

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1186

Affirmed
Requests to Reopen Denied

PROCEDURAL HISTORY: On June 8, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work from April 10, 2016 to May 28, 2016 (decision # 112152). On June 28, 2016, decision # 112152 became final without claimant having filed a timely request for hearing. On July 11, 2016, the Department served notice of an administrative decision based on decision # 112152 assessing a \$2,052 overpayment that claimant was liable to repay (decision # 140505). On July 18, 2016, claimant filed a late request for hearing on decision # 112152 and a timely request for hearing on decision # 140505. On August 3, 2016, the Office of Administrative Hearings (OAH) mailed notice of two hearings scheduled for August 16, 2016 at 9:30 a.m. and 10:45 a.m., respectively, neither of which claimant attended. On August 16, 2016, ALJ Seideman issued Hearing Decision 16-UI-65753, dismissing claimant's request for hearing on decision # 112152 for failure to appear, and Hearing Decision 16-UI-65729, dismissing claimant's request for hearing on decision # 140505 for failure to appear. On September 6, 2016, Hearing Decisions 16-UI-65753 and 16-UI-65729 became final without claimant having requested reopening. On October 5, 2016, claimant filed requests to reopen both August 16th hearings. On October 13, 2016, ALJ Kangas reviewed claimant's requests and issued Hearing Decision 16-UI-69192, denying claimant's request to reopen the hearing on decision # 112152, and Hearing Decision 16-UI-69181, denying claimant's request to reopen the hearing on decision # 140505. On October 20, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-69181 and 16-UI-69192. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-1186 and 2016-EAB-1187).

EAB considered claimant's argument when reaching its decisions in these matters.

FINDINGS OF FACT: (1) After July 2016, claimant left his residence to work as a wildland firefighter. He did not receive notice of the hearings scheduled for August 16, 2016 and did not attend them.

(2) On August 19, 2016, claimant called OAH about missing his August 16th hearings. OAH staff instructed claimant to "send in a request for a reopen." DR Exhibit 6. Claimant waited approximately six weeks after that call before requesting reopening in either case.

CONCLUSIONS AND REASONS: Claimant's requests to reopen should be denied.

ORS 657.270(5) and (7)(a)(C) provides that an individual's request for hearing is subject to dismissal if he fails to appear at the time of the hearing, subject to his right to request to reopen the hearing. Requests to reopen must be filed within 20 days of the date the hearing decision dismissing the request for hearing was mailed, unless the party shows good cause to extend the filing deadline a reasonable time. See ORS 657.270(c)(B); ORS 657.875. Requests to reopen must be in writing. OAR 471-040-0040(1)(b) and (3) (February 10, 2012); OAR 471-040-0041(4) (February 10, 2012).

Hearing Decisions 16-UI-65753 and 16-UI-65729, which dismissed claimant's requests for hearing in these matters for failure to appear, became final without claimant having requested reopening on September 6, 2016. Claimant filed his requests to reopen on October 5, 2016, as shown by the postmark date affixed to the envelope in which he mailed the requests.¹ Because claimant's requests to reopen were not filed within 20 days of the date the hearing decisions in this case were mailed, claimant's requests to reopen were late.

In order for claimant's late requests to reopen to be allowed, claimant must have good cause for failing to request reopening within the time allowed and must have filed the requests within "a reasonable time." OAR 471-040-0041(1). "Good cause" is "an action, delay, or failure to act [that] arises from an excusable mistake or from factors beyond an applicant's reasonable control." OAR 471-041-0041(2). A "reasonable time" is defined as "seven days after the circumstances that prevented a timely filing ceased to exist." OAR 471-040-0041(3).

In this case, the circumstances that prevented claimant from filing a timely request to reopen were likely his failure to receive the notices scheduling the hearing and that his work prevented him from calling OAH. Those circumstances, however, were both resolved as of August 19, 2016, by which time claimant knew the hearings had been scheduled, knew that he had missed them, and knew that he needed to file requests to reopen in order to pursue further appeal of the department's decisions. The seven-day "reasonable time" period allowed under the rule would therefore extend only to August 26, 2016, seven days after claimant's call to OAH. Because August 26th was within the timely appeal period, however, the deadline would be extended to September 6th. Claimant's request to reopen and written argument show that he was understandably busy with work and serious personal matters during and after the relevant period. Claimant established no specific circumstances (or excusable mistake), however, that would justify an extension of the appeal period from September 6th to October 6th or that

¹ Claimant called OAH staff and discussed reopening the hearings with them on August 19, 2016. However, OAR 471-040-0040 and OAR 471-040-0041 required that requests to reopen must be in writing. Therefore, claimant's calls cannot suffice as requests to reopen. The first *written* requests to reopen in this record occurred when claimant mailed his requests on October 5, 2016. Documents filed by mail are considered "filed" on the postmarked date affixed to the envelope in which the documents were mailed. See OAR 471-010-0040(2) (December 25, 2005), OAR 471-040-0040(5), OAR 471-040-0041(5); accord OAR 471-040-0005(4)(b) (July 14, 2011). The postmark date for claimant's requests to reopen was October 5, 2016, which is, therefore, the date claimant's reopen requests were filed.

would justify his failure to mail his written requests within the appeal period. Therefore, his requests to reopen must be denied.

DECISION: Hearing Decisions 16-UI-69181 and 16-UI-69192 are affirmed.

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

DATE of Service: October 26, 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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