

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1305

Reversed
Late Request for Hearing Allowed

PROCEDURAL HISTORY: On August 4, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 135437). On August 24, 2016, decision # 135437 became final, without a request for hearing having been filed. On September 20, 2016, claimant filed an untimely request for hearing. On September 23, 2016, ALJ Kangas issued Hearing Decision 16-UI-67936, dismissing claimant's hearing request as untimely, subject to claimant's right to renew the request by responding to an appellant questionnaire within 14 days. Claimant timely responded to the appellant questionnaire. By letter dated October 6, 2016, the Office of Administrative Hearings cancelled Hearing Decision 16-UI-67936. On October 20, 2016, ALJ Triana conducted a hearing, and on November 8, 2016, issued Hearing Decision 16-UI-7-785, concluding that claimant failed to show good cause for filing an untimely hearing request. On November 18, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

EVIDENTIARY MATTER: At the hearing, the ALJ refused to admit Exhibit 2, which was offered into evidence by claimant, because claimant had not sent a copy of the exhibit to the other parties. Exhibit 2 consists of two letters written by an attorney: one letter, dated November 24, 2015, was written to a doctor of osteopathy, and the second letter, dated November 14, 2015, was written to a medical doctor. Both letters summarize conversations the attorney had with the doctors regarding claimant's physical and mental condition. Under OAR 471-041-0090(1) (October 29, 2006), EAB may

receive exhibits that were offered, but not received into evidence, “as necessary to complete the record.” Because evidence concerning claimant’s mental and physical condition is relevant to the reasons why he filed an untimely hearing request, Exhibit 2 will be received into the record. Any party that objects to the admission of Exhibit 2 must submit written objections to this office, setting forth the basis of the objection, within ten days of the date on which this decision is mailed. Unless such an objection is received, Exhibit 2 will remain part of the record.

FINDINGS OF FACT: (1) In October 2014, claimant was involved in an accident in which he suffered a concussion. After the accident, claimant was diagnosed with post-concussive syndrome. Symptoms of this syndrome from which claimant suffered included loss of memory, unusual behavior, anxiety, depression, and headaches. Exhibit 2.

(2) Claimant received and read decision # 135437 several days after it was mailed on August 4, 2016. Claimant was very disappointed by the decision. At the time claimant received the decision, he was suffering from depression that made him not “want to do anything,” and caused him to consider ending his life. Audio recording at 28:27. Claimant could not afford to seek medical attention for his depression because he was unemployed and had no health insurance.

(3) On September 20, 2016, claimant was able to file his request for hearing because he was feeling much better.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that claimant demonstrated good cause for filing a late hearing request.

Under ORS 657.269, claimant had 20 days after decision # 135437 was issued – until August 24, 2016 – to request a hearing. Claimant’s request, which was filed on September 20, 2016, was therefore untimely. ORS 657.875 provides, however, that the time period for requesting a hearing may be extended “a reasonable time” upon a showing of “good cause.” “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.” OAR 471-040-0010(1). A “reasonable time” is “seven days after the circumstances that prevented a timely filing ceased to exist.” OAR 471-040-0010(3).

In Hearing Decision 16-UI-70785, the ALJ rejected claimant’s assertion that his depression constituted good cause for his failure to timely filing his hearing request because “[c]laimant did not see a doctor or mental health professional, nor did he receive a formal diagnosis of depression.” The ALJ also noted that at the time claimant received the decision, claimant continued to perform “necessary daily activities” such as taking his children to and from school and looking for work. Hearing Decision 16-UI-70785 at 3.

We disagree with the ALJ’s findings about claimant’s depression. Contrary to the ALJ’s assertion, claimant was diagnosed with post-concussive syndrome in November 2015; one of the symptoms of this syndrome was depression. Exhibit 2. In addition, claimant testified that his depression in August 2016 was severe enough that he had suicidal thoughts and was extremely lethargic. Based on this record, we conclude that claimant demonstrated that a circumstance beyond his reasonable control – depression – prevented him from acting promptly to request a hearing on decision # 135437. The record also shows that claimant acted within a reasonable time after his mental condition improved; he testified that he

filed his hearing request as soon as he began to feel better in September 2016. Audio Recording at 27:04.

For the foregoing reasons, claimant's late request for a hearing is allowed. Claimant is entitled to a hearing on the merits of decision # 135437.

DECISION: Hearing Decision 16-UI-70785 is set aside, as outlined above.

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

DATE of Service: November 28, 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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