

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1178**

*Remanded for a Hearing to Obtain Additional Evidence*

**PROCEDURAL HISTORY:** On August 19, 2007, the Oregon Employment Department (the Department) served notice of an administrative decision (# 74835) concluding that claimant was not available for work. On September 8, 2008, decision # 74835 became final without a request for hearing having been filed. On June 12, 2014, the Department served notice of a decision (# 154029) which cancelled decision # 74835 and concluded that claimant was not available for work from July 6 through July 12, 2008. On July 2, 2014, decision # 154029 became final without a request for hearing having been filed. On July 22, 2014, the Department served notice of a decision (# 144226) assessing a \$189 overpayment based on decision # 154029. On August 11, 2014, decision # 144226 became final without a request for hearing having been filed. Decisions # 154029 and # 144226 were sent to claimant at the following address: 1526 NE Alberta St., #130, Portland OR 97211-5046.

On February 12, 2015, claimant filed untimely telephone requests for hearings on decisions # 154029 and # 144226; on that date, claimant provided the Alberta street address as her address of record to the Department and the Office of Administrative Hearings (OAH). On February 25, 2015, ALJ Kangas served notice of Hearing Decision 15-UI-34001, dismissing claimant's request for hearing on decision # 144226 (the overpayment decision), and Hearing Decision 15-UI- 34080, dismissing claimant's request for hearing on decision # 154029 (the availability for work decision). Both decisions were subject to claimant's right to renew the hearing requests by responding to appellant questionnaires within 14 days. The decisions were sent to claimant at the Alberta street address. On March 11, 2015, The U.S. Postal Service returned both decisions as undeliverable to OAH.

On July 27, 2015, claimant submitted an untimely request for hearing on decision # 74835, the availability for work decision that was amended by a later decision. Claimant provided the following address to OAH in her hearing request: 726 SW 11<sup>th</sup> Ave., Portland OR 97205. On August 3, 2015, ALJ Kangas served notice of Hearing Decision 15-UI-42457, dismissing claimant's request for hearing on decision # 74835, subject to claimant's right to renew the request by responding to an appellant questionnaire within 14 days; this hearing decision was sent to claimant at the Alberta street address. On August 12, 2015, the U.S. Postal Service returned Hearing Decision 15-UI-42457 as undeliverable to

by letter dated September 1, 2015, OAH notified claimant that Hearing Decision 15-UI-42457 was vacated because it was issued in error. The letter explained that the error occurred because OAH mistakenly failed to realize it had no authority to issue Hearing Decision 15-UI-42457 because the Department decision for which the hearing had been requested (decision # 74835) had been cancelled by a later Department decision (# 154039). This letter was sent to claimant at the 11<sup>th</sup> avenue address.

On September 11, 2015, claimant submitted untimely responses to the appellant questionnaires in Hearing Decisions 15-UI-34001 and 15-UI-34080. Also on September 11, 2015, claimant filed applications for review of these two hearing decisions with the Employment Appeals Board (EAB). By letters dated September 15, 2015, OAH notified claimant that her responses were untimely and would not be considered, and that Hearing Decisions 15-UI-34001 and 15-UI-34080 remained in effect. Both letters were sent to claimant at the SW 11<sup>th</sup> address. On September 29, 2015, claimant filed additional applications for review of Hearing Decisions 15-UI-34001 and 15-UI-34080.

EAB considered claimant's argument to the extent it was relevant and based on the record.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-34001 and 15-UI-34080. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-1177 and 2015-EAB-1178).

**CONCLUSION AND REASONS:** These matters are remanded to OAH for additional proceedings.

ORS 657.270(6) required that claimant's application for review of Hearing Decisions 15-UI-34001 and 15-UI-34080 be filed no later than 20 days from the date on which the hearing decisions were mailed to claimant at her last known address, *i.e.*, March 27, 2015. The filing date for an application for review may be determined by a receipt date stamped by a public employee (if the application for review was delivered in person), by the U.S. Postal Service postmark date (if the application for review was mailed), or by the receipt date on the fax transmission (if the application for review was faxed). OAR 471-041-0065(1) (October 29, 2006). Where, as here, the information regarding how the application for review was submitted is missing, "the filing date is the date that EAB determines to be the most probable date of filing." OAR 471-041-0065(2). Because the application for review forms claimant submitted are dated September 10, 2015, we conclude that this is the most probable filing date. Claimant's applications for review are therefore untimely.

OAR 471-041-0070 (August 30, 2011) provides that the filing period may be extended a reasonable time upon a showing of good cause as provided by ORS 657.875. OAR 471-041-0070(2)(a) provides: "Good cause" exists when the applicant provides satisfactory evidence that factors or circumstances beyond the applicant's reasonable control prevented timely filing. An individual filing a late application for review is required to provide "a written statement describing the circumstances that prevented a timely filing." OAR 471-041-0070(2). EAB may, however, refer the matter to OAH for a hearing "if in EAB's discretion, a hearing is necessary to EAB's determination" as to whether the filing should be extended a reasonable time upon a showing of good cause. OAR 471-041-0070(3); ORS 657.275(1). We conclude it is necessary to remand this matter to OAH to obtain additional evidence so that we can determine whether good cause exists for extending the period by which claimant was required to file her application for review, and, if so, whether claimant filed her application for review within a reasonable time after the circumstances that prevented a timely filing ceased to exist.

The June 12, 2014 Department decisions for which claimant requested hearings concern events that occurred eight years ago: one Department decision (# 154029) amended an August 19, 2007 decision and concluded that claimant was unavailable for work during one week in July 2007; the second administrative decision (# 144226) concluded that claimant was overpaid unemployment benefits for this week. In addition, the record shows that claimant's address changed sometime after February 12, 2015, the date on which she filed her hearing requests. Claimant may have become confused when, after she filed a request for hearing on the Department's August 19, 2007 decision, OAH issued a hearing decision dismissing her hearing request, and then vacated that decision as mistakenly issued. These circumstances suggest a possibility that the Department's tardy decision making process, failure by the Department or OAH to record her address change, or claimant's confusion resulting from OAH's mistake may have constituted a circumstance beyond claimant's reasonable control that prevented her from timely receiving the hearing decisions at issue, and timely responding to the appellant questionnaire. If any such circumstance is shown to have existed, claimant might then have good cause for filing a late application for review, so long as the evidence shows that she filed her application for review within a reasonable time after these circumstances ended.<sup>1</sup> Additional evidence is necessary for EAB to make such a determination, however.

On remand, we direct the ALJ to conduct a hearing to inquire why claimant may have failed to receive the hearings decisions soon after they were mailed, and why she may therefore have failed to respond to the appellant questionnaires within 14 days of the date on which these decisions were mailed. If the ALJ determines that claimant had good cause for failing to timely respond to the appellant questionnaires (i.e., if she were not provided with notice consistent with principles of due process), then the ALJ must vacate Hearing Decisions 15-UI-34001 and 15-UI-34080, and determine whether claimant had good cause for filing late hearing requests under OAR 471-040-0010 (February 10, 2012). If the ALJ finds good cause for these late hearing requests, then the ALJ must conduct a hearing on the merits of claimant's hearing requests. If the ALJ determines that no circumstances beyond claimant's reasonable control prevented her from timely responding to the appellant questionnaires, the ALJ should so rule and prepare findings of fact to support this ruling. These findings of fact and ruling will be returned to EAB, and EAB will then consider the applications for review.

**DECISION:** In accordance with ORS 657.275, these matters are remanded to conduct hearings to obtain additional evidence.

Susan Rossiter and J. S. Cromwell

**DATE of Service:** October 6, 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,

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<sup>1</sup> In her application for review, claimant discussed some of the problems she encountered in attempting to address matters that occurred 8 years ago; she did so in such a sarcastic manner, however, that we could discern no reasonable explanation for her failure to timely respond to the appellant questionnaires. Given this record, it is understandable why claimant is upset about the way in which these matters were processed. A straightforward explanation of why she failed to timely respond to the questionnaires will be the most helpful evidence claimant can provide to the ALJ on remand.

Oregon 97310 or visit the Court of Appeals website at [courts.oregon.gov](http://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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