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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1197

Affirmed
Late Request for Hearing Dismissed
Overpayment, No Penalties

PROCEDURAL HISTORY: On July 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work or available for work from April 10, 2016 to July 9, 2016 (decision # 140018). On August 10, 2016, decision # 140018 became final without claimant having filed a timely request for hearing. On August 18, 2016, the Department served notice of a second administrative decision, based on decision # 140018, assessing a \$4,257.00 overpayment, \$1,277.10 monetary penalty and 30 penalty weeks (decision # 193181). On August 22, 2016, claimant filed a late request for hearing on decision # 140018 and a timely request for hearing on decision # 193181. On September 14, 2016, the Office of Administrative Hearings (OAH) mailed notice of two hearings scheduled for September 29, 2016, one at 9:30 a.m. on decision # 140018, and at 10:45 a.m. on decision # 193181. On September 29, 2016, ALJ Vincent conducted both hearings, and on October 6, 2016 issued Hearing Decision 16-UI-68725, dismissing claimant's late request for hearing on decision # 140018, and Hearing Decision 16-UI-68721, affirming the Department's assessment of an overpayment but concluding the claimant was not liable for any misrepresentation penalties. On October 26, 2016, claimant filed timely applications for review of both decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-68721 and 16-UI-68725. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-1196 and 2016-EAB-1197).

EAB considered claimant's arguments when reaching these decisions to the extent the arguments were relevant and based on the hearing record.

FINDINGS OF FACT: (1) Claimant has experienced shoulder pain since the mid-1980s. In 2014, claimant's shoulder pain worsened when he was required to operate a jackhammer at work. Claimant planned to have arthroscopic surgery to relieve the pain.

(2) Effective the week ending January 9, 2016, claimant filed an initial claim for unemployment insurance benefits.

(3) Effective April 11, 2016, Valley Immediate Care placed claimant on work restrictions. Claimant considered himself capable of working. Claimant's surgeon did not place claimant on restricted duty.

(4) Claimant filed weekly claims for benefits each week from April 10, 2016 to July 16, 2016. Each week claimant claimed benefits, he reported to the Department that he was physically able to work. As a result of claimant's reports to the Department, the Department paid claimant a total of \$4,257 pursuant to his weekly claims.

(5) Claimant received notice of decision # 140018 and disagreed with it. At some point between the date he received the decision and August 22, 2016, claimant called the Department with the intent of requesting a hearing. The Department made no record of such a call until August 22, 2016.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's late request for hearing must be dismissed, and that claimant is liable to repay benefits he was overpaid as a matter of law but not subject to any misrepresentation penalties.

As a preliminary matter, we note that much of claimant's testimony and his written arguments to EAB were intended to establish that he was, in fact, able to work between April 10, 2016 and July 9, 2016. Claimant's ability to work, however, is not within EAB's jurisdiction at this time. In order for EAB to have jurisdiction over that issue, claimant must first have established that he filed a timely request for hearing on decision # 140018 or had good cause to file a late request for hearing, and, for the reasons we will explain, we conclude that claimant did not. That decision is therefore final as a matter of law and EAB did not, and will not, review the substance of that decision. We also note that no adversely affected party requested review of the portion of Hearing Decision 16-UI-68721 in which the ALJ concluded that claimant was not liable for misrepresentation penalties. These decisions are therefore confined to the following issues: claimant's late request for hearing on decision # 140018; and claimant's \$4,257 overpayment.

Late request for hearing. ORS 657.269 provides that an individual has 20 days to request a hearing on an administrative decision before the decision becomes final. Claimant argued, in essence, that he filed a timely request for hearing by telephone when he called the Department after decision # 140018 was issued but some time before August 22, 2016. Claimant could not, however, specify when he made the call, or provide any details that would indicate that he made the call to request a hearing before decision # 140018 became final on August 10, 2016. Nor do Department records indicate that claimant called on or before August 10, 2016 to make a timely telephone request for hearing. In the absence of evidence tending to show it is more likely than not that claimant called the Department to request a hearing on or before August 10, 2016, the record fails to show that claimant made a timely request for hearing on decision # 140018.

ORS 657.875 provides that the 20-day period allowed under ORS 657.269 for requesting a hearing may be extended a reasonable time upon a showing of good cause. OAR 471-040-0010 defines "good cause" as an excusable mistake or factors beyond the applicant's reasonable control, and a "reasonable time" as seven days after the circumstances that prevented a timely filing ceased to exist. Given that claimant

argued only that he filed a timely request for hearing the record lacks evidence demonstrating that claimant had good cause for filing a late request for hearing. His assertions that he was aware of decision # 140018 and understood he needed to request a hearing suggest that it was within his reasonable control to do so, and nothing in this record suggests his failure to request a hearing on or before August 10, 2016 was due to an excusable mistake. For those reasons, claimant's late request for hearing on decision # 140018 is dismissed, and that decision, concluding claimant was not able to work from April 10, 2016 to July 9, 2016, remains final and undisturbed.

Overpayment. ORS 657.310(1) provides that an individual who received benefits to which the individual was not entitled is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to the individual under ORS chapter 657. That provision applies if the benefits were received because the individual made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of the individual's knowledge or intent. *Id.*

The Department paid claimant \$4,257 in weekly benefits between April 10, 2016 and July 9, 2016 based in part upon his weekly reports to the Department that he was able to work during each of those weeks. The Department determined, however, that claimant was not able to work during those weeks, and the Department's decision to that effect has become final as a matter of law. Therefore, as a matter of law, claimant was not eligible for benefits. He was, therefore, overpaid the \$4,257 he received when not eligible for benefits. The overpayment occurred because claimant reported to the Department that he was able to work, a report that is false as a matter of law because it contradicts the Department's final decision concluding otherwise. Regardless of claimant's knowledge or intent in making reports to the Department about his ability to work that turned out to be false, because he was overpaid benefits because of those statements, he is liable to repay the overpayment to the Department or have the benefits deducted from future benefits otherwise payable to him.

DECISION: Hearing Decisions 16-UI-68721 and 16-UI-68725 are affirmed.

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

DATE of Service: November 7, 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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