

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1259

Reversed
Request to Reopen Allowed

PROCEDURAL HISTORY: On August 19, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 73228). On September 8, 2016, the Office of Administrative Hearings (OAH) issued notice of a hearing scheduled for September 22, 2016 at 9:30 a.m. On September 26, 2016, ALJ Wyatt issued Hearing Decision 16-UI-68106, dismissing claimant's hearing request for failure to appear at the September 22 hearing. Claimant filed a timely request to reopen. On October 27, 2016, ALJ Frank conducted a hearing, and on November 2, 2016, issued Hearing Decision 16-UI-70391, denying claimant's request to reopen. On November 8, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information regarding her work separation that was not part of the hearing record. Under OAR 471-040-0090, EAB may consider new information if the party presenting the information demonstrates that the information is material and relevant to EAB's determination, and that the party presenting the information was prevented by circumstances beyond the party's reasonable control from presenting the information at the hearing. Information about claimant's work separation is not material or relevant to the issue before EAB, which is whether claimant demonstrated good cause to reopen her hearing. Claimant's request to have EAB consider new information is therefore denied, and we considered only information received into evidence at the hearing when reaching this decision. Because we are reversing Hearing Decision 16-UI-68106 and remanding the matter to the ALJ for a hearing on the merits of claimant's hearing request, claimant will have an opportunity to present information relevant to her work separation at the hearing.

FINDINGS OF FACT: (1) Claimant received and read the September 22, 2016 hearing notice. The hearing notice instructed claimant to call 1-800-622-4041 at the time the hearing was scheduled to begin, and enter an appearance code number to access the hearing. The hearing notice also instructed claimant to call 1-800-311-3394 if no ALJ or OAH representative came on the line within 5 minutes of the time the hearing was scheduled to begin, or if claimant had problems connecting to the hearing. The

hearing notice told claimant to call 1-800-311-3304 or a local Salem number, 503-947-1515, with any questions about the hearing.

(2) On September 22, 2016, a few minutes before 9:30 a.m., claimant made three or more attempts to call into the hearing. She was unable to connect to the hearing, however, either because she received a busy signal or because she did not connect to the hearing after entering the appearance code number. At approximately 10:50 a.m., claimant called 503-947-1515 and spoke to an OAH representative who told her that her hearing request had been dismissed for failure to appear at the hearing, and explained the procedure for filing a request to reopen.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that claimant demonstrated good cause for reopening.

ORS 657.270(5) provides that any party who failed to appear at a hearing may request to reopen the hearing, and the request will be allowed if it was filed within 20 days of the date the hearing decision was issued and shows good cause for failing to appear. “Good cause” exists when the requesting party’s failure to appear at the hearing arose from an excusable mistake or from factors beyond the party’s reasonable control. OAR 471-040-0040(2) (February 10, 2012).

In Hearing Decision 16-UI-70391, the ALJ found that it was well within claimant’s reasonable control to carefully read the hearing notice and enter the correct appearance code number, and to promptly contact OAH if she was unable to connect to the ALJ. Because the ALJ determined that claimant failed to take these actions, the ALJ concluded that she failed to demonstrate good cause for failing to appear at the hearing and denied her request to reopen the hearing. Hearing Decision 16-UI-70391 at 4.

In regard to claimant’s inability to connect to the hearing, the ALJ found that this occurred because claimant entered an incorrect appearance code number. The ALJ based his finding on a note from OAH files of which he took official notice. Audio Recording at 15:40. The note, made by an unidentified “representative” of OAH, stated that the “representative” spoke to claimant at 10:15 a.m. on September 22, and that claimant had attempted to connect to the hearing by entering a “pin” number given to her by the Department rather than the appearance code number. Audio Recording at 16:45. According to the ALJ, this note constituted an admission by claimant that she was using an incorrect number to attempt to access the hearing. Decision 16-UI-70391 at 3. Claimant, however, stated that she believed that she entered the correct number, and that the OAH representative suggested to her that she probably entered a Department “pin” number rather than the appearance code number. Claimant’s Request to Reopen, Audio Recording at 18:01 and 18:37. We find that claimant’s first-hand testimony about her efforts to appear at the September 22 hearing is entitled to greater weight than the hearsay evidence provided in the note from OAH files. We conclude that claimant’s failure to appear at the hearing resulted from some type of technical malfunction that resulted in an inability to access the hearing, despite her use of the correct appearance code number.

We also disagree with the ALJ’s conclusion it was within claimant’s reasonable control to more promptly contact OAH to resolve her problems in connecting to the hearing. The record does not support the ALJ’s finding that claimant provided no “logical or persuasive” explanation why she did not

call OAH until approximately 10:50 a.m.¹ Hearing Decision 16-UI-70391 at 4, Claimant’s Request to Reopen. Contrary to the ALJ’s assertion, claimant’s explanation for the delay in contacting OAH was entirely reasonable. Although the hearing notice instructed claimant to call OAH if she experienced problems connecting to the hearing, the notice stated no deadline by which she needed to make such a call to avoid having her hearing request dismissed. Thus, even if claimant had “read appearance instructions carefully” as the ALJ concluded it was within her reasonable control to do, she would not have known that failure to contact OAH by a specific time would result in dismissal of her hearing request. Claimant also testified that each of her attempts to call the appropriate number and enter the appearance code took several minutes. In addition, claimant testified that because she was nervous, upset about her inability to connect to the hearing, and confused by the three telephone numbers provided on the hearing notice, it took her some time to determine which number she should call, and additional time to “get through” to OAH. Audio Recording at 18:33, 18:44, and Claimant’s Request to Reopen. Given these circumstances, we find nothing implausible about claimant’s assertion that it took her a considerable amount of time after she gave up trying to connect to the hearing to reach an OAH representative to report her inability to connect to the hearing.²

Because claimant demonstrated good cause for reopening her hearing, her request is granted, and this case reversed and remanded for a hearing on the merits of claimant’s hearing request.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-70391 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.

DECISION: Hearing Decision 16-UI-70391 is set aside, as outlined above.

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

DATE of Service: November 17, 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.

¹ The note from OAH files of which the ALJ took official notice stated that claimant contacted an OAH representative at 10:15 a.m. In her request to reopen, claimant asserted that she “got through to someone” at 10:50 a.m. For the reasons stated above, we find claimant’s statement regarding her call to OAH to be more credible than the OAH file note.

² The ALJ also concluded that because claimant “likely made multiple mistakes,” her failure to appear did not result from an “excusable mistake.” Hearing Decision 16-UI-70391. If the ALJ means that an individual who makes multiple mistakes, even if excusable, does not satisfy the standard for reopening in OAR 471-040-0042(1), we believe he has incorrectly interpreted this rule. It is unnecessary for us to address this issue, however, because of our conclusion that claimant’s failure to appear was caused by circumstances beyond her reasonable control.

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