

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1165

Reversed
Late Requests to Reopen Allowed

PROCEDURAL HISTORY: On May 9, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work from April 3, 2016 to April 30, 2016 (decision # 84204). On May 17, 2016, the Department served notice of an administrative decision concluding claimant did not actively seek work from May 1, 2016 to May 7, 2016 (decision # 63620). On May 31, 2016, decision # 84204 became final without claimant having filed a request for hearing. On June 6, 2016, decision # 63620 became final without claimant having filed a request for hearing.

On June 17, 2016, the Department served notice of an administrative decision based on decision # 63620 assessing a \$294 overpayment (decision # 135001). On June 21, 2016, the Department served notice of an administrative decision based on decision # 84204 assessing a \$1,176 overpayment (decision # 130832).

On July 7, 2016, claimant filed late requests for hearing on decisions # 84204 and 63620, and timely requests for hearing on decisions # 130832 and 135001. On July 19, 2016, the Office of Administrative Hearings (OAH) mailed two notices of two consolidated hearings scheduled for August 10, 2016 at 9:30 a.m. and 10:45 a.m. Claimant failed to appear at both hearings.

On August 15, 2016, ALJ Vincent issued four hearing decisions dismissing claimant's hearing requests for failure to appear, including Hearing Decision 16-UI-65649, dismissing claimant's hearing request on decision # 84204, Hearing Decision 16-UI-65648, dismissing claimant's hearing request on decision # 63620, Hearing Decision 16-UI-65637, dismissing claimant's hearing request on decision # 130832, and Hearing Decision 16-UI-65647, dismissing claimant's hearing request on decision # 135001. On September 6, 2016, Hearing Decisions 16-UI-65637, 16-UI-65647, 16-UI-65648 and 16-UI-65649 became final without claimant having requested reopening or filed an application for review with the Employment Appeals Board (EAB).

On September 14, 2016, claimant filed late requests to reopen all four August 10, 2016 hearings. On September 26, 2016, ALJ Kangas reviewed one of claimant's requests and issued Hearing Decision 16-

UI-68054, dismissing claimant's late request to reopen the hearing on decision # 130832. On September 27, 2016, ALJ Kangas reviewed claimant's remaining requests and issued Hearing Decision 16-UI-68106, dismissing claimant's late requests to reopen the hearings on decision # 84204, Hearing Decision 16-UI-68110, dismissing claimant's request to reopen the hearing on decision # 135001, and Hearing Decision 16-UI-68201, dismissing claimant's request to reopen the hearing on decision # 63620.

On October 13, 2016, claimant filed timely applications for review of Hearing Decisions 16-UI-68054, 16-UI-68106, 16-UI-68110 and 16-UI-68201 with EAB.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-68054, 16-UI-68106, 16-UI-68110 and 16-UI-68201. For case-tracking purposes, this decision is being issued in quadruplicate (EAB Decisions 2016-EAB-1165, 2016-EAB-1166, 2016-EAB-1167 and 2016-EAB-1168).

EAB considered claimant's written argument when reaching this decision to the extent it was based on the hearing record.

FINDINGS OF FACT: (1) In claimant's July 7, 2016 request for hearing, claimant notified OAH in writing that she had recently moved to an address on West 17th and requested to "update my address for your records." Exhibit DR 2. Claimant provided OAH with the specific address to which she had moved.

(2) On August 10, 2016, OAH mailed the notices scheduling the August 10, 2016 hearings to claimant at her previous address on Bardell Avenue in Eugene. On August 15, 2016, OAH mailed notice of all four hearing decisions to claimant at her previous address on Bardell Avenue.

(3) On August 20, 2016, claimant signed three applications for review forms, and on August 24, 2016, claimant signed one additional application for review form. Claimant subsequently faxed four pages to EAB in two batches, one batch including one page and the second batch including three pages. The undated fax transmission logs for each transaction indicated that all four pages transmitted to EAB "OK." EAB apparently did not receive the documents.

(4) On September 14, 2016, claimant contacted OAH about having missed the hearings in these matters and notified OAH that she had faxed reopen requests. OAH instructed claimant to re-send the paperwork.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant's late requests to reopen should be allowed.

ORS 657.270(5) allows any party who failed to appear at the hearing to request reopening, and provides that the request may be allowed if the party filed the request within 20 days after the hearing decision(s) were issued and showed good cause for failing to appear. ORS 657.875 provides that the 20-day deadline may be extended a reasonable time upon a showing of good cause for the extension.

In these cases, the ALJ denied claimant's late requests to reopen, reasoning that claimant failed to provide "any information why [she] failed to appear at the previously scheduled hearing," "that an

excusable mistake or factors beyond her reasonable control caused her to fail to request reopening within the time allowed, or that she had good cause for failing to appear at the scheduled hearing." Hearing Decisions 16-UI-68054, 16-UI-68106, 16-UI-68110 and 16-UI-68201 at 3. We disagree.

The first thing claimant must prove is that she had "good cause" for filing late requests to reopen and filed the late requests within a "reasonable time" after the circumstances preventing a timely filing ceased to exist. "Good cause" is "when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant's reasonable control" and includes "[f]ailure to receive a document because the . . . Office of Administrative hearings mailed it to an incorrect address despite having the correct address," and a "reasonable time" is seven days. OAR 471-040-0041 (February 10, 2012).

Although OAH mailed the four hearing decisions dismissing claimant's requests for hearing to an incorrect address despite claimant having previously notified OAH in writing of her updated address, that circumstance does not appear to have caused claimant to file late requests to reopen in these matters, because OAH mailed the four hearing decisions on August 15, 2016, and claimant had received and signed them by August 24, 2016, which was within the appeal period. Rather, it appears that the reason claimant's requests to reopen were late was that her initial attempts to file timely requests were unsuccessful.

The ALJ accurately noted in her decisions that the fax transmittal sheets claimant submitted in an attempt to prove her efforts to file timely requests to reopen were undated and she did not include any statements indicating when she had attempted those filings. However, there is circumstantial evidence in the record suggesting that claimant's attempts to file requests to reopen occurred close in time to August 20th and August 24th. For example, one fax transmittal sheet claimant submitted indicates that claimant faxed three pages to EAB's fax number in one batch, which appears to correspond to three of the application for review forms claimant submitted dated August 20th. Another fax transmittal sheet indicates that claimant faxed a single document to EAB's fax number in a second batch, which appears to correspond to the fourth application for review form claimant submitted dated August 24th. The second fax on August 24th does not make sense if claimant had not already completed her attempt to fax the first three documents, making it more likely than not that claimant attempted to fax those three requests on or before the date she attempted to send second fax, likely sometime between August 20th and August 24th. The fact that claimant likely faxed the first three forms so close in time to the date she signed them also suggests that claimant likely faxed the single form dated August 24th close in time to the date she signed it, making it more likely than not that she faxed the second form on or after August 24th but prior to the September 6th deadline.

For those reasons, and based in part on records of claimant's conversation with OAH staff on September 14th indicating that claimant had already faxed her requests to reopen, it is more likely than not that claimant filed late requests to reopen in these matters because she mistakenly believed she had already filed timely requests based on her attempts to do so in late August. Claimant received fax confirmation sheets indicating that the results of her fax attempts were "OK," indicating no problems with the fax transmissions, and, absent any suggestion that claimant should otherwise have been aware of a problem with either fax transmission, she reasonably relied upon the fax transmission confirmation sheets, thus making her mistaken belief that she had faxed timely requests to reopen excusable. Because claimant faxed late requests to reopen because of an excusable mistake, she had good cause for the late filing.

The record shows that claimant likely learned of her mistake on September 14, 2016 when she spoke with OAH staff and learned that she had not yet successfully filed requests to reopen in these matters. The record further shows that claimant re-sent her requests to reopen to OAH on September 14th, and they were received the same day, making the filing within the 7-day "reasonable time" period. For those reasons, claimant's requests to reopen are not subject to dismissal because she filed them late.

Having concluded that claimant had good cause for filing her requests to reopen after the deadline for doing so had expired and filed them within a reasonable time, claimant must next prove that she had "good cause" for failing to appear at the August 10, 2016 hearings. "Good cause" includes "[f]ailure to receive a document because the . . . Office of Administrative Hearings mailed it to an incorrect address despite having the correct address." OAR 471-040-0040 (February 10, 2012).

The record is sparse concerning the reason or reasons claimant failed to appear at the August 10, 2016 hearing, and claimant's explanations and submissions concerning that issue were vague and difficult to understand. However, the record clearly shows that claimant notified OAH on July 7, 2016 that she had recently moved and provided OAH with her updated address at that time. Nevertheless, OAH continued to mail items, including the notices of hearing in these matters, to claimant's old address. It is more likely than not that OAH's failure to mail the notices of hearing to claimant at her correct address either caused or significantly contributed to the circumstances that resulted in claimant's failure to attend all four hearings in these matters. Under OAR 471-040-0040(2)(a)(A), claimant therefore had good cause for failing to appear at the August 10, 2016 hearings.

Claimant's late requests to reopen are allowed. Claimant is entitled to further proceedings on her late requests for hearing on decisions # 63620 and 84204, and is entitled to a hearing on decisions # 130832 and 135001.

DECISION: Hearing Decisions 16-UI-68054, 16-UI-68106, 16-UI-68110 and 16-UI-68201 are set aside, as outlined above.

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

DATE of Service: October 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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