

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1114

Affirmed
Requests to Reopen Denied

PROCEDURAL HISTORY: On July 21, 2010, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 100743) concluding that claimant voluntarily left work without good cause. On July 22, 2010, the Department served notice of an administrative decision assessing a \$5,877 overpayment and 46 penalty weeks based on the voluntary quit decision. On August 4, 2010, claimant requested hearings on both decisions. On September 10, 2010, the Office of Administrative Hearings (OAH) issued notice of hearings scheduled for September 22, 2010. On September 22, 2010, ALJ Clink issued Hearing Decisions 10-UIB-24251-D and 10-UIB-24283-D, dismissing claimant's hearing requests for failure to appear. On October 12, 2010, these hearing decisions became final without requests to reopen or applications for review having been filed.

On July 7, 2016, claimant filed requests to reopen. On July 26, 2016, ALJ Kangas issued Hearing Decision 16-UI-64450, which dismissed claimant's request to reopen the hearing on the decision # 100743 as untimely, and Hearing Decision 16-UI-64453, which dismissed claimant's request to reopen the hearing on the overpayment decision as untimely. On August 10, 2016, claimant filed applications for review with the Employment Appeals Board (EAB).

On August 11, 2016, EAB issued Appeals Board Decisions 2016-EAB-0930 and 2016-EAB-0932, reversing and remanding the hearing decisions at issue for further development of the record. On September 2, 2016, ALJ Shoemake conducted hearings, and on September 9, 2016, issued Hearing Decision 16-UI-67173, which re-dismissed claimant's request to reopen the hearing on decision # 100743, and Hearing Decision 16-UI-67174, which re-dismissed claimant's request to reopen the hearing on the overpayment decision. On September 29, 2016, claimant filed applications for review of these hearing decisions with EAB.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-67173 and 16-UI-67174. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-1114 and 2016-EAB-1115).

FINDINGS OF FACT: (1) From September 2010 until March 2012, claimant was incarcerated. As a result of his incarceration, he never received hearing decision # 100743 or the administrative decision that found he had been overpaid unemployment benefits.

(2) On June 5, 2016, claimant contacted the Department to update his address and phone number, and to protest the garnishment of his wages. At that time, the Department representative told him about the hearing decisions that dismissed his request for hearings on administrative decision # 100743, and the decision finding that he had been overpaid unemployment benefits that caused the garnishment of his wages. The Department representative transferred claimant to a Department revenue agent, who assisted claimant in establishing a plan to repay the benefits he had been overpaid.

(3) On July 7, 2016, claimant filed requests to reopen his hearings on the voluntary quit and overpayment decisions. Claimant filed his reopen requests because he could not afford the financial loss caused by the Department's continued garnishment of his wages. 9/2/16 Hearing, audio recording at 23:54.

CONCLUSION AND REASONS: We agree with the ALJ, and conclude that claimant's requests to reopen must be dismissed.

An ALJ may reopen a hearing at which the party who requested the hearing failed to appear if: the party requesting the hearing requests reopening within 20 days of the date the decision dismissing the hearing request is mailed, and the party demonstrates good cause for reopening. OAR 471-040-0040(1) (February 10, 2012). The period within which a party must request reopening may be extended if the party requesting reopening demonstrates good cause for failing to file a timely reopening request, and the party "acts within a reasonable time." OAR 471-040-0041(1) (February 10, 2012). Good cause exists if the failure to act resulted from an excusable mistake or factors beyond the party's reasonable control. OAR 471-040-0041(2). "'A reasonable time' is seven days after the circumstances that prevented a timely filing ceased to exist." OAR 741-040-0041(3).

Claimant was incarcerated in September 2010, soon after he filed his August 4, 2010 requests for hearing on the administrative decisions at issue. Because he was incarcerated from September 2010 until March 2012 and absent from his address of record during that period, claimant never received notice of the September 10 hearings and never received the hearing decisions that dismissed his requests for hearing for failure to appear. Claimant's incarceration was therefore the cause of his inability to file timely requests to reopen. On August 4, 2010, the date on which claimant filed his hearing requests, claimant knew or reasonably should have known that a hearing would be scheduled. It was well within claimant's reasonable control to make arrangements to have his mail checked or forwarded to him during the time he was incarcerated so that he could remain aware of matters related to his unemployment claims and hearing requests. Claimant therefore failed to demonstrate good cause for filing untimely requests to reopen his hearings.

Even if we were to find that claimant's incarceration constituted good cause for his failure to file timely requests to reopen, we would conclude that he did not file his requests within a reasonable time after the circumstances that prevented his timely filing ceased to exist. On June 5, 2012, after his incarceration ended, claimant contacted the Department and learned about the September 2010 hearing decisions that had dismissed his requests for hearing for failure to appear. Claimant did not request that the hearings

be reopened until July 7, 2016, far more than 7 days after the circumstances that prevented his timely filing ceased to exist, *i.e.*, he learned about the hearings he had missed.

For the foregoing reasons, claimant's untimely requests to reopen the September 10, 2010 hearings are denied.

DECISION: Hearing Decisions 16-UI-67173 and 16-UI-67174 are affirmed.

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

DATE of Service: October 18, 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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