

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1392

Hearing Decision 16-UI-72506 Reversed – Late Request for Hearing Allowed
Hearing Decision 16-UI-72507 Reversed and Remanded

PROCEDURAL HISTORY: On September 30, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work from August 28, 2016 to September 3, 2016 (decision # 151857). On October 20, 2016, decision # 151857 became final without claimant having filed a timely request for hearing. On November 2, 2016, the Department served notice of an administrative decision, based on decision # 151857, assessing a \$308 overpayment that claimant was liable to repay (decision # 85903). On November 10, 2016, claimant filed a late request for hearing on decision # 151857 and a timely request for hearing on decision # 85903. On December 7, 2016, ALJ M. Davis conducted two hearings, and on December 8, 2016 issued Hearing Decision 16-UI-72506, dismissing claimant's late request for hearing on decision # 151857, and Hearing Decision 16-UI-72507, affirming decision # 85903. On December 12, 2016, claimant filed applications for review of both hearing 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-72506 and 16-UI-72507. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-1391 and 2016-EAB-1392).

FINDINGS OF FACT: (1) The Department mailed notice of decision # 151857 to claimant at her address of record.

(2) Between September 30, 2016, the date the Department mailed decision # 151857, and October 20, 2016, the deadline for filing a timely request for hearing in that matter, claimant contacted the Department at least six times regarding her weekly claims and work searches. On October 10, 2016, claimant called the Department about a work search for week 36-16 and was instructed to fax it to the Department.¹ On October 11, 2016, the Department received claimant's week 32-16 work search. On

¹ The Department's witness provided some testimony about claimant's calls to the Department during the relevant time period; we take notice of supplemental facts about claimant's contacts with the Department, which are contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing,

October 17, 2016, the Department received a letter about claimant's week 36-16 work searches. On October 18, 2016, claimant called the Department twice for help claiming a week of benefits; during one of the calls, claimant self-disclosed that she had not actively sought work during week 40-16. On October 19, claimant called the Department twice for help claiming a week of benefits.

(3) On October 27, 2016, a Department employee noted for purposes of clarification that claimant was using the Department's resources to seek work and keeping records of her work search, and noted that claimant's work search for week 32-16 was sufficient.

(4) Claimant received decision # 85903 between November 3, 2016 and November 5, 2016.² On November 10, 2016, claimant called the Department three times, once to reopen her claim for week 44-16 and twice regarding decision # 85903 and to request a hearing on decision # 151857.

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-72506 should be reversed and the matter scheduled for a hearing on the merits of decision # 151857. Hearing Decision 16-UI-72507, which was based entirely on the determination in decision # 151847 that claimant was not eligible for benefits, should be reversed and remanded pending the outcome of that hearing.

ORS 657.269 provides that the Department's decisions become final unless a party files a request for hearing within 20 days after the date it is mailed. ORS 657.875 provides that the 20-day deadline may be extended a "reasonable time" upon a showing of "good cause." OAR 471-040-0010 provides that "good cause" includes factors beyond an applicant's reasonable control, and defines "reasonable time" as seven days after those factors ceased to exist.

The ALJ found as fact that claimant received decision # 151857 by October 10, 2016, and concluded that claimant's late request for hearing on decision # 151857 should be dismissed because "[n]o evidence was presented to establish why claimant waited to request a hearing and no evidence was presented to indicate that an excusable mistake or factors or circumstances beyond claimant's reasonable control caused the late filing of the request for hearing" so she "has not established sufficient grounds for a late appeal." Hearing Decision 16-UI-71506 at 1, 3. We disagree. Although we note that claimant testified she received decision # 151857 and testified that she must have received it in order to call the Department on October 10th, claimant's tone and response suggested she was speculating about her receipt of the document and the record as a whole fails to show that she received it, much less by October 10th.³ We also note that the work search claimant called the Department about on October 10th pertained to week 36-16, the week after the week at issue in decision # 151857, and therefore it does not

setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed facts will remain in the record.

² We take notice of the generally cognizable fact that first class mail shipped through the United States Postal Service generally takes 1-3 days to deliver to the designated recipient, making it more likely than not that claimant received decision # 85903, mailed on November 2nd, between November 3rd and November 5th. See <https://www.usps.com/ship/first-class-mail.htm>. 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. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

³ Audio recording at ~ 11:15, ~ 12:20, ~ 13:05.

necessarily follow that claimant had to have received or been aware of decision # 151857 in order to have a reason to place her October 10th call to the Department.

The record fails to show that claimant received decision # 151857 when it was mailed to her. Although documents sent through the US Postal Service are presumed received, the presumption may be rebutted by circumstantial evidence suggesting non-receipt. *See* OAR 137-030-0520(9). Here, the totality of the evidence shows that claimant was in close contact with the Department between September 30, 2016 and October 20, 2016, including following up with the Department at least three times about her work search activities, providing the Department with copies of her work searches, and self-disclosing to the Department when she had not sought work during a particular week. Given those circumstances, we find it more likely than not that had claimant received decision # 151857, or any other indication from the Department that there was an issue with her work search during the week of August 28, 2016 to September 3, 2016, claimant would have been in prompt contact with the Department about the matter. We therefore find it more likely than not that claimant did not receive decision # 151857 within the appeal period, and that her non-receipt of the decision is what caused her to fail to file a timely request for hearing. Claimant's non-receipt of the decision was a factor beyond her reasonable control, and amounted to good cause to extend the filing deadline.

As noted above, the filing deadline may only be extended a reasonable time, seven days, after the circumstances that prevented a timely filing ceased to exist. The circumstances preventing a timely filing likely ceased to exist when claimant received decision # 85903. The Department mailed decision # 85903 to claimant on November 2, 2016. The US Postal Service probably delivered decision # 85903 to claimant between November 3, 2016 and November 5, 2016, and claimant filed a request for hearing on decision # 151857 on November 10, 2016, which is no more than 7 days after the first possible date the factors which prevented claimant from filing a timely request for hearing on decision # 151857 ceased to exist. She therefore requested a hearing within the seven-day "reasonable time" period.

Having shown good cause to extend the deadline for requesting a hearing on decision # 151857 a reasonable time, claimant's request for hearing on that decision is allowed, and she is entitled to a hearing on the merits of that decision.

The ALJ's determination in Hearing Decision 16-UI-72507 that claimant was overpaid benefits for the week of August 28, 2016 to September 3, 2016 was based entirely on her determination in Hearing Decision 16-UI-72506 dismissing claimant's request for hearing on decision # 151857, and finding that decision final as a matter of law. Because we have concluded that claimant is entitled to a hearing about her eligibility for benefits that week and, depending on the outcome of that hearing, may or may not have been overpaid, we also conclude that there is an insufficient basis upon which to conclude that claimant was overpaid benefits. Hearing Decision 16-UI-72507 must therefore be reversed, and remanded pending a determination of claimant's eligibility for benefits.

We note that the failure of any party to appear at any subsequent hearings scheduled in these matters will not reinstate Hearing Decisions 16-UI-72506 or 16-UI-72507 or return these matters to EAB. Only timely applications for review of any subsequent hearing decisions will cause these matters to return to EAB.

DECISION: Hearing Decision 16-UI-72506 is set aside, as outlined above. Hearing Decision 16-UI-72507 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: January 5, 2017

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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