

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0679

Reversed & Remanded

PROCEDURAL HISTORY: On May 11, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$3,154 overpayment, \$946.20 monetary penalty and 23 penalty weeks (decision # 200563). On June 1, 2015, decision # 200563 became final without claimant having filed a timely request for hearing. On February 5, 2016, claimant filed a late request for hearing by fax. On February 10, 2016, ALJ Kangas issued Hearing Decision 16-UI-52686, dismissing claimant's late request for hearing subject to claimant's right to renew the request by responding to an appellant questionnaire by February 24, 2016. On March 1, 2016, Hearing Decision 16-UI-52686 became final without claimant having responded to the appellant questionnaire or filed an application for review. On May 4, 2016, claimant received a letter from the United States Department of the Treasury notifying her that her federal tax refund had been applied to her outstanding debt with the Department. On May 13, 2016, claimant responded to the appellant questionnaire attached to Hearing Decision 16-UI-52686. On May 19, 2016, ALJ Kangas reviewed claimant's response and issued Hearing Decision 16-IU-59991, re-dismissing claimant's late request for hearing. On June 8, 2016, claimant filed an application for review of Hearing Decision 16-IU-59991 with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. See ORS 657.275(2).

FINDINGS OF FACT: (1) Claimant continuously claimed unemployment insurance benefits until March 14, 2015. Effective March 15, 2015, claimant stopped filing weekly claims for unemployment

insurance benefits.¹ Thereafter, claimant did not have regular contact with or engage in business with the Department, and did not keep the Department informed of her mailing address.

(2) The Department mailed notice of its May 11, 2015 decision to claimant at 1055 Lockhaven Drive NE #36 in Keizer, Oregon. On December 1, 2015, claimant changed her address with the Department to PO Box 334 in Arlington, Oregon.²

(3) On claimant's February 5, 2016 hearing request, claimant provided the Office of Administrative Hearings (OAH) with new address, 1000 Wilsonville Road #105 in Newberg, Oregon. OAH mailed notice of its February 20, 2016 decision to claimant's previous address, PO Box 334 in Arlington. On April 19, 2016, the US Postal Service returned claimant's copy of the decision stamped "Return to Sender[,] Vacant[,] Unable to Forward."³

(4) Some time after receiving notice that her federal tax refund had been applied to her debt with the Department on May 4, 2016, and before she filed her response to the appellant questionnaire attached to Hearing Decision 16-UI-52686, claimant received a copy of Hearing Decision 16-UI-52686 and the questionnaire. In her response to the questionnaire, claimant noted that OAH "got my paperwork for request Feb 5th," and that she "gave you my new # and address and it got sent to old address." In response to questions about meeting deadlines, claimant asserted that she met them.⁴

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-59991 should be reversed, and this matter remanded for additional proceedings.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986).

¹ We take notice of the facts in this paragraph, which are contained in Employment Department records. Those records consist of a screenshot showing the last weeks claimant claimed benefits during her BYE 42-15 claim, which has been marked as EAB Exhibit 1. A copy of EAB Exhibit 1 is attached to the copies of this decision that were mailed to the parties. Any party that objects to our taking notice of these facts 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.

² We take notice of this fact, which is contained in Department records. The record consists of a screenshot showing the claimant's December 2015 address change with the Department, and has been marked as EAB Exhibit 2. A copy of EAB Exhibit 2 is attached to the copies of this decision that were mailed to the parties. Any party that objects to our taking notice of these facts 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 2.

³ DR Exhibit 4.

⁴ DR Exhibit 3.

At all relevant times hereto, claimant was not claiming unemployment insurance benefits. In fact, at the time the Department issued decision # 200563, claimant had not filed a weekly claim for benefits or had business with the Department for more than two months, nor does it appear that she had contact with the Department for the following seven months. As such, claimant had no reason to expect to receive mail from the Department regarding her claim, and was under no obligation to keep the Department informed of her current contact information. When claimant requested a hearing approximately 9 months after the Department issued decision # 200563, OAH overlooked the new mailing address claimant had provided and directed claimant's questionnaire to an old, invalid address. As a result, claimant did not receive the questionnaire; the US Postal Service did not return it to OAH until more than two months had passed.

Several months after the deadline for responding to the questionnaire expired, claimant received and responded to the questionnaire. The ALJ allowed claimant's late response to the questionnaire, reasoning that OAH's error in sending the questionnaire to the wrong address prevented claimant's timely filing.⁵ The ALJ then denied claimant's late request for hearing, reasoning,

The appellant believes she filed her appeal on time. However, an appeal of the administrative decision was due on June 1, 2015. Appellant faxed, and the OAH received, her appeal on February 5, 2016. The appellant did not provide any information, nor is there any of record, that she filed her appeal prior to February 5, 2016. * * * The appellant did not provide any information that she was prevented from filing her appeal on or before June 1, 2015. Hence, no good cause for the late request has been shown.⁶

We disagree that the record supports the ALJ's conclusion. The information claimant provided on her appellant questionnaire is ambiguous, but supports a reasonable inference that, when answering the questions on the questionnaire, claimant was referring to a combination of her February 5, 2016 request for hearing and the timeliness of her response to the appellant questionnaire. Given the totality of the circumstances in this case, including that claimant had not claimed benefits in over two months at the time decision # 200563 was issued, changed her address with the Department after it was issued, changed her address with OAH when she requested a hearing, was subjected to misdirected mail through no fault of her own, she was apparently, and reasonably, confused over which "hearing request" or "appeal" she was meant to explain when responding to the questionnaire. In this instance and because of circumstances unique to this case, claimant should not lose her right to explain the circumstances that caused her to file a late request for hearing on decision # 200563 because of confusion resulting from circumstances that were outside her control. For those reasons, we conclude that the record on review does not support any conclusion as to whether claimant had good cause for filing a late request for hearing on decision # 200563, and the ALJ was obligated under ORS 657.270(3) to exercise her discretion to hold a hearing on that issue. *See* OAR 471-040-0010(5). Hearing Decision 16-UI-59991 is, therefore, reversed, and this matter is remanded for development of the record.

The parties should note that the primary issue before the ALJ on remand is whether claimant's request for hearing on decision # 200563 was late, and, if so, whether she had good cause to extend the filing deadline a reasonable time. If the ALJ determines claimant's request for hearing should be allowed, the next issue is decision # 200563, which concluded that claimant was overpaid and subject to penalties.

⁵ The ALJ did not cite to any law or rule allowing the ALJ's exercise of jurisdiction over this matter.

⁶ Hearing Decision 16-UI-59991 at 3.

We note that claimant's availability for work between October 26, 2014 to March 14, 2015 during her medical leave from YMCA is *not*, as claimant suggested in her written argument to EAB, at issue in this case. The Department's decision finding claimant was not available for work became final on May 28, 2015, and Department records show no indication that claimant has ever requested a hearing on that decision.

DECISION: Hearing Decision 16-UI-59991 is set aside, and this matter remanded for further proceedings consistent with this order.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-59991 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

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

DATE of Service: June 10, 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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