

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1366

Reversed & Remanded

PROCEDURAL HISTORY: On April 19, 2010, the Oregon Employment Department (the Department) served two notices of two administrative decisions, one concluding that claimant was not eligible for Training Unemployment Insurance benefits (decision # 153720), and the other concluding claimant did not actively seek work from February 28, 2010 to April 10, 2010 (decision # 154138). On May 10, 2010, decisions # 153720 and 154138 became final without claimant having filed a request for hearing.¹ On December 5, 2013, the Department served notices of two additional administrative decisions. The first one, based on decision # 154138, concluded that claimant was overpaid regular and Federal Additional Compensation (FAC) benefits in the amount of \$820 (decision # 140521). The second decision, based on decision # 153720, concluded that claimant was overpaid regular and FAC benefits in the amount of \$880 (decision # 141721). On December 26, 2013, decisions # 140521 and 141721 became final without claimant having filed a request for hearing.

On October 20, 2016, claimant filed late requests for hearing on all four decisions. On October 31, 2016, ALJ Kangas issued four hearing decisions, each of which dismissed one of claimant's requests for hearing, subject to her right to renew the requests by responding to an appellant questionnaire by November 14, 2016. Hearing Decision 16-UI-70236 dismissed claimant's late request for hearing on decision # 153720, Hearing Decision 16-UI-70238 dismissed claimant's late request for hearing on decision # 154138, Hearing Decision 16-UI-70239 dismissed claimant's late request for hearing on decision # 140521, and Hearing Decision 16-UI-70240 dismissed claimant's late request for hearing on decision # 141721. On November 21, 2016, claimant filed an application for review with the Employment Appeals Board (EAB) that included an appellant questionnaire response. On November 29, 2016, ALJ Kangas issued a letter stating that, with respect to Hearing Decision 16-UI-70239, OAH

¹ With her application for review, claimant provided EAB with a copy of another administrative decision the Department issued to her on June 24, 2010. The decision referenced a June 14, 2010 decision in which the Department had concluded that claimant had willfully made one or more misrepresentations to obtain benefits and was liable for a \$1,905 overpayment and 16 penalty weeks as a result. The June 24, 2010 decision stated claimant had not needed to seek work, did not make any misrepresentations and was not liable for the \$1,905 overpayment or penalty. The Department's June 24, 2010 decision was not adverse to claimant, and, as such, was not appealed by claimant. While the findings and conclusions contained in the June 24, 2010 decision might be relevant to claimant's late requests for hearing, whether she was eligible for TUI, whether she actively sought work, and whether she was overpaid, the decision itself is not at issue in these cases.

would not review claimant's response because it was received after November 14, 2016. The letter stated that if claimant had filed an application for review with EAB, "that review process remains unaffected." OAH did not consider claimant's appellant questionnaire response with respect to the other three hearing decisions, nor did it issue any letters regarding the other three hearing decisions.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-70236, 16-UI-70238, 16-UI-70239 and 16-UI-70240. For case-tracking purposes, this decision is being issued in quadruplicate (EAB Decisions 2016-EAB-1364, 2016-EAB-1365, 2016-EAB-1366 and 2016-EAB-1367).

CONCLUSIONS AND REASONS: Hearing Decisions 16-UI-70236, 16-UI-70238, 16-UI-70239 and 16-UI-70240 are set aside, and this matter remanded.

As a preliminary matter, the ALJ erred in applying the appellant questionnaire response claimant provided in these matters only to Hearing Decision 16-UI-70239. Although claimant returned only that one form to the Office of Administrative Hearings (OAH), the information claimant provided clearly referenced her work search, her receipt of benefits while attending school and overpayment matters, thereby encompassing all the issues underlying Hearing Decisions 16-UI-70236, 16-UI-70238 and 16-UI-70240, as well as her late requests for hearing on all those matters. It is also worth noting that in layout and appearance, all of the appellant questionnaire forms OAH mailed to claimant are nearly identical, differing only in procedural details that an ordinary and reasonable person might miss unless scrutinizing each of the four forms in a side-by-side comparison making it likely that claimant did not realize she needed to return the same explanation on all four forms. Just as we have construed claimant's application for review form, considered in the context of the rest of her submissions, as applying to all four of these matters, so too do we construe her appellant questionnaire form.

This matter is therefore before EAB on claimant's applications for review of Hearing Decisions 16-UI-70236, 16-UI-70238, 16-UI-70239 and 16-UI-70240, all of which dismissed claimant's late requests for hearing as untimely, subject to her right to renew her requests by responding to appellant questionnaires no later than November 14, 2016. OAH received claimant's responses late and, as such, refused to consider their contents. OAR 471-041-0090 provides, however, that EAB may consider information that was not received into evidence during proceedings before OAH if the information was (1) offered but not received into evidence but is necessary to complete the record, or (2) is relevant and material to EAB's determination and factors or circumstances beyond the party's reasonable control prevented the party from previously offering the information into evidence.

Claimant offered the information at issue into the record, but the ALJ reviewing claimant's case refused to admit the evidence because it was received after the deadline. Because the information claimant offered is, however, the only evidence about the issue of claimant's late requests for hearing, the information is both relevant and material to EAB's determinations in these matters and necessary to complete the record. The ALJ's refusal to consider the information was a circumstance outside EAB's control. We therefore conclude that claimant's new information is admissible before EAB under OAR

417-041-0090. EAB has marked claimant's questionnaire response as Exhibit 1, which is hereby admitted into these records subject to the parties' right to object.²

Claimant's questionnaire response and other submissions to EAB suggest that she might have good cause for the late filings in these matters based upon the alleged resolution of the TUI and work search issues in June 2010 and her change of residence after she stopped receiving unemployment insurance benefits in 2012. However, there is insufficient evidence in the record upon which to base a conclusion about whether those circumstances amounted to good cause. ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). A remand is therefore required, so the ALJ can develop a record about the circumstances under which claimant was prevented from filing timely requests for hearing in each of these four matters, and whether claimant filed her late requests for hearing within the seven-day "reasonable time" period after those circumstances ceased to exist.

We note that claimant provided information about her work search, claims for TUI benefits and overpayment issues with her submissions to EAB. During the hearing on remand, however, the scope of the issues before the ALJ will, at least initially, include *only* the late request for hearing issues; that is, whether claimant can prove she had good cause to miss and extend the filing deadlines in each of these four cases, and prove that when she filed her late requests on October 20, 2016 it was within the seven-day reasonable time period after those circumstances ceased to exist. *Only* if claimant can establish good cause would the ALJ then have jurisdiction to hear evidence about claimant's work search during the relevant period in 2010, her receipt of TUI benefits while attending school less than full time, and her receipt of any overpaid benefits during those periods. If claimant cannot prove good cause for the late requests for hearing, she will not be entitled to present evidence about those matters.

DECISION: Hearing Decisions 16-UI-70236, 16-UI-70238, 16-UI-70239 and 16-UI-70240 are set aside, and these matters remanded for further proceedings consistent with this order.³

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

DATE of Service: December 8, 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

² Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. Unless such objection is received and sustained, the noticed fact will remain in the record in each of these four cases as EAB Exhibit 1.

³ **NOTE:** The failure of any party to appear at the hearings on remand will not reinstate Hearing Decisions 16-UI-70236, 16-UI-70238, 16-UI-70239 and 16-UI-70240 or return these matters to EAB. Only timely applications for review of the subsequent hearing decisions will cause these matters to return to EAB.

'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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