

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0190

Late Application for Review Allowed
Hearing Decision 17-UI-74299 Reversed & Remanded

PROCEDURAL HISTORY: On June 9, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant willfully underreported earnings to obtain benefits and therefore was overpaid \$719 in benefits that he must repay, is disqualified for 52 weeks of future benefits and subject to a \$179.75 monetary penalty (decision # 195241). On June 29, 2016, decision # 195241 became final without claimant having filed a request for hearing. On January 3, 2017, claimant filed a late request for hearing. On January 9, 2017, ALJ Kangas issued Hearing Decision 17-UI-74299, dismissing claimant's request for hearing as untimely without a showing of good cause, subject to his right to renew the request by filing a response to an appellant questionnaire by January 23, 2017. On January 30, 2017, Hearing Decision 17-UI-74299 became final without claimant having filed a response to the appellant questionnaire, or an application for review of Hearing Decision 17-UI-74299 with the Employment Appeals Board (EAB). On February 16, 2017, claimant filed a late application for review of Hearing Decision 17-UI-74299 and his response to the appellant questionnaire with EAB.

CONCLUSIONS AND REASONS: Claimant's late application for review of Hearing Decision 17-UI-74299 is allowed. Hearing Decision 17-UI-74299 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for a hearing on whether to allow claimant's late request for hearing on decision # 195241 and, if necessary the merits of decision # 195241.

Late Application for Review. ORS 657.270(6) required that claimant's application for review of Hearing Decision 17-UI-74299 be filed no later than January 30, 2017. It was filed on February 16, 2017, and therefore was late. OAR 471-041-0070 (August 30, 2011) provides that the filing period may be extended a reasonable time upon a showing of good cause as provided by ORS 657.875. "Good cause" exists when the applicant provides satisfactory evidence that factors or circumstances beyond the applicant's reasonable control prevented timely filing. OAR 471-041-0070(2)(a). "A reasonable time" is seven days after the circumstances that prevented timely filing ceased to exist. OAR 471-041-0070(2)(b).

In written argument, claimant asserted that he did not file his application for review of Hearing Decision 17-UI-74299 by January 30, 2017 because he did not receive the January 9, 2017 notice of the decision in the mail. Claimant further asserted that he filed his application for review after contacting OAH about the status of his request for hearing, first learning that Hearing Decision 17-UI-74299 had been mailed to him, having it re-mailed to him, and receiving it in the mail. Claimant's assertions are supported by a copy of Hearing Decision 17-UI-74299 submitted with his application for review, stamped with the following statement: "REMAILED FOR OUR INFORMATION ONLY[.] ORIGINAL DATE OF MAILING CONSTITUTES DATE OF SERVICE". Claimant's evidence is sufficient to show that he failed to file a timely application for review because he did not receive the January 9, 2017 notice of Hearing Decision 17-UI-74299 in the mail, which likely was beyond his reasonable control. His evidence also is sufficient to show that he likely filed his application for review within a reasonable time after he received the re-mailed notice. Claimant therefore established good cause to extend the filing deadline to February 16, 2017, and his application for review is allowed.

Late Request for Hearing. ORS 657.269 required claimant's request for hearing on decision # 195241 to be filed by June 29, 2016. It was filed on January 3, 2017, and therefore was late. Under ORS 657.875, however, 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) (February 10, 2012). A "reasonable time" is "seven days after the circumstances that prevented a timely filing ceased to exist." OAR 471-040-0010(3).

In his application for review, claimant asked EAB to consider his response to the appellant questionnaire regarding his late request for hearing on decision # 195241. Claimant's request is construed as a request for consideration of information not received into the hearing record under OAR 471-041-0090(2) (October 29, 2006), which allows new, relevant and material information to be considered if the party offering the information establishes that factors or circumstances beyond the party's reasonable control prevented the party from offering the information into the hearing record.

In his response to the appellant questionnaire, claimant asserted that he did not file his request for hearing by June 29, 2016 because he never received the June 9, 2016 notice of decision # 195241 in the mail, did not become aware of the decision until he telephoned the Department regarding a new claim for benefits, and filed his request for hearing on January 3, 2017. Claimant's new information is relevant and material to whether he had good cause for failing to file a timely request for hearing, and filed his request within a reasonable time. As noted above, claimant's failure to receive the January 9, 2017 notice of Hearing Decision 17-UI-74299, and therefore the appellant questionnaire, in the mail was beyond his reasonable control, and prevented him from offering his information into the hearing record.

Claimant's request for consideration of his new information therefore is granted. Due process requires that the Department be allowed an opportunity to respond to claimant's information. Hearing Decision 17-UI-74299 therefore is reversed, and this matter remanded to OAH for a hearing on whether to allow claimant's late request for hearing on decision # 195241 and, if so, the merits of decision # 195241.

DECISION: Hearing Decision 17-UI-74299 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: February 17, 2017

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-74299 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

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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