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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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<p>EMPLOYMENT APPEALS BOARD DECISION 2017-EAB-0042</p>
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Affirmed
Request to Reopen Denied
Overpayment Assessed

PROCEDURAL HISTORY: On June 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work from March 13, 2016 to April 9, 2016 (decision # 122959). On June 10, 2016, claimant filed a timely request for hearing by fax. On June 14, 2016, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for June 27, 2016, at which claimant failed to appear. On June 27, 2016, ALJ Murdock issued Hearing Decision 16-UI-62632, dismissing claimant's request for hearing for failure to appear. On July 18, 2016, Hearing Decision 16-UI-62632 became final without claimant having filed a request to reopen. On July 29, 2016, the Department served notice of an administrative decision that concluded, based on decision # 122959, that claimant was overpaid \$2,096 in unemployment benefits that he was required to repay (decision # 154100). On August 18, 2016, decision # 154100 became final without claimant having filed a request for hearing. On November 16, 2016, claimant filed a late request to reopen the hearing on decision # 122959 and a late request for hearing on decision # 154100.

On November 23, 2016, ALJ Kangas issued Hearing Decision 16-UI-71745, dismissing claimant's late request for hearing on decision # 154100 subject to his right to renew the request by responding to an appellant questionnaire by December 7, 2016. On December 5, 2016, OAH received claimant's response. On December 6, 2016, OAH mailed a letter stating that Hearing Decision 16-UI-71745 was canceled. On December 19, 2016, OAH mailed two notices of two hearings scheduled for January 3, 2017. On January 3, 2017, ALJ Murdock conducted two hearings. On January 4, 2017, the ALJ issued Hearing Decision 17-UI-74091, allowing claimant's late request for hearing on decision # 154100 and affirmed the Department's assessment of the \$2,096 overpayment. On January 6, 2017, the ALJ issued Hearing Decision 17-UI-74265, denying claimant's late request to reopen the hearing on decision # 122959. On January 10, 2017, claimant filed timely 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 17-UI-74091 and 17-UI-74265. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0041 and 2017-EAB-0042).

No adversely affected party requested that EAB review the portion of Hearing Decision 17-UI-74091 in which the ALJ allowed claimant's late request for hearing on decision # 154100. We therefore confined our decision to the matters in dispute, that is, claimant's late request to reopen the hearing on decision # 122959 and the Department's assessment of the overpayment.

Claimant's argument contained information that was not part of the hearing record. For EAB to consider the new information, claimant must prove that the information is relevant and material to the issue before us. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006). The information claimant provided concerned his layoff during the weeks in issue, the issue underlying decision # 122959. That information would, however, only be relevant if we determined that claimant had good cause to reopen the hearing on that decision. Because we have concluded otherwise, we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Claimant filed weekly claims for benefits for the weeks of March 13, 2016 through April 9, 2016 (weeks 11-16 through 14-16), the weeks at issue. On May 14, 2016, claimant stopped claiming benefits.

(2) When claimant claimed the weeks at issue, he reported to the Department that he was temporarily laid off work during those weeks and did not seek work. Based on claimant's reports, the Department concluded that claimant was excused from seeking work based on his laid off status during the weeks at issue, and paid him \$2,096 for the period, \$524 each week.

(3) After paying claimant for each of the weeks at issue, the Department concluded that claimant was not excused from seeking work during the weeks at issue (decision # 122959). The Department subsequently mailed its June 1, 2016 notice of decision # 122959 to claimant at his address of record, a PO Box in Toledo, Oregon.

(4) Claimant received decision # 122959 between June 1, 2016 and June 10, 2016 and filed a timely request for hearing by fax. Within a two week period surrounding June 10, 2016, claimant discontinued his use of the PO Box and began using a street address in Toledo instead. Claimant changed his address with the U.S. Postal Service but did not change his address of record with the Department or OAH.

(5) The Department mailed notice of the June 27th hearing on decision # 122959 to claimant at his PO Box address, but claimant did not receive it. He was unaware that the hearing was scheduled. OAH mailed notice of Hearing Decision 16-UI-62632 to claimant at his PO Box, as well, but it appears unlikely claimant received it. Claimant was likely unaware of the hearing, and unaware that his hearing request was dismissed, until approximately November 16, 2016, when he received an overpayment billing statement based on decision # 122959. On November 16, 2016, he filed a late request to reopen decision # 122959.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's late request to reopen the hearing on decision # 122959 should be denied, and we agree that claimant was overpaid \$2,096 that he is required to repay.

Request to reopen. Individuals may request that a hearing be reopened; an ALJ may reopen the hearing if, in pertinent part, the individual failed to appear at the hearing and files the request to reopen within 20 days after the ALJ issued the hearing decision. ORS 657.270(5)(a) and (7)(a). The period in which an individual may file a request to reopen may be extended a reasonable time upon a showing of good cause. ORS 657.875. In this case, claimant's request for hearing was dismissed for failure to appear, but the 20-day period in which claimant could file a timely request to reopen expired on July 18, 2016; claimant filed his request to reopen late, on November 16, 2016.

The period in which a party may request reopening may be extended if the party requesting reopening has good cause for failing to request reopening within in the time allowed. OAR 471-040-0041(1) (February 10, 2012). "Good cause" means when an action, delay, or failure to act arises from an excusable mistake or factors beyond an applicant's reasonable control, but does not include "[f]ailure to receive a document due to not notifying the Employment Department or 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." OAR 471-040-0041(2) and (2)(b).

Claimant did not request reopening on or before July 18th because, likely, he did not know a hearing was scheduled, did not know he missed that hearing, and did not know that the ALJ had issued Hearing Decision 16-UI-62632 or that he needed to request reopening at any relevant time. However, the reason claimant did not know a hearing was scheduled, did not know he missed that hearing, and did not receive the hearing decision dismissing his request for hearing was that he changed his address without updating it with the Department or OAH. Although claimant was no longer claiming benefits at the time, he had, within two weeks of changing his address, filed a request for hearing with OAH. He therefore knew, or reasonably should have known, of a pending appeal, and was, as suggested by OAR 471-040-0041, obligated to keep the Department or OAH informed of his current address. Under that rule, failing "to receive a document due to not notifying" the Department or OAH of his address while his appeal was pending is specifically excluded from the definition of good cause; accordingly, we must conclude that claimant did not have good cause for filing a late request to reopen, and his late request to reopen must be denied.

Because claimant did not show good cause for failing to request reopening on or before July 18, 2016, he is not entitled to a hearing on decision # 122959. In other words, he is not entitled to dispute the Department's conclusion that he did was not eligible for benefits during the weeks at issue. Decision # 122959 is, therefore, final, as a matter of law.

Overpayment. ORS 657.310(1) provides that an individual who received benefits to which the individual was not entitled is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to the individual under ORS chapter 657. That provision applies if the benefits were received because the individual made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of the individual's knowledge or intent. *Id.* In addition, an individual who has been disqualified for benefits

under ORS 657.215 for making a willful misrepresentation is liable for a penalty in an amount of at least 15, but not greater than 30, percent of the amount of the overpayment. ORS 657.310(2).

The Department paid claimant in the amount of \$2,096 for four weeks of benefits during the weeks at issue, but subsequently concluded in decision # 122959 that claimant was not eligible to receive them. Although claimant requested a hearing on decision # 122959, he failed to appear for the hearing or file a timely request to reopen the hearing, and, as noted above, he has not shown good cause for filing a late request to reopen. As such, his request for hearing was dismissed, leaving decision # 122959 undisturbed and claimant without further rights to contest it. Claimant was, therefore, overpaid during the four weeks at issue as a matter of law.

The Department erroneously paid claimant \$2,096 based upon facts claimant reported to the Department concerning his employment status and work search activities, all of which suggested to the Department that claimant was eligible for benefits during the four weeks at issue when, as a matter of law, he was not. Because claimant reported that he was eligible for benefits when he was not, his statements were, as a matter of law, false. Because the Department overpaid claimant because of false statements he made about his eligibility, and regardless of claimant's knowledge or intent in making them, claimant is liable to repay the overpaid benefits to the Department, or have them deducted from future benefits otherwise payable.

DECISION: Hearing Decisions 17-UI-74091 and 17-UI-74265 are affirmed.

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

DATE of Service: January 18, 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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