

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1139

Reversed and Remanded

PROCEDURAL HISTORY: On July 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 145226). Claimant filed a timely request for hearing. On August 23, 2016, the Office of Administrative Hearings (OAH) issued notice of a telephone hearing scheduled for August 30, 2016 at 1:30 p.m. On August 30, 2016, ALJ Frank issued Hearing Decision 16-UI-66598, dismissing claimant's hearing request for failure to appear at the hearing. Claimant filed a timely request to reopen. On September 28, 2016, ALJ Kangas issued Hearing Decision 16-UI-68225, dismissing claimant's request to reopen. On October 8, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information which had not been previously presented in her request to reopen. Under OAR 471-041-0090 (October 29, 2006), EAB may consider new information if the information is relevant and material to EAB's determination, and if the party presenting the information demonstrates that circumstances beyond the party's control prevented the party from presenting the information at the hearing. The information claimant wants EAB to consider, which concerns her personal situation on the date she requested a hearing and an explanation why she missed the August 30 hearing, is relevant and material to EAB's consideration of claimant's request to reopen. As we conclude below, the ALJ failed to give claimant a reasonable opportunity for a fair hearing and thereby did not develop a record that demonstrates a full and fair inquiry into the issues before the ALJ. This was a circumstance beyond claimant's reasonable control that restricted her ability to present relevant evidence. We therefore considered the new information contained in claimant's written argument in reaching this decision.

FINDINGS OF FACT: (1) On August 17, 2016, Martin Alvey, an attorney representing claimant, filed a request for hearing on decision # 145226.

(2) On the date claimant's hearing request was filed, her address of record with the Department was 9402 N. Macrum Ave., Portland, Oregon. Claimant was not living at this address on August 17, however, but continued to receive mail there. Claimant knew she would be receiving notice of a hearing, and checked her mail at the N. Macrum address on August 25, 2016. As of that date, she had not received notice of the August 30 hearing.

(3) On August 30, 2016, claimant and a friend went on a hike that took claimant to an area where she lost cell phone service. Claimant's attorney appeared for the 1:30 p.m. hearing, but claimant did not. Sometime after 1:30 p.m., claimant returned from her hike, accessed her cell phone, and learned that she had missed the hearing.

CONCLUSION AND REASONS: Hearing Decision 16-UI-68225 is reversed, and this matter remanded to the ALJ for further development of the record.

Under OAR 471-040-0040(1) (February 10, 2013), an ALJ may reopen a hearing if the party requesting reopening failed to appear at the hearing and demonstrates good cause for failing to appear. Good cause for reopening exists if the party's failure to act arises from an excusable mistake or factors beyond the party's reasonable control. OAR 471-040-0040(1)(a).

In Hearing Decision 16-UI-68225, the ALJ concluded that claimant failed to demonstrate that factors beyond her reasonable control caused her failure to appear at the August 30 hearing. According to the ALJ, it was well within claimant's reasonable control either to check her mail at the N. Macrum address between August 26 and 30, 2016, or provide the Department with a new mailing address. Hearing Decision 16-UI-68224 at 2. Further development of the record is necessary, however to determine why claimant did not notify the Department of a new address and why she did not check her mail after August 25. In her motion to reopen, claimant asserted that she was "forced to move out of my house" due to her inability to pay rent; in her written argument, she stated that she was "technically homeless" and did not have a new address. At the hearing, the ALJ must ask claimant about her personal circumstances at the time she filed her hearing request – what did she mean that she was "technically homeless," did she have no address other than the N. Macrum St address at which she could receive mail, did she continue to receive all her mail at the N. Macrum St. address, and, if she did, how often did she check her mail, and why she did not check her mail between August 26 and August 30. In addition, the ALJ should inquire as to what arrangements, if any, claimant made with her attorney to have her attorney notify her about the hearing. In her written argument, claimant stated that on August 30, she was "out of [cell phone] service for no more than 3 hours." On remand, the ALJ must ask claimant if she knew she would be in an area where she would not have cell phone service on August 30, at what time did she lose cell phone service and at what time she regained it, and when and how many times her attorney called her regarding the hearing on August 30.

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). Because further development of the record is needed to determine if claimant had good cause for her failure to appear at the August 30, 2016 hearing, this matter is remanded for a hearing on this issue. If the ALJ

determines that claimant had good cause for her failure to appear, then the ALJ should conduct a hearing on the merits of claimant's work separation.¹

DECISION: Hearing Decision 16-UI-68225 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: October 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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¹ The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-68225 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.