

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1388

Affirmed
Ineligible

PROCEDURAL HISTORY: On August 12, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work from June 14, 2015 to August 1, 2015 (decision # 75345). On September 1, 2015, decision # 75345 became final without a request for hearing having been filed. On October 2, 2015, claimant filed a late request for hearing. On November 2, 2015, ALJ Vincent conducted a hearing, and on November 10, 2015 issued Hearing Decision 15-UI-47474, concluding that claimant filed a timely request for hearing, and that claimant had good cause for filing a late request for hearing, and affirming decision # 75345. On November 24, 2015, claimant filed a timely application for review with the Employment Appeals Board (EAB).

In Hearing Decision 15-UI-47474, the ALJ found as fact that claimant filed his request for hearing on October 6, 2015, but also found that to be timely, claimant's request for hearing needed to have been filed on or before September 1, 2015.¹ The ALJ concluded without explanation that claimant's "request for hearing was filed in a timely manner," and, in his opinion, reasoned, "The administrative law judge took evidence on the matter at issue without addressing the late hearing request. The claimant has therefore shown that the failure to request a hearing within 20 days was due to a circumstance beyond his reasonable control, and filed a hearing request within a reasonable time after the circumstances that prevented a timely filing ceased to exist."²

¹ Hearing Decision 15-UI-47474 at 1.

² *Id.* at 2.

The ALJ erred in several respects. First, claimant did not file his request for hearing on October 6, 2015. That is the date the Office of Administrative Hearings (OAH) received claimant's hearing request. However claimant filed his request for hearing by mail, and the file date for a request for hearing filed by mail is the postmark date affixed to the envelope in which the request was mailed.³ The postmark date on the envelope in which claimant filed his request for hearing was October 2, 2015, making that the correct filing date in this matter. Second, ALJs' decisions "shall be based upon the evidence in the hearing record." OAR 471-040-0030(2) (August 1, 20014). ALJs' decisions are also required to have "[c]onclusions based upon the findings of fact." OAR 471-040-0030(3)(e). However, the ALJ's conclusion that claimant filed a timely request for hearing contradicted his conclusion that claimant had "shown" good cause for a late filing, and the conclusion that claimant had good cause for filing a late request for hearing was not supported by any evidence in the hearing record or the ALJ's findings. Third, and finally, the ALJ exceeded his statutory authority by conducting the hearing on the merits of decision # 75345 without first having determined whether or not claimant had good cause for filing his request for hearing over a month after the deadline for doing so had expired.

It appears likely that the ALJ failed to take evidence on claimant's late request for hearing due to administrative error combined with oversight on his part. However, the ALJ compounded his error by purporting to make findings or draw conclusions without any evidence in the record to support them. Although the ALJ exceeded his statutory authority by conducting a hearing without first determining that claimant had shown good cause to extend the time allowed for filing, we have consistently held that to deny claimant a determination on the merits after a hearing has been conducted constitutes a denial of due process.⁴ By conducting a hearing on the merits of the administrative decision, the ALJ mooted the issue of whether claimant's late request for hearing should be allowed, and we decline to address that issue further. We also note that no adversely affected party has requested review of the portion of the ALJ's decision allowing claimant's late request for hearing. For those reasons, we confine our review to the issue of whether claimant actively sought work during the weeks at issue.

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the hearing decision under review is **adopted** as modified herein.

DECISION: Hearing Decision 15-UI-47474 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: December 1, 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.

³ OAR 471-040-0005(4)(b) (July 14, 2011).

⁴ See *Darrel L. Scudder* (Employment Appeals Board, 10-AB-3722, December 3, 2010) (so stating).

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