

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0906

Affirmed
Request to Reopen Denied

PROCEDURAL HISTORY: On May 26, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available or able to work between May 1, 2016 and May 21, 2016 (decision # 165003). On approximately May 30, 2016, claimant filed a timely request for hearing. On June 14, 2016, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for June 27, 2016 to her address of record. On June 27, 2016, claimant failed to appear for the hearing, and on June 28, 2016, ALJ Holmes-Swanson issued Hearing Decision 16-UI-62641, dismissing claimant's request for hearing for failure to appear. On July 5, 2016, claimant filed a request to reopen the June 27th hearing. On July 12, 2016, OAH mailed notice of a hearing scheduled for July 27, 2016. On July 27, 2016, ALJ R. Frank conducted a hearing, and on July 29, 2016 issued Hearing Decision 16-UI-64714, denying claimant's request to reopen. On August 2, 2016, claimant filed an application for review of Hearing Decision 16-UI-64714 with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) In late May 2016, claimant was waiting to receive information about entering a residential treatment program out of state.

(2) On May 30, 2016, claimant signed the request for hearing form to request a hearing on decision # 165003. The form included a section that stated, "Following are the dates in the next 60 days that I am **NOT** available: _____." (Emphasis in original.) Claimant left that section blank. Claimant mailed the form to OAH on May 30th or within a couple of days of signing the form.

(3) On May 31, 2016 or June 1, 2016, claimant received the information she had been waiting for from the residential treatment program. She understood at that point that she would fly to the location of the treatment program and enter treatment on June 2, 2016. Claimant understood that she would be in treatment for 30 days.

(4) On June 2, 2016 claimant entered the residential treatment program. The treatment program limited claimant's access to the phone and computer, except for a brief period at the beginning of treatment. On

or about June 6, 2016, claimant used the program's phone to contact her employer and insurance carrier, and to file a claim for unemployment insurance benefits for the preceding week. She did not notify OAH or the Department at any point in time that she had left the state or would be unavailable for a hearing during the period of time she was in her residential treatment program.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's request to reopen should be denied.

ORS 657.270(5) provides that any party may file a request to reopen the hearing, and it may be allowed if the requesting party failed to appear at the hearing, files the request within 20 days of the date the hearing decision was issued, and shows good cause for failing to appear. OAR 471-040-0040 (February 10, 2012) defines "good cause" as follows:

(2) "Good cause" exists when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant's reasonable control.

(a) Good cause includes but is not limited to:

(A) Failure to receive a document because the Employment Department or Office of Administrative hearings mailed it to an incorrect address despite having the correct address;

(B) For telephone hearings, unanticipated, and not reasonably foreseeable, loss of telephone service.

(b) Good cause does not include:

(A) Failure to receive a document due to not notifying the Employment Department or Office of Administrative Hearings of an updated address while the person is claiming benefits or if the person knows, or reasonably should know, of a pending appeal;

(B) Not understanding the implications of a decision or notice when it is received.

Claimant missed the hearing in this matter because, within a day or two after requesting the hearing, she traveled out of state to participate in a 30-day residential treatment program. Claimant argued that the residential treatment program restricted her access to phones and computers, leaving her unable to communicate with OAH or the Department while she was in treatment. The ALJ specifically found her to lack credibility on that point, but, assuming for the sake of argument that claimant was correct, it is not determinative of the good cause issue. At the time claimant filed her request for hearing in this matter, before she left for treatment, she was anticipating that she was going to leave to travel out of state to enter a 30-day residential treatment program. She did not plan or arrange to have her mail forwarded to her or monitored by someone else who could attend to her important business while she was absent, although she knew she would not be attending to her mail during that time. She knew she was not going to be able to communicate with the Department or OAH while in treatment. Nevertheless, when she requested a hearing only a day or two before leaving for treatment, she left the form blank as to the days or period of time she would be unavailable for a hearing, and she did not

notify OAH when she left for treatment. The record fails to show that contacting OAH or the Department about her unavailability for a hearing was outside her reasonable control, or that she failed to do so she was mistaken about anything.

Claimant also argued that she did not report her unavailability for a hearing at the time she requested it because, in essence, she was uncertain at that point when she would be leaving for treatment. It is irrelevant that claimant did not know when her hearing would be scheduled, however, because she had notice of her own unavailability. She knew based on the request for hearing form she filled out that OAH wanted to know the dates within the next 60 days she would be unavailable. Although claimant might not have known on May 30th when she signed her request for hearing form, she found out when her treatment program was to begin on May 31st or June 1st, almost immediately after requesting the hearing. On or about June 6th, she received special permission from the treatment program to use the phone, in part to claim a week of unemployment insurance benefits. Given that claimant knew her treatment schedule at least a couple of days in advance, and had another opportunity on June 5th to attend to personal business related to her unemployment insurance claim and hearing request, claimant did not show that her failure to do so arose from an excusable mistake or factors beyond her reasonable control.

Finally, claimant's situation is analogous to that described in OAR 471-040-0040(2)(b)(A), which says, in context, that an individual who failed to attend a hearing because she did not receive notice of a hearing, and failed to receive notice of the hearing because she failed to keep the Department or OAH notified of her correct address "while the person is claiming benefits or if the person knows, or reasonably should know, of a pending appeal," does *not* have good cause to reopen the hearing. Although claimant was only temporarily absent from her regular address, claimant did not receive notice of the hearing in this matter because she did not notify OAH that she would be unavailable for a hearing for a protracted period during a time when she was actively claiming benefits and knew, as she had just requested it, that an appeal was pending in her case.

Claimant did not have good cause to reopen the hearing because she did not establish that an excusable mistake or circumstances beyond her reasonable control prevented her from attending the hearing, and because the reason she missed the hearing was specifically excluded from the definition of good cause. Claimant's request to reopen the hearing is, therefore, denied.

DECISION: Hearing Decision 16-UI-64714 is affirmed.

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

DATE of Service: August 5, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.