

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0941

Reversed & Remanded

PROCEDURAL HISTORY: On May 20, 2016, the Oregon Employment Department (the Department) served notice of two administrative decisions: decision # 80648 concluded that claimant did not actively seek work from March 13 through April 9, 2016 (weeks 11-16 through 15-16), and decision # 83034 concluded that claimant did not actively seek work from May 1 through May 14, 2016 (weeks 18-16 and 19-16). On June 9, 2016, these administrative decisions became final, without requests for hearing having been filed. On June 21, 2016 the Department served notice of a decision (decision # 131618) concluding that claimant was overpaid \$1,937 in unemployment benefits, based on the May 20 decisions. On July 11, 2016, decision # 131618 became final without a request for hearing having been filed. On July 27, 2016, claimant submitted a request for hearing to the Office of Administrative Hearings (OAH).

On August 2, 2016, ALJ Kangas issued Hearing Decision 16-UI-74882, dismissing claimant's request for hearing on decision # 131618 as untimely. On August 11, 2016, claimant filed an application for review of Hearing Decision 16-UI-74882 with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Claimant stopped claiming unemployment benefits on May 17, 2016; on that date, he filed a claim for the week of May 8 through 14, 2016 (week 19-16).¹

(2) Claimant lives in Welches, Oregon, an area in which mail is not delivered to individual homes. Claimant picks up his mail from a post office box, which he does not check on a regular basis.

(3) On July 27, 2016, claimant submitted a letter in which he requested "a hearing to appeal the Administrative Decision that was made regarding claimant Philip G. Dodge." Claimant explained that because he "had no reason to expect a letter from the Oregon Employment Department, I did not receive

¹ We take official notice of this fact which is contained in Department records. OAR 471-0041-0090(3) (October 29, 2006). Any party that objects to our taking notice of this fact must submit its objections to this office in writing, setting forth the basis of the objection, within 10 days of the date on which this decision is mailed. Unless such an objection is received, the noticed fact will remain part of the record.

the letter until July 20, 2016.” Claimant included a copy of decision # 131618 with his letter. DR Exhibit 2.

CONCLUSION AND REASONS: Hearing Decision 16-UI-64882 is set aside, and this matter remanded to the ALJ to conduct a hearing to determine whether claimant had good cause for filing a late request for hearing on the Department’s May 20, 2016 and June 21, 2016 decisions. If the ALJ determines that claimant had good cause for his untimely hearing request, the ALJ must then determine if the hearing request was filed within a reasonable time.

NATURE OF CLAIMANT’S HEARING REQUEST: OAR 471-040-0005(1) (July 14, 2011) provides that a request for hearing on an administrative decision need not be filed on a Department form “provided the party specifically requests a hearing or otherwise expresses a present intent to appeal.” OAH construed claimant’s July 27 letter to be a request for hearing *only* on decision # 131618, the overpayment decision, and not a request for hearing on the May 20, 2016 decisions concerning claimant’s failure to actively search for work.

Claimant’s July 27 letter does not specify that claimant only wishes to appeal, *i.e.*, request a hearing, on the overpayment decision. In the written argument he submitted to EAB, claimant stated that he is writing “in regards to your decision to deny my request for hearing,” and provides evidence and argument to demonstrate that he was not required to perform a job search in 2016, when “I got laid off and applied for unemployment.” Based on the totality of these circumstances, we conclude that claimant’s July 27 letter expressed “a present intent to appeal” both the May 20 decisions concerning his failure to actively search for work and the June 21 decision assessing an overpayment. On remand, OAH is directed the process the July 27 letter as a request for hearing on all three decisions.

TIMELINESS OF CLAIMANT’S HEARING REQUEST: ORS 657.269 provides that an individual has 20 days after the date an administrative decision is mailed to request a hearing. ORS 657.875 provides that this deadline may be extended a reasonable time upon a showing of good cause. OAR 471-040-0010 (February 10, 2012) defines “good cause” as an excusable mistake or factors beyond an individual’s reasonable control, and “reasonable time” as seven days from the date the circumstances that prevented a timely filing ceased to exist.

In Hearing Decision 16-UI-74882, the ALJ found that claimant’s failure to file a late hearing request occurred “because he does not check his postal box on a regular basis for mail.” Hearing Decision 16-UI-74882 at 2. Because the ALJ also found that it was within claimant’s reasonable control to regularly check his mail, she concluded he did not show that an excusable mistake or factors beyond his reasonable control caused the late filing and dismissed his hearing request. *Id.* The record shows, however, that at the time the Department issued the hearing decisions at issue – on May 20 and June 21, 2016 – claimant was no longer filing weekly claims for unemployment benefits. This evidence suggests the possibility that claimant’s failure to check his mail may have resulted from an excusable mistake – a belief that he no longer needed to maintain contact with the Department because he was no longer claiming benefits. Further development of the record is needed to determine whether claimant’s untimely hearing request resulted from an excusable mistake and, if so, whether he filed his hearing request within a reasonable time after the circumstances that prevented a timely filing ceased to exist.

On remand, the ALJ must ask claimant when he decided to stop filing weekly claims for unemployment benefits, and whether he expected to receive mail from the Department once he stopped claiming. The ALJ should inquire whether claimant received mail from the Department during the period he was claiming benefits, and how he communicated with or contacted the Department during this period. The ALJ must ask claimant how often he checked his post office box when he was claiming unemployment benefits and after he stopped claiming, on what date(s) claimant collected the May 20 and June 21 Department decisions from his post office box, and on what date he understood that he had been denied benefits or otherwise realized that he disagreed with the decisions. The ALJ should ask any other questions necessary to determine whether claimant's untimely hearing request was caused by an excusable mistake or circumstances beyond his reasonable control, and whether claimant filed his hearing requests within a reasonable time after the circumstances that prevented a timely filing ceased to exist.

ORS 657.270 requires that an ALJ 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). Hearing Decision 16-UI-74882 is reversed and this matter remanded so that the ALJ can develop a record necessary to determine whether claimant had good cause for failing to timely file a hearing request on the Department's May 20 and June 21, 2016 decisions, and if he did, whether this request was filed within a reasonable time.

DECISION: Hearing Decision 16-UI-64882 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: September 26, 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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