

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0096

Affirmed
Late Request for Hearing Denied

PROCEDURAL HISTORY: On September 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 100201) concluding that claimant was not available for work from July 10 through August 20, 2016. On October 12, 2016, decision # 100201 became final, without a request for hearing having been filed. On October 26, 2016, the Department served notice of an administrative decision (decision # 141844) that assessed a \$2,835 overpayment, based on decision # 100201. On November 15, 2016, decision # 141844 became final, without a request for hearing having been filed. On December 19, 2016, claimant filed untimely requests for hearing on both decisions. On December 21, 2016, ALJ Kangas issued Hearing Decision 16-UI-73439, which dismissed as untimely claimant's request for hearing on decision # 100201, and Hearing Decision 16-UI-73440, which dismissed as untimely claimant's request for hearing on decision # 141844. Both hearing decisions were subject to claimant's right to renew his hearing requests by responding to an appellant questionnaire within 14 days. On January 6, 2017, claimant filed an application for review of Hearing Decision 16-UI-73439 with the Employment Appeals Board (EAB) and submitted his appellant questionnaire. By letter dated January 17, 2017, the Office of Administrative Hearings (OAH) notified claimant that it would not consider his response to the appellant questionnaire issued with Hearing Decision 16-UI-73439. On January 26, 2017, claimant filed an application for review of Hearing Decision 16-UI-73440 with EAB.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-73439 and 16-UI-73440. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0095 and 2017-EAB-0096).

Evidentiary matter: With his applications for review, claimant included his responses to the appellant questionnaires, evidence that was not considered by the ALJ and therefore was not part of the record. Under OAR 471-041-0090(2) (October 29, 2006), EAB may consider new information that is not part of the record if the party presenting the information demonstrates that circumstances beyond the party's reasonable control prevented the party from offering the information into evidence. OAH's refusal to consider a response to an appellant questionnaire unless submitted within 14 days of the date on which the hearing decision was mailed was a circumstance beyond claimant's reasonable control. We have

therefore considered the information contained in the responses to the appellant questionnaires in reaching these decisions. The questionnaire claimant submitted in response to Hearing Decision 16-UI-73439 is marked as EAB Exhibit 1, and the questionnaire claimant submitted in response to Hearing Decision 16-UI-73440 is marked as EAB Exhibit 2. Copies of EAB Exhibits 1 and 2 are included with this decision. Any party that objects to the admission of EAB Exhibits 1 and 2 must submit its objections to this office in writing, 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, EAB Exhibits 1 and 2 will remain part of the record.

Timeliness issue: Under OAR 471-041-0070 (March 20, 2012), an application for review is timely if it is filed within 20 days of the date that OAH mailed the decision sought to be reviewed. An application for review may be filed on forms provided by the Office of Administrative Hearing (OAH), but use of the form is not required provided the party “requests review of a specific hearing decision, or otherwise expresses intent to appeal a specific hearing decision.” OAR 471-041-0060(1) (January 8, 2008). Decision 16-UI-73440 was mailed on December 21, 2016. Because claimant used an OAH form to file his application for review on January 26, 2017, it appears to be untimely.

In the appellant questionnaire he included with his application for review of Hearing Decision 16-UI-73440, however, claimant stated that the “Jan 6th questionnaire was mailed in.” EAB Exhibit 2. This statement indicates that claimant may have been confused and may have believed that when he submitted an appellant questionnaire and filed an application for review on January 6, 2017, he was filing applications for review on *both* hearing decisions he had received. We find that claimant therefore indicated an intent to appeal Hearing Decision 16-UI-73440 when he filed the appellant questionnaire and application for review on January 6, 2016. We construe those materials as timely filed applications for review of both hearing decisions.

FINDINGS OF FACT: (1) Claimant received decision # 100201 in late October, and is unsure of the date on which he received decision # 141844.

(2) At all times relevant to this decision, claimant worked in a job that kept away from home for an average of 25 days per month. When he returned home, claimant often found correspondence imposing deadlines that had already passed.

CONCLUSION AND REASONS: Claimant’s late requests for hearing must be dismissed.

ORS 657.269 provides that parties have 20 days to request a hearing after the Department issues an administrative decision. ORS 675.875 allows the 20-day deadline to be extended “a reasonable time” upon a showing of “good cause.” OAR 471-040-0010 (February 10, 2012) defines “good cause” as factors beyond the party’s reasonable control or an “excusable mistake.” A “reasonable time” is seven days after the date on which the circumstances that prevented a timely filing cease to exist. OAR 471-040-0010(3). The administrative decisions at issue here were mailed on September 22, 2016 and October 26, 2016. Because claimant did not file his hearing requests until December 19, 2016, these requests were late.

At the time the decisions were mailed to him, claimant was working in a job that kept him away from home an average of 25 days a month. When claimant returned home, he often found correspondence

imposing deadlines that had already passed. It is more likely than not that claimant's failure to timely file his hearing requests occurred because he did not become aware of the administrative decisions until sometime after the deadlines for requesting hearings had passed. It was well within claimant's reasonable control to make arrangements to have his mail forwarded to him or to have someone check his mail while he was away. Claimant therefore failed to demonstrate good cause for filing untimely hearing requests.

DECISION: Hearing Decision 16-UI-73439 and 16-UI-73440 are affirmed.

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

DATE of Service: January 30, 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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