

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1050

Affirmed
Late Request for Hearing Dismissed

PROCEDURAL HISTORY: On December 1, 2011, the Oregon Employment Department (the Department) served notice of an administrative decision assessing an \$18,818 overpayment, \$2,822.70 monetary penalty and 52 penalty weeks (hereinafter, "the overpayment decision"). On December 21, 2011, the overpayment decision became final without claimant having filed a timely request for hearing. On August 2, 2016, claimant filed a late request for hearing. On August 9, 2016, ALJ Kangas issued Hearing Decision 16-UI-65241 dismissing claimant's late request for hearing subject to her right to renew the request by responding to an appellant questionnaire by August 23, 2016. On August 17, 2016, the Office of Administrative Hearings (OAH) received her response. On August 19, 2016, OAH mailed a letter stating that Hearing Decision 16-UI-65241 was canceled, and mailed notice of a hearing scheduled for September 6, 2016. On September 6, 2016, ALJ M. Davis conducted a hearing, and on September 7, 2016 issued Hearing Decision 16-UI-66983, dismissing claimant's late request for hearing. On September 12, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Between November 2011 and early January 2012, claimant's address of record with the Department was on Needhams Court in Ellenwood, Georgia.

(2) In November 2011, claimant moved from that address to Nashville, Tennessee. She was continuously claiming benefits at the time.¹ She did not notify the Department that she had moved, and did not change her address of record with the Department.

¹ Claimant stated during the hearing that she was not claiming benefits in November and December 2011, but Department records show that claimant was in fact in continuous claim status through December 17, 2011. Employment Department records documenting the weeks claimant claimed unemployment insurance benefits during the period at issue as referenced in findings of fact (1) through (4) are hereby admitted into evidence. OAR 471-041-0090 (October 29, 2006). Any party that objects to our doing so 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. Unless such objection is received and sustained, the noticed fact will remain in the record as EAB Exhibit 1.

(3) On December 1, 2011, the Department mailed notice of the overpayment decision to claimant at her address of record in Ellenwood, Georgia. Because claimant had moved to Tennessee without changing her address with the Department she did not receive notice of the overpayment decision, and it was later returned to the Department as undeliverable.

(4) Claimant claimed benefits with the Department during all the weeks surrounding December 1, 2011 and was in continuous claim status through the week ending December 17, 2011. After a short break in reporting, claimant filed claims for benefits for the remainder of 2011 and the first week of 2012. At no time during that period, late November through early January 2012, throughout which claimant was actively claiming benefits, did claimant notify the Department that her address of record had changed.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's late request for hearing should be dismissed.

ORS 657.269 requires that parties file requests for hearing within 20 days after the date the decisions were mailed. In order to be timely, claimant's request for hearing in this matter had to be filed no later than December 21, 2011. Claimant filed it on August 2, 2016, making the request over four years late. ORS 657.875 allows the filing deadline to be extended a "reasonable time" upon a showing of "good cause." OAR 471-040-0010(1) defines "good cause" as factors or circumstances beyond an individual's reasonable control or an excusable mistake, but specifically excludes from the definition of "good cause" "[f]ailure to receive a document due to not notifying the Employment Department . . . of an updated address while the person is claiming benefits . . ." OAR 471-040-0010(1)(b)(A) (February 10, 2012).²

The principal reason claimant did not file a timely request for hearing in this matter was that she did not receive notice of the overpayment decision. She did not receive notice of the overpayment decision because she moved from her address of record in November 2011 and, although she was continuously claiming benefits between November and mid-December 2011, she did not notify the Department of her updated address. Those circumstances that prevented claimant from filing a timely request for hearing, and caused her to file a late one, are specifically excluded from the definition of good cause recited above. We must therefore conclude that claimant did not establish good cause for her late request for hearing, and her request must be dismissed. Claimant is not entitled to a hearing on the merits of the overpayment decision.

We note that claimant argued at the hearing that her request for hearing should be allowed because during the years following the issuance of the overpayment decision she was repeatedly told by Department staff that she was not allowed to appeal the overpayment decision. Claimant's argument is essence, an argument that because the Department prevented her from requesting a hearing before

Claimant also stated, and may have meant, that she was not receiving benefits in November and December 2011. Claimant is correct. Although Department records show that although claimant was filing weekly claims for benefits, those records also show that the Department did not pay benefits to claimant between August 2011 and January 2012. (*See* Exhibit EAB 1, showing claimant claimed, but was not paid, benefits between October 2011 and January 2012.)

² The version of the rule applicable to this case was adopted after the events at issue occurred. OAR 471-040-0010(6) provides that the version of the rule applied "is effective for all hearing requests filed on or after August 26, 2011." Claimant's request for hearing was filed in August 2016, and, therefore, the cited version of the rule is applicable to this case.

August 2nd it should be estopped from denying her request for a hearing on the basis that her August 2nd filing was too late. As a preliminary note, any advice or statements given to claimant barring her from requesting a hearing on the overpayment decision was incorrect. However, we are unable to confirm or resolve the validity of claimant's allegation based on evidence in this record. Claimant's testimony about what Department employees told her lacked sufficient detail about the dates, the individuals or position titles involved, and context of the statements she alleged occurred. On the other hand, the absence of available Department records supporting claimant's allegations is not dispositive of the issue unless it is accompanied by evidence that the absence of evidence proves that the allegations are false, for example, evidence suggesting that every detail of each of claimant's conversations with Department employees over an almost five-year period was documented and available for review by the Department representative while he was testifying at the hearing. Although the evidence about this issue is not sufficient to support a decision, we need not remand the case for additional evidence. Evidence about barriers to claimant's appeal of the overpayment decision between 2012 and 2016 goes to the issue of whether claimant filed her August 2, 2016 late request for hearing within a "reasonable time" or was prevented from filing it within a reasonable time. Because we have already concluded that claimant did not have "good cause" to extend the filing period, and claimant must prove *both* that she had "good cause" *and* that she acted in a "reasonable time," it is unnecessary to resolve the "reasonable time" issue.

Claimant requested a hearing more than four years after the 20-day filing period expired, and did not establish good cause for the late request. Claimant's late request for hearing is, therefore, denied.

DECISION: Hearing Decision 16-UI-66983 is affirmed.

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

DATE of Service: September 20, 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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