

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0359

Affirmed
No Waiting Week Credit for Week 42-16

PROCEDURAL HISTORY: On November 28, 2016, the Oregon Employment Department (the Department) served notice of administrative decision # 93907 concluding that claimant did not follow the Department's rules when claiming benefits for the week of October 16 through 22, 2016 (week 42-16). Claimant filed a timely request for hearing. On March 1, 2017, ALJ Murdock conducted a hearing, and on March 13, 2017 issued Hearing Decision 17-UI-78793, concluding that claimant is not entitled to backdate his initial claim for benefits to include week 42-16. On March 22, 2017, claimant filed a timely application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: EAB considered the entire hearing record when reaching this decision. At hearing, the ALJ excluded a two-page document claimant submitted to OAH and the Department for admission into the hearing record. Audio Record at 12:16-13:06. The ALJ marked the document as Exhibit 1, and in Hearing Decision 17-UI-78793 stated that it was not admitted because it was immaterial or unduly repetitious of testimony.¹ However, Exhibit 1 is relevant to EAB's determination of the issue in this case, whether claimant should be allowed waiting week credit for week 42-16, and therefore is received into evidence under OAR 471-041-0090(1) as necessary to complete the record. EAB considered Exhibit 1 when reaching this decision. 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, Exhibit 1 will remain in the record.

FINDINGS OF FACT: (1) On October 19, 2015, claimant filed an initial claim for benefits. That initial claim expired at the end of the week of October 2 through 8, 2016 (week 40-16).

(2) Claimant did not speak with a Department representative during the weeks from October 9 through 22, 2016 (weeks 41-16 and 42-16).

¹ See Exhibit 1; Hearing Decision 17-UI-78793 at 1.

(3) On October 23, 2016 (during week 43-16), claimant filed a new initial claim for benefits. On October 31, 2016, claimant claimed benefits for week 42-16. On November 2, 2016, claimant contacted the Department and stated that he was trying to make week 42-16 his waiting week, which the Department construed as a request to backdate his new initial claim for benefits to week 42-16.²

CONCLUSIONS AND REASONS: Claimant is not entitled to waiting week credit for week 42-16.

OAR 471-0030-0040(3) (February 23, 2014) states that an initial claim is effective on the Sunday of the calendar week in which it is filed and must be filed prior to or during the first week for which waiting week credit is claimed. Here, claimant's October 19, 2015 initial claim for benefits expired at the end of week 40-16. He waited until week 43-16 to file his initial claim for benefits, which therefore was not effective until that week. Department rules do not provide for backdating an initial claim to a prior week. *See* OAR 471-0030-0040(3). Thus, because no initial claim was in effect during week 42-16, claimant is not entitled to waiting week credit for that week under Department rules.

At hearing, however, claimant nevertheless asserted he should be allowed waiting week credit for week 42-16 based on a conversation with a Department representative during week 41-16 or 42-16, which led claimant to believe he could file his new initial claim for benefits during week 43-16, and then claim and receive waiting week credit for week 42-16. Audio Record at 6:30-7:15. Claimant's assertion is construed as an argument that he should be allowed benefits under the doctrine of equitable estoppel. The doctrine of equitable estoppel "requires proof of a false representation, (1) of which the other party was ignorant, (2) made with the knowledge of the facts, (3) made with the intention that it would induce action by the other party, and (4) that induced the other party to act upon it." *Keppinger v. Hanson Crushing, Inc.*, 161 Or App 424, 428, 983 P2d 1084 (1999) (citation omitted). In addition, to establish estoppel against a state agency, a party "must have relied on the agency's representations and the party's reliance must have been reasonable." *State ex rel SOSOC v. Dennis*, 173 Or App 604, 611, 25 P3d 341, *rev den*, 332 Or 448 (2001) (*citing Dept. of Transportation v. Hewett Professional Group*, 321 Or 118, 126, 895 P2d 755 (1995)).

Contrary to claimant's assertion, however, Department records do not show that he spoke with a Department representative during week 41-16 or 42-16. Department records do show that on February 17, 2017, claimant asserted to a Department representative that he had called the Department during week 42-16 and been advised to file his new initial claim on October 23, 2016, and that he stated he would get a printout of his cell phone call history to confirm that assertion. However, Department records also show that on March 1, 2017, claimant and a Department representative agreed that according to a review of claimant's and the Department's phone records, claimant's first contact with the Department during the period at issue was October 31, 2016.³ Nor do the cell phone records

² We take notice of this fact, which is contained in Employment Department records. 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.

³ We take notice of these facts, which are contained in Employment Department records. 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 facts will remain in the record.

claimant submitted for the hearing show that he contacted the Department prior to October 31, 2016. *See* Exhibit 1. The record therefore fails to show that a Department representative told claimant prior to October 23, 2016 that claimant could file his new initial claim for benefits during week 43-16, and then claim and receive waiting week credit for week 42-16. Claimant therefore is not entitled to waiting week credit for week 42-16 under the doctrine of equitable estoppel.

In sum, we conclude that claimant is not entitled to waiting week credit for week 42-16 under the Department's rules or the doctrine of equitable estoppel.

DECISION: Hearing Decision 17-UI-78793 is affirmed.

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

DATE of Service: April 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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