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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-0294</p>
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Reversed
Late Request for Hearing Allowed

PROCEDURAL HISTORY: On October 11, 2016, the Oregon Employment Department(the Department) served three notices of three administrative decisions, one concluding claimant was not available for work during week 12-16 (decision # 104033), one concluding claimant was not available for work during week 20-16 (decision # 104927), and one concluding Red Rooster Café discharged claimant for misconduct (decision # 105824). On October 12, 2016, the Department served notice of an administrative decision, based on the three October 11th decisions, assessing an \$895 overpayment, \$268.50 monetary penalty and 22 penalty weeks (decision # 193557). On October 31, 2016, decisions # 104033, 104927 and 105824 became final without claimant having filed timely requests for hearing. On November 1, 2016, decision # 193557 became final without claimant having filed a timely request for hearing. On January 10, 2017, claimant filed a late request for hearing on decision # 193557 by telephone. On January 23, 2017, ALJ Kangas issued Hearing Decision 17-UI-75212, dismissing claimant's late request for hearing subject to her right to renew the request by responding to an appellant questionnaire by February 6, 2017. On January 25, 2017, claimant responded to the questionnaire. On February 8, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing on decision # 193557 scheduled for February 22, 2017. On February 22, 2017, ALJ S. Lee conducted a hearing, and on February 24, 2017 issued Hearing Decision 17-UI-77718, re-dismissing claimant's late request for hearing on decision # 193557. On March 4, 2017, claimant filed a timely application for review of Hearing Decision 17-UI-77718 with the Employment Appeals Board (EAB).

As a preliminary matter, claimant testified at the hearing in this matter that she thought she had requested hearings on decisions # 104033, 104927 and 105824 at the same time she requested one in this case, and it was explained to claimant that she did not use the proper forms to do so. While claimants may opt to use a request for hearing form, they need not do so, and may effectively file requests for hearing, even late ones, via telephone call to the Department. *See* OAR 471-040-0005. It appears at the

time of this review that neither the Department nor OAH has construed claimant's statements to the Department on January 4th or January 10th and during the hearing, or her January 18th filing on the wrong form, as late requests for hearing on decisions # 104033, 104927 and 105824. If claimant still disputes the decisions the Department reached in decisions # 104033, 104927 and 105824 and would like a hearing about them, she should call the Department, or request a hearing by writing to the Department or OAH that she would like a hearing on those decisions. Should claimant choose to pursue a hearing on those matters, she would have to prove good cause for the late requests before being allowed to dispute the merits of the decisions. In order for a "good cause" determination to be made in those cases, an ALJ would have to develop a record about the circumstances under which claimant requested hearings in those three matters; as that has not yet occurred, we cannot and do not reach a decision as to whether claimant showed good cause for her late requests in those cases. We note, however, that the record in this matter, as we set forth below, suggests claimant might have filed telephonic request(s) for hearing in these three cases on January 4th and/or January 10th, and that she might have good cause for the late requests for hearing in decisions # 104033, 104927 and 105824 for the reasons explained below.

FINDINGS OF FACT: (1) On September 23, 2016, the Department mailed a letter to claimant at her address of record.

(2) Claimant stopped claiming benefits the week ending September 24, 2016. At the time, claimant had exhausted her claim for that benefit year and was ineligible for further benefit payments.

(3) Around the same time claimant stopped claiming benefits, she left her residence for a couple of weeks, primarily to attend her own medical appointments at a facility located across the state from her residence, a more than five-hour drive of approximately 325 miles. She arranged for a friend to collect her mail during her absence. Her friend did not open the mail, but just placed it in a basket to give to claimant at a later time. Claimant did not receive the Department's September 23, 2016 letter when it arrived.

(4) On September 30, 2016, the Department mailed another letter to claimant at her address of record. Claimant's friend retrieved the letter and placed it in the basket with claimant's other mail. Claimant did not receive the letter when it arrived.

(5) Claimant briefly returned to her residence approximately two weeks after she left, but did not collect her mail. She was not expecting to receive any mail from the Department because she had stopped claiming benefits, and was not aware of any issues with her exhausted claim.

(6) In approximately early October, claimant left her residence for several months. Claimant left primarily because she believed that residing with her parents in Sequim, Washington would provide her with more rapid and ready access to the facility where her medical appointments were located.¹ While

¹ We take notice of the generally cognizable fact that claimant's residence was located approximately 325 miles from the facility where her medical appointments were scheduled, and that Sequim, Washington is located approximately 230 miles from the facility where claimant's medical appointments were scheduled. <http://classic.mapquest.com/directions#e47951c1f911ff270a646307>. 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.

staying with her parents, her father was diagnosed with cancer and claimant needed to remain with them to help care for her father and assist her mother. She continued to have her friend collect her mail and place it in a basket for when she returned.

(7) The Department mailed its October 12, 2016 notice of decision # 193557 to claimant at her address of record. Claimant's friend retrieved the mail and placed it in the basket with claimant's other mail. Claimant did not receive decision # 193557 or other items mailed to her in December and January.

(8) On January 4, 2017, claimant filed a new initial claim for unemployment insurance benefits. The Department told her about a discharge issue that would prevent her from receiving benefit payments. She subsequently claimed a week of benefits and did not receive any benefit payment.

(9) On January 10, 2017, claimant called the Department and was first told about the overpayment and misrepresentation penalties (fraud) in decision # 193557. Claimant disagreed with the decision and denied committing fraud. The Department mailed new copies of the fraud and other decisions to claimant.

(10) On January 16, 2017, claimant arrived back at her residence. She collected the basket of mail from her friend, including mail from the Department. On January 18, 2017, claimant faxed the request for hearing form that had been attached to decision # 193557 to the Office of Administrative Hearings.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that claimant had good cause for filing a late request for hearing on decision # 193557. She is therefore entitled to a hearing.

OAR 471-040-0005(2) provides that a request for hearing may be filed by mail or fax to the Department or OAH, or by telephone to the Department. OAR 471-040-0005(1) provides that an individual may use a form to request a hearing; however, that rule also provides that using the form is not necessary "provided the party specifically requests a hearing or otherwise expresses a present intent to appeal."

The ALJ found as fact that claimant filed her request for hearing on decision # 193557 on January 18th. See Hearing Decision 17-UI-77718 at 3. We disagree. The ALJ asked claimant during the hearing if she disagreed with decision # 193557 while on the phone with a Department employee on January 10th; claimant replied, "Probably, yeah," and then further explained that she told the Department employee on the phone that she had not committed fraud. Audio recording at ~ 35:30. When asked whether she said she wanted to contest decision # 193557, claimant responded, "she [the Department employee] told me what to do." Audio recording at ~ 36:00. Claimant subsequently completed the form request for hearing attached to decision # 193557 and submitted it. In that context, it is more likely than not that claimant expressed to the Department employee with whom she spoke on January 10th that she disagreed with the fraud decision, *i.e.* decision # 193557, and indicated that she wanted to take further action regarding that decision. We conclude that claimant's January 10th conversation with the Department employee was sufficient to "express[] a present intent to appeal" decision # 193557. January 10th was, therefore, the date claimant's request for hearing was filed, and it was filed by telephone.

ORS 657.269(2) requires that requests for hearing on administrative decisions be filed within 20 days after it was mailed. The deadline to request a hearing on decision # 193557 was November 1st; claimant filed her request on January 10th, making her request late. However, ORS 657.875 allows the filing deadline to be extended a “reasonable time” upon a showing of “good cause.”

OAR 471-040-0010(3) defines a “reasonable time” as “seven days.” OAR 471-040-0010(1) defines “good cause” as “when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant’s reasonable control.” That rule also provides that good cause 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.”

The ALJ reasoned that claimant filed a late request for hearing in this matter because “she was away from her residence for an extended period of time and did not make any arrangements to have someone open her mail to check for time-sensitive items.” Hearing Decision 17-UI-77718 at 4. The ALJ concluded that claimant did not show good cause for the late filing because she was “responsible for ensuring that she has access to mail sent to her record address and that she checks it regularly,” and “[i]t was within claimant’s reasonable control to either collect her mail more frequently . . . or have her friend open items to ensure they did not need a response.” *Id.* We agree that three months is a long period of time to go without checking one’s mail, but disagree with the ALJ’s ultimate conclusion.

Under the applicable “good cause” definitions, it appears that an individual is liable for her failure to keep the Department apprised of her current address “while the person is claiming benefits or if the person knows, or reasonably should know, of a pending appeal.” In this case, however, claimant had stopped claiming benefits weeks before decision # 193557 was mailed, had exhausted her benefits for the year, was not aware of any problems with her previous claim for benefits, and was not expecting to receive any mail from the Department. Since claimant had no obligation to check the mail for letters from the Department under the circumstances, the fact that she did not check her mail for three months, or arrange for someone to monitor her mail, is not determinative of whether she had good cause. Claimant failed to receive or attend to decision # 193557 when it was mailed to her because of her own health issues and medical appointments and because she was assisting one of her parents in caring for her seriously ill parent; we conclude that claimant’s failure to receive mail for those reasons amounted to a factor or circumstance beyond her reasonable control and she had “good cause” for the late filing.²

Finally, the ALJ reasoned that even if claimant had shown good cause, her late request for hearing was still subject to dismissal because she did not file it within a “reasonable time,” based upon the ALJ’s findings that claimant discovered the need to file a request for hearing on January 10th and did not “file” the request for hearing on January 18th, one day beyond the seven day “reasonable time” period. Hearing Decision 17-UI-77718 at 4. In her written argument, claimant urged EAB to overturn the ALJ’s decision because the ALJ “said 7 days was reasonable but I contacted on the 8th day.”

² We note that claimant also failed to receive a document mailed to her during the last week she claimed, and another mailed to her the following week; if this case was about claimant’s failure to respond to those documents, the outcome of this case might be different since those documents were mailed in such close proximity to the weeks she claimed. The decision at issue in this case was, however, mailed weeks after she stopped claiming; we cannot conclude that an individual who has an exhausted claim and has stopped claiming benefits for weeks has an obligation to maintain a current address with the Department or to regularly check her mail for notices or correspondence from the Department.

First, we agree with the ALJ with respect to what a “reasonable time” means. OAR 471-040-0010(3) defines a “reasonable time” as “seven days after the circumstances that prevented a timely filing ceased to exist.” Given that definition, we cannot find that a filing that occurred on the eighth day occurred within a “reasonable time.” That said, however, we also disagree with the ALJ’s conclusion that claimant did not file her request for hearing within a reasonable time. As we previously concluded, claimant first learned of decision # 193557 on January 10th; we also concluded, different from the ALJ, that claimant filed her late request for hearing by telephone on January 10th. Because claimant filed her late request for hearing on the same day the circumstances that had prevented a timely filing ceased to exist, she filed it within the seven day “reasonable time” period.

Having concluded that claimant showed good cause and met the reasonable time requirement, we conclude that her late request for hearing on decision # 193557 should be allowed, and she is entitled to a hearing on the merits of decision # 193557.

In reaching this decision, we emphasize that the only matter EAB has decided at this time is that claimant is entitled to a hearing on the merits of decision # 193557; in further proceedings in this case, the only issues before the ALJ will be the overpayment and fraud penalty issues set forth in decision # 193557. Unless and until claimant establishes – in separate proceedings – that she had good cause for filing late requests for hearing on decisions # 104033, 104927 and 105824, those decisions are final, claimant is not entitled to hearings on them, and the findings and conclusions therein cannot be disputed.

DECISION: Hearing Decision 17-UI-77718 is set aside, as outlined above.

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

DATE of Service: March 10, 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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