

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1133-R

On Reconsideration
Applications for Review Allowed
Hearing Decisions 14-UI-21865 and 14-UI-21866 Reversed and Remanded

PROCEDURAL HISTORY: On May 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work with Truststaff on March 30, 2013 without good cause (decision # 115716). On May 13, 2014, the Department served notice of another administrative decision, based in part on decision # 115716, assessing a \$2532.00 overpayment, \$379.80 monetary penalty and 24 penalty weeks (decision # 201684). On June 2, 2014, decisions # 115716 and 201684 became final without claimant having filed timely requests for hearing. On July 16, 2014, claimant filed untimely requests for hearing on decisions # 115716 and 201684. On July 21, 2014, ALJ Kangas issued Hearing Decision 14-UI-21866, dismissing claimant's request for hearing on decision # 115716, and Hearing Decision 14-UI-21865, dismissing claimant's request for hearing on decision # 201684, both subject to claimant's right to renew her requests by responding to an appellant questionnaire within 14 days, or August 4, 2014. On August 11, 2014, the Office of Administrative Hearings (OAH) received claimant's response. On August 13, 2014, OAH issued letters to claimant stating that her response to the appellant questionnaires were late and would not be considered. On October 3, 2016, claimant filed applications for review of Hearing Decisions 14-UI-21865 and 14-UI-21866 with the Employment Appeals Board (EAB). On October 10, 2016, EAB issued Appeals Board Decisions 2016-EAB-1133 and 2016-EAB-1134, dismissing claimant's applications for review as late. On November 10, 2016, claimant filed late requests for reconsideration of Appeals Board Decisions 2016-EAB-1133 and 2016-EAB-1134 with EAB.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 14-UI-21865 and 14-UI-21866. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-1133-R and 2016-EAB-1134-R).

This decision is issued pursuant to EAB's authority under ORS 657.290(3).

FINDINGS OF FACT: (1) On August 11, 2014, claimant faxed her appellant questionnaire responses to OAH. With her responses, claimant included signed copies of "Application for Review" forms requesting EAB review Hearing Decisions 14-UI-21865 and 14-UI-21866. The "Application for Review" forms were not recognized or processed as applications for review.

(2) On August 13, 2014, ALJ Kangas issued letters to claimant stating that OAH would not consider the information claimant provided in her appellant questionnaire responses because claimant provided the information after the 14-day deadline to provide that information had expired. The ALJ's letters stated,

This means the order mailed July 21, 2014, remains in effect. If a timely request for review of that order was filed with the Employment Appeals Board, that review process remains unaffected.

CONCLUSIONS AND REASONS: On reconsideration, claimant's October 3, 2016 applications for review are allowed and these matters remanded for development of the record.

Reconsideration. ORS 657.290(3) grants EAB the authority to reconsider its previous decisions upon its own motion or by request of any party. OAR 471-041-0145(2) provides that such motion is subject to dismissal if it does not include a statement that a copy was provided to the other parties or is filed over 20 days after the decision(s) sought to be reconsidered are mailed.

Claimant's requests for reconsideration are subject to dismissal because they did not include a statement that a copy was mailed to the other parties. Claimant's requests are also subject to dismissal because they were filed on November 10th, well over 20 days after EAB's October 10th decisions were mailed in these matters.

Upon review of the records pursuant to claimant's requests, however, EAB identified errors of material fact or law in these records that warrant reconsideration. Therefore, while claimant's request are subject to dismissal, EAB has determined it is appropriate to reconsider its decisions in these matters on its own motion. Reconsideration is, therefore, allowed.

Applications for Review. ORS 657.270(6) provides that the ALJ's decisions become final 20 days after the hearing decisions were mailed, unless a party files an application for review of the decisions with EAB. OAR 471-041-0060(1) provides that the application for review may be filed on forms provided by OAH. OAR 471-041-0060(2) provides that an application for review may be filed, among other methods, by fax to any office of the Employment Department.

In Appeals Board Decisions 2016-EAB-1133 and 2016-EAB-1134, EAB concluded that, to be timely, claimant needed to file applications for review of Hearing Decisions 14-UI-21865 and 14-UI-21866 no later than August 11, 2014, filed them on October 3, 2016 instead, and, although the deadline may be

extended under certain circumstances based on parties' written statements, claimant did not explain why she filed her applications for review over two years late and her applications were, therefore, dismissed. EAB erred in reaching those conclusions.

Further review of the records in these matters shows that claimant filed "Application for Review" forms pertaining to Hearing Decisions 14-UI-21865 and 14-UI-21866 on August 11, 2014. She filed them by faxing to OAH the forms OAH attached to those Hearing Decisions. OAH is an office of the Employment Department. ORS 183.605(1). Claimant therefore filed valid applications for review of Hearing Decisions 14-UI-21865 and 14-UI-21866 within the time period allowed. That neither OAH nor EAB, until this time, recognized claimant as having done so is not attributable to claimant. Claimant's *timely* applications for review of Hearing Decisions 14-UI-21865 and 14-UI-21866 are, therefore, allowed.

New Information, Claimant's Questionnaire Responses. This matter is therefore before EAB on claimant's applications for review of Hearing Decisions 14-UI-21865 and 14-UI-21866, which dismissed claimant's late requests for hearing on decisions # 115716 and 201684 as untimely, subject to her right to renew her requests by responding to appellant questionnaires no later than August 4, 2014. OAH received claimant's responses late and, as such, refused to consider their contents.

OAR 471-041-0090 provides that EAB may consider information that was not received into evidence during proceedings before OAH if the information was (1) offered but not received into evidence but is necessary to complete the record, or (2) is relevant and material to EAB's determination and factors or circumstances beyond the party's reasonable control prevented the party from previously offering the information into evidence.

Claimant offered the information at issue into the record, but the ALJ reviewing claimant's case refused to admit the evidence because it was received after the deadline. Because the information claimant offered is, however, the only evidence about the issue of claimant's late requests for hearing, the information is both relevant and material to EAB's determination in this matter and necessary to complete the record. The ALJ's refusal to consider the information was a circumstance outside EAB's control. We therefore conclude that claimant's new information is admissible before EAB under OAR 417-041-0090.

EAB has marked claimant's questionnaire responses (including the completed application for review forms) as Exhibit 1, her October 10, 2016 written argument to EAB as Exhibit 2, and her November 10, 2016 reconsideration request as Exhibit 3. The exhibits are hereby admitted into the record subject to the parties right to object.¹

Late Requests for Hearing. ORS 657.269(2) provides that parties have 20 days after an administrative decision was mailed to request a hearing on that decision. ORS 657.875 provides that the deadline may be extended "a reasonable time" upon a showing of "good cause." OAR 471-040-0010(1) defines good cause, in pertinent part, as an excusable mistake or factors or circumstances beyond claimant's

¹ Any party that objects to our admission of these materials into evidence 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 marked.

reasonable control. OAR 471-040-0010(3) defines “a reasonable time” as “seven days after the circumstances that prevented a timely filing ceased to exist.

Claimant’s questionnaire responses and subsequent written submissions to EAB suggest that she might not have received notice of decisions # 115716 and 201684 in May 2014 when the Department mailed them to her. There is insufficient evidence in the record upon which to base a conclusion about whether her non-receipt of the decisions amounted to good cause, however. 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).

On remand, the ALJ should inquire with claimant and any other party with relevant information as to whether claimant received the Department’s decisions when they were mailed to her in May 2014. If she did not, the ALJ should inquire about the circumstances under which she failed to receive them, and when she first received notice of them. The ALJ should also inquire about whether claimant filed her late requests for hearing in these matters within seven days of the date whatever circumstances prevented a timely filing ceased to exist, and ask any follow-up questions the ALJ deems necessary to develop a complete record on claimant’s late requests for hearing.

Scope of Hearing on Remand. In claimant’s October 10, 2016 written argument to EAB, claimant included information about the manner in which she reported her earnings when claiming benefits and about her work separation. In her November 10, 2016 correspondence, claimant reiterated some of that information and included information about the manner in which her fees and repayment have since been handled by the Department. During the hearing on remand, however, the scope of issues before the ALJ will, at least initially, include *only* the late request for hearing issue; that is, whether claimant can prove she had “good cause” to miss and extend the June 2, 2014 filing deadlines for decisions # 115716 and 201684, and whether she can prove that when she filed her late requests for hearing on July 16, 2014 it was within the 7-day “reasonable time” period after the circumstances that caused her to miss the June 2 filing deadline ceased to exist. *Only* if claimant can establish “good cause” to extend the filing period “a reasonable time” would the ALJ then have jurisdiction to hear evidence about claimant’s March 2014 work separation from Truststaff or the substantive overpayment and misrepresentation penalty issues. If claimant cannot meet that evidentiary burden as to the late requests, claimant will *not* be entitled to present evidence about the work separation, overpayment or misrepresentation issues, and, regardless, the ALJ’s jurisdiction in the remand hearing would be confined to the circumstances that prompted the Department to assess an overpayment and penalties, and not development of a record on the Department’s subsequent handling of the fee and repayment matters or resolution of any problems related thereto.

DECISION: On reconsideration, claimant’s applications for review filed October 3, 2016 are allowed, and Hearing Decisions 14-UI-21865 and 14-UI-21866 reversed and remanded.²

Susan Rossiter, J. S. Cromwell and D. P. Hettle

² **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decisions 14-UI-21865 and 14-UI-21866 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.

DATE of Service: November 14, 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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