testimony to mean and disclosed that she was very nervous during the hearing testimony and trying very hard not to give incorrect information. Audio at ~31:24, 35:54. Similarly, although the ALJ pointed out that claimant’s testimony during the hearing was suspect because she appeared to vacillate on whether she knew the employer was disputing her claimant for unemployment benefits before the hearing scheduled

for July 14, 2015 and changed to August 4, 2015, her testimony, viewed fairly, was based on her confusion between her claim for benefits filed in May 2015 and an earlier claim she had made in approximately February 2015. Audio at ~41:52, ~43:27, ~48:24, ~50:45. On balance, viewing the sum of this record, the inference that claimant's testimony was consciously disingenuous or not credible is not supported by the weight of the evidence. Most likely, claimant was simply confused by her lack of familiarity with legal processes, the many different administrative proceedings involving claimant and the employer, and the multitude of notices of hearing that were sent to claimant during the same approximate times. We disagree with the ALJ that claimant's hearing testimony should be discounted.

OAR 137-003-0520(10) (January 31, 2012) states that documents delivered through the USPS are presumed to have been received by the addressee, subject to evidence to the contrary. Here, claimant offered testimony that she had problems receiving her mail in the past due its arrival at one main address for several different residents and subsequent sorting errors by the staff at the place she resided. Claimant also testified that she had taken reasonable steps to avoid the type of error that resulted in her not receiving mail addressed to her by telling the staff and asking them to exercise greater care when sorting the mail. Claimant's testimony was not rebutted and, assuming its accuracy, it is not utterly implausible that the two notices originally scheduling the hearing were mis-sorted and not received by her while the administrative decision, the hearing decision and the later notices scheduling the hearing on her request to reopen made it into her box and were received by her. On this record, claimant successfully rebutted the presumption that mail is presumed to have been received by its addressee. That claimant did not receive the notices scheduling the initial hearing, means that she did not appear for that hearing because she was unaware that a hearing had been scheduled. Claimant demonstrated that more likely than not her failure to receive the initial notices resulted from improperly sorted mail, a factor or circumstance beyond her reasonable control. We therefore disagree with the ALJ and conclude that claimant showed good cause for failing to appear at the original hearing. Claimant's request to reopen is allowed.

DECISION: Hearing Decision 15-UI-44478 is set aside, as outlined above, and further proceedings should be undertaken consistent with this order.

Susan Rossiter and J. S. Cromwell

DATE of Service: October 20, 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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