

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0007

Request for Reconsideration Granted
Eligible Weeks 18-15 through 46-15
Overpayment Not Assessed

PROCEDURAL HISTORY: On August 12, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision (# 155260) concluding that claimant was not available for work from May 3 through August 8, 2015 (weeks 18-15 through 31-15). Claimant filed a timely request for hearing. On September 24, 2015, ALJ Wyatt conducted a hearing and on September 28, 2015, issued Hearing Decision 15-UI-44966, concluding that claimant was not available for work from May 3 through September 19, 2015 (weeks 18-15 through 37-15). Claimant filed a timely application for review of Hearing Decision 15-UI-44966 with the Employment Appeals Board (EAB). On October 21, 2015, EAB issued Appeals Board Decision 2015-EAB-1184 affirming Hearing Decision 15-UI-44966.

On October 23, 2015, the Department served notice of an administrative decision (# 124406), concluding that claimant was not available for work from September 20 through October 17, 2015 (weeks 38-15 through 41-15). Claimant filed a timely request for hearing. On November 19, 2015, ALJ Logan conducted a hearing and on November 20, 2015, issued Hearing Decision 15-UI-48098, concluding that claimant was not available for work from September 20 through November 14, 2015 (weeks 38-15 through 45-15). Claimant filed a timely application for review of Hearing Decision 15-UI-48098 with EAB.

On November 24, 2015, the Department issued two decisions: decision # 140303 concluded that claimant was not able to work from November 15 through November 21, 2015 (week 46-15), and decision # 112165 concluded that claimant was overpaid benefits in the amount of \$4,305, based on Appeals Board Decision 2015-EAB-1184. Claimant filed timely hearing requests. On December 7, 2015, EAB issued Appeals Board Decision 2015-EAB-1395, reversing and remanding Hearing Decision 15-UI-48098 (the decision concerning claimant's availability for work during weeks 38-15 through 45-15) for further development of the record.

On December 28, 2015, ALJ Holmes-Swanson conducted a combined hearing on claimant's hearing requests concerning decisions # 140303, the decision concerning claimant's ability to work during week 46-15; and the matter remanded by EAB, concerning claimant's availability for work from September 20 through November 14, 2015 (weeks 38-15 through 45-15). On December 30, 2015, ALJ Holmes-Swanson issued the following hearing decisions: Hearing Decision 15-UI-50266 concluded that claimant was available for work from November 15 through 21, 2015 (week 46-15) and not actively seeking work from November 22 through 28, 2015 (week 47-15); and Hearing Decision 15-UI-50271 concluded that claimant was available for work from September 20 through November 14, 2015 (weeks 38-15 through 45-15).

Also on December 28, 2015, ALJ Holmes-Swanson conducted a hearing and on December 30, 2015, issued Hearing Decision 15-UI-50253, affirming decision # 112165 and concluding that claimant was overpaid benefits in the amount of \$4,305. Claimant filed timely applications for review of all three hearing decisions issued on December 30, 2015.

On January 5, 2016, the Department filed a request for reconsideration of Appeals Board Decision 2015-EAB-1184.

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

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its reconsideration of Appeals Board Decision 2015-EAB-1184, and its review of Hearing Decisions 15-UI-50266, 15-UI-50253, and 15-UI-50271. For case-tracking purposes, this decision is being issued in quadruplicate (EAB Decisions 2015-EAB-1184-R, 2015-EAB-0007, 2015-EAB-0008, and 2015-EAB-0014).

FINDINGS OF FACT: (1) On May 6, 2015, claimant filed an initial claim for unemployment insurance benefits. A weekly benefit amount of \$400 was established.

(2) Claimant claimed benefits for the weeks from May 3 through November 28, 2015 (weeks 18-15 through 47-15), the weeks at issue. For the period from May 10, 2015 through August 8, 2015 (weeks 19-15 through 31-15), the Department paid claimant unemployment benefits in the amount of \$4,305.

(3) During weeks 18-15 through 47-15, claimant sought work as a cashier, stock clerk, and in retail sales. Claimant's labor market is Lebanon, Oregon. The usual hours and days customary for the work claimant sought was 8:00 a.m. to 10:00 p.m., all days of the week. Claimant was available for work in Lebanon during all of the weeks at issue.

(4) During week 48-15, claimant did not perform any work seeking activities.

CONCLUSION AND REASONS: On reconsideration, Appeals Board Decision 2015-EAB-1184 is reversed, Hearing Decision 15-UI-50266 is adopted, and claimant's application for review of Hearing Decision 15-UI-50271 is dismissed as presenting no justiciable controversy. We therefore conclude that claimant was available for work from May 3 through November 21, 2015 (weeks 18-15 through 46-15) and that claimant did not actively seek work from November 22 through 28, 2015 (week 47-15).

Hearing Decision 15-UI-50253 is reversed, and we conclude that claimant was not overpaid unemployment benefits.

Reconsideration of Appeals Board Decision 2015-EAB-1184

ORS 657.290(3) provides that EAB may, "upon its own motion or upon application of any party in interest," and "irrespective of whether it has become final," reconsider any previous decision to correct an error of fact or law. The Department requested reconsideration in this matter to correct an error of material fact and the conclusions EAB drew from those facts in Appeals Board Decision 2015-EAB-1184. OAR 471-041-0145(1) (October 29, 2006).¹

In Appeals Board Decisions 2015-EAB-1184, EAB agreed with the ALJ's conclusion that claimant was unavailable for work during weeks 18-15 through 37-15 because, due to a lack of transportation, she was not capable of accepting and reporting for all suitable work opportunities within her labor market as required by OAR 471-030-0036(3)(February 23, 2015). This conclusion was based on evidence provided by a Department representative, who testified at the September 24, 2015 hearing that claimant's labor market was Lebanon, Albany and Sweet Home, Oregon. The Department subsequently determined that this definition of claimant's labor market was erroneous; at the December 28, 2015 hearing, a Department representative testified that claimant's labor market was Lebanon and the record was devoid of any evidence that claimant was unavailable for all suitable work opportunities in this labor market during all weeks at issue. We therefore reverse Appeals Board Decision 2015-EAB-1184 to correct this factual error and conclude that claimant was available for work from May 3, through September 19, 2015 (weeks 18-15 through 37-15).

Claimant's Application for Review of Hearing Decision 15-UI-50271

Upon review of Hearing Decision 15-UI-50271, we determined that this decision was in claimant's favor. We conclude that the application for review of this decision presents no justiciable controversy and should therefore be dismissed. Hearing Decision 15-UI-50271, which concluded that claimant was available for work from September 20 through November 14, 2015, 2015 (weeks 38-15 through 45-15) remains undisturbed.

Review of Hearing Decision 15-UI-50266

EAB reviewed the entire hearing record in this case. On *de novo* review and pursuant to ORS 657.275(2), the hearing decision under review – which concluded that claimant was available for work from November 15 through 21, 2015 (week 46-15) and that claimant did not actively seek work from November 22 through 28, 2015 (week 47-15) – is adopted.

¹ OAR 471-041-0145(2) provides that requests for reconsideration filed by parties more than 20 days after the decision sought to be reconsidered is mailed are subject to dismissal. In this case, the Department's request for reconsideration was filed late, and, therefore, must be dismissed. However, because the Department's request identified an error of material fact that must be corrected, EAB will exercise its discretion under ORS 657.290(3) to reconsider this matter on its own motion.

Review of Hearing Decision 15-UI-50253

In Hearing Decision 15-UI-50253, the ALJ concluded that claimant was overpaid unemployment benefits in the amount of \$4,305 during weeks 19-15 through 31-15. The ALJ's decision was based on Appeals Board Decision 2015-EAB-1184, which found that claimant was ineligible for unemployment benefits because she was not available for work during weeks 18-15 through 37-15, the weeks at issue. As discussed above, EAB has reconsidered this decision and concluded that claimant was available for work during the weeks at issue. Because claimant was eligible to receive unemployment benefits during weeks 18-15 through 37-15, she was not overpaid benefits that she is must repay to the Department. We therefore reverse Hearing Decision 15-UI-50253.

DECISION: On reconsideration, Appeals Board Decision 2015-EAB-1184 is reversed. The application for review of Hearing Decision 15-UI-50271 is dismissed, and this hearing decision remains undisturbed. Hearing Decision 15-UI-50266 is affirmed. Hearing Decision 15-UI-50253 is set aside, as outlined above.²

Susan Rossiter and J. S. Cromwell

DATE of Service: January 7, 2016

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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² To any extent this decision reverses a hearing decision that denied benefits, please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.