

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1399

Reversed & Remanded
(Revocada & Remitada)
Late Request for Hearing Allowed
(Petición Tardía para Una Audiencia Permitida)

PROCEDURAL HISTORY: On July 26, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause on January 2, 2016 (decision # 91415). On July 27, 2016, the Department served notice of an administrative decision (decision # 194520) assessing a \$3,135 overpayment, 23 penalty weeks, and a \$470.24 monetary penalty based on decision # 91415. On August 15, 2016, decision # 91415 became final without a request for hearing having been filed, and on August 16, 2016, decision # 194520 became final without a request for hearing having been filed. On October 14, 2016, claimant filed untimely requests for hearing. On October 19, 2016, ALJ Kangas issued Hearing Decision 16-UI-69460, which dismissed claimant's hearing request on decision # 194520 as untimely, and Hearing Decision 16-UI-69536, which dismissed claimant's hearing request on decision # 91415 as untimely. Both decisions were subject to claimant's right to renew his hearing requests by responding to appellant questionnaires within 14 days. Claimant timely responded to the appellant questionnaires. By letters dated November 14, 2016, the Office of Administrative Hearings cancelled Hearing Decisions 16-UI-69460 and 16-UI-69536. On December 1, 2016, ALJ Frank conducted a consolidated hearing, and on December 2, 2016, issued Hearing Decision 16-UI-72142, which dismissed claimant's hearing request on decision # 194520 as untimely, and Hearing Decision 16-UI-72144, which dismissed claimant's hearing request on decision # 91415 as untimely. On December 13, 2016, claimant filed applications for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-72142 and 16-UI-72144. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-1399 and 2016-EAB-1401).

With his application for review, claimant submitted a letter from an individual who is not identified in which the individual provided claimant with advice on how to demonstrate good cause for his late hearing request, and if he was able to show good cause, how to demonstrate he filed his hearing request within a reasonable time once the circumstances preventing his timely filing ceased to exist. This letter

was not offered into evidence at the hearing. Under OAR 471-041-0090 (October 29, 2006), EAB may consider new information, if the party offering the information demonstrates that the information is relevant and material to EAB's determination, and that circumstances beyond the individual's control prevented the individual from presenting the information at the hearing. Advice claimant may have received regarding how to present his case at the December 2 hearing is not relevant to the factual and legal determinations EAB must make, *i.e.*, whether claimant had good cause for his late hearing requests and whether he filed his hearing requests within a reasonable time after the circumstances that prevented his timely filing ceased to exist. Claimant's request to present new information is therefore denied, and EAB considered only information received into evidence at the hearing when reaching these decisions.

FINDINGS OF FACT: (1) From January 3 through May 21, 2016, claimant claimed and received unemployment benefits. When claimant began claiming benefits, his address of record was 244 SE 188th Ave., # 113 in Portland, Oregon.

(2) Sometime in March 2016, claimant moved to 863 SE 193rd Ave., in Portland, Oregon. Claimant notified the U.S. Postal Service and other government agencies, but did not notify the Department of his change of address.

(3) On July 26 and 27, 2016, the Department sent decisions # 91415 and # 194520 to claimant at the SE 188th Ave. address. The decisions were returned to the Department as undeliverable.

(4) On October 8, 2016, claimant received a bill for the Department for the overpayment and monetary penalty he was assessed in decision # 194520. On October 14, 2016, claimant contacted the Department, learned about the decisions the Department had tried to send him in July, and requested hearings on decisions # 91415 and 194520. Exhibit 3.

CONCLUSION AND REASONS: We disagree with the ALJ, and conclude that claimant demonstrated good cause for filing untimely hearing requests, and filed his hearing requests within a reasonable time once the circumstances that prevented his timely filing ceased to exist.

Under ORS 657.269, claimant had 20 days after decisions # 91415 and # 194520 were issued – until August 15 and 16, 2016 – to request hearings. Claimant's requests, which were filed on October 14, 2016, were 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 Decisions 16-UI-72142 and 16-UI-72144, the ALJ found that claimant's failure to receive the administrative decisions in July 2016 occurred because he did not change his address with the Department when he moved in March 2016. The ALJ cited OAR 471-040-0010(b)(A), which states that "good cause" does not include "[f]ailure to receive a document due to not notifying the Employment Department of Office of Administrative Hearings of an updated address while the person is claiming benefits or if the person knows, or reasonably should know, of a pending appeal." Based on this rule, the ALJ concluded that claimant did not demonstrate good cause for his untimely hearing requests. We disagree.

The ALJ held that claimant's failure to advise the Department of an address change in March 2016 was the proximate cause of his failure to receive decisions issued in July 2016, a conclusion we find unreasonable. The proper focus of analysis in this case must be claimant's actions in July 2016, when the decisions were issued. In July 2016, claimant was no longer claiming benefits and had not done so for approximately two months. At that time, he had no reason to know or suspect that he would receive mail from the Department about a work separation that occurred seven months ago. Nor did he know or suspect, after he had received unemployment benefits for almost three months without a problem, that the Department would subsequently determine he had been overpaid these benefits based on the work separation decision. Under these circumstances, a reasonable person would not find it necessary or important to make sure the Department had his current address. Because claimant had no reason to think the Department would contact him two months after he stopped claiming benefits, or suspect that there was a problem with the benefits he had already received, filing timely hearing requests were beyond his reasonable control. He therefore demonstrated good cause to extend the filing deadline for requesting hearings on both administrative decisions.

We next consider whether claimant filed his hearing requests within a reasonable time after the circumstances preventing his timely filing ceased to exist. Evidence presented at the hearing on this issue was inconclusive. Although the ALJ asked claimant to read the Spanish responses he provided in the appellant questionnaires into the record so they could be translated, the ALJ failed to have claimant read all of these responses. In addition, claimant's response to a critical question by the ALJ – "Do you know when you received that October 5th billing statement"¹ – was inaccurately translated as explained below:

Claimant's actual response, which was given in both English and Spanish: "Dos o tres días – the same day I receive it – la recibí un día antes y el otro día llamé por teléfono cuando me dieron la audiencia." Audio recording at 53:07.

Correct translation: "Two or three days – the same day I receive it – I received it one day before and the other day I called by telephone when they gave me the hearing."

Translation made by the interpreter: "I received it on the next day. I called and it was when I was given the hearing."²

Because it is unclear from claimant's testimony when he received the October 5th billing statement, we have found facts in accordance with his responses to the appellant questionnaire, Exhibit 3, and the testimony of the Department representative regarding the date on which claimant requested a hearing. According to this evidence, claimant received the billing statement on October 8 and requested hearings on the administrative decisions on October 14.³ Because claimant requested hearings within seven days of the date on which he learned about the administrative decisions, *i.e.*, when the circumstances that prevented timely filing of his hearing requests ceased to exist, his hearing requests were made within a reasonable time.

¹ Transcript at 9.

² Transcript at 9-10.

³ Transcript at 5.

For the forgoing reasons, claimant's late requests for hearings are allowed. Claimant is entitled to hearings on the merits of decisions # 91415 and # 194520.

DECISION: Hearing Decisions 16-UI-72142 and 16-UI-72144 are set aside, and these matters matter remanded for further proceedings consistent with this order. *Decisiones de la Audiencia 16-UI-72142 y 16-UI-72144 se ponen a un lado, y estas materias se remiten para otros procedimientos constantes con esta orden.*

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

DATE of Service: January 6, 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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NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.