

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0685

Reversed & Remanded

PROCEDURAL HISTORY: On April 19, 2017, the Oregon Employment Department (the Department) served a wage and potential benefit report concluding that claimant did not have sufficient base year wages or work hours to qualify for benefits. Claimant filed a timely request for hearing. On May 25, 2017, ALJ Monroe conducted a hearing, and on June 1, 2017 issued Hearing Decision 17-UI-84728, affirming the wage and potential benefit report. On June 5, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument comprised of a copy of a January 11, 2017 letter in which SVZ-USA, Inc. offered employment to claimant, the stub to a \$24,759 check issued to claimant by ADP, SVZ's payroll processor, on behalf of SVZ on April 12, 2017 and a summary created by claimant stating that he worked 328 hours for SVZ during the period January 13, 2017 through February 1, 2017. Although claimant did not offer these documents at the hearing, OAR 471-041-0090(2) (October 29, 2006) allows EAB to consider new information if that information is relevant and material to the issues before EAB and the party offering it shows factors or circumstances beyond the party's reasonable control prevented the party from offering it during the hearing.

At the hearing, claimant was obviously under the impression that the only relevant documentary information as to his wages and hours would be records from SVZ, his employer, or its payroll processing agent, ADP, and neither the ALJ nor the Department's witness challenged claimant's understanding. Audio at ~16:48, ~27:20. Claimant testified that he asked SVZ several times for any records it had about the wages he earned and hours he worked during the first quarter of 2017 since a significant proportion of them were not processed or paid through ADP, but SVZ did not provide the requested information to him. Audio at ~15:15, ~16:11, ~16:50. As well, while the ALJ stated to claimant during the hearing that he was not required to submit documentation about his hours and wages, she then found in Hearing Decision 17-UI-84728 that she was unable to accept his "sincere, plausible testimony at hearing," about his wages and hours during the first quarter of 2017, which she "ha[d] no reason to disbelieve," because the record "contain[ed] no objective evidence or other

documentary proof” establishing that claimant had more wages or hours of work other than those identified by the Department. Audio at ~27:55, Hearing Decision 17-UI-84728 at 3. The employer’s failure to make payroll records available to claimant, and the ALJ’s statements that may have led claimant to think it was unnecessary for him to provide documentary proof of his wages and hours, were all factors or circumstances that were beyond his reasonable control and likely caused him not to prepare or offer into evidence the new information that he now seeks to provide directly to EAB. Because the documents that comprised claimant’s argument are relevant and material to the wages that claimant earned and the hours that he worked in the first quarter of 2017, and claimant was deterred from offering them into evidence during the hearing, EAB will admit them into the record and has marked them as EAB Exhibit 1. A copy of EAB Exhibit 1 is included with this decision. Any party that objects to the admission of EAB Exhibit 1 into evidence must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. Unless such objection is received and sustained, EAB Exhibit 1 will remain in the record.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-84728 is reversed and this matter is remanded for further development of the record.

ORS 657.150(2)(a) provides that to qualify for unemployment insurance benefits an individual must have worked in subject employment in the base year and earned total base year wages of \$1,000 or more, must have total base year wages equal to or in excess of one and one-half times the wages in the highest quarter of the base year, and must have earned wages in subject employment equal to six times the individual’s weekly benefit amount. ORS 657.150(2)(b) provides that if the individual does not meet the requirements of subsection (a), the individual may qualify for benefits if the individual has worked a minimum of 500 hours in subject employment during the base year. The regular base year is calculated using the first four of the last five completed calendar quarters preceding the benefit year, while the alternate base year is calculated using the last four completed calendar quarters preceding the base year. *See* ORS 657.010(1), 657.173(1).

It was undisputed that claimant had no earnings and worked no hours for any subject employer in any quarter in 2016. Audio recording at 8:05, 13.35. Claimant therefore was not eligible for benefits using a regular base year calculation, and it was necessary to use an alternate base year calculation to determine if he was eligible for benefits. An alternate base year calculation would have to take into account his work for SVZ, which began on January 13, 2017, during the first quarter of 2017. *See* ORS 657.173(1); Audio recording at 9:22, 10:09. Since claimant’s only work during the alternate base year was performed in the first quarter of 2017, he needed to establish that he worked at least 500 hours for SVZ during the first quarter of 2017 to qualify for benefits. *See* ORS 657.150(2)(a). Claimant asserted that the Department’s wage and potential benefit report, which showed that he worked only 256 hours for SVZ and earned \$18,300.15 during the first quarter of 2017, was inaccurate. The ALJ relied on OAR 471-030-0048(1) (March 3, 2011)¹ to conclude that claimant failed to present “objective evidence, such as wage records or other documentary proof” to establish that he worked at least 500 hours in the first

¹ OAR 471-030-0048(1) states that “[a]n individual who receives a monetary claim determination under ORS 657.266(2) may request that the determination be amended. The Director upon receipt of such a request will examine wage records submitted to the Department by employers in an attempt to locate wages and/or hours of work alleged by the claimant to be missing. If the discrepancy involves only hours of work and the claimant has provided documentary evidence of hour sufficient to make the claim valid, the Director may issue a redetermination.”

quarter of 2017. Hearing Decision 17-UI-84278 at 3. We disagree with the ALJ's interpretation and application of OAR 471-030-0038(1), however.

OAR 471-030-0048(1) states only that the Department, upon the request of a claimant for a redetermination of a claim, will examine the wage records submitted in an effort to locate wages or hours alleged to be missing. It further states that if a claimant provides "documentary evidence of hours" sufficient to make a claim valid, the Department may issue a redetermination of a claim. *Id.* By using the term "documentary evidence" rather than "wage records" to describe what is expected from claimants who are disputing the information in a wage and potential benefit report, the regulation envisions that documents other than employer payroll records or employer-issued pay stubs may be considered to determine the accuracy of a wage and potential benefit report. The language of the rule also indicates that if "documentary evidence" presented by a claimant is otherwise reliable, it may be sufficient to show that a claim is valid despite the wage records submitted to the Department. Because the ALJ denied claimant an opportunity to present "documentary evidence" regarding hours worked and wages earned during the first quarter of 2017, Hearing Decision 17-UI-84278 must be reversed, and the matter remanded for additional evidence.

On remand, claimant must be prepared to present a detailed explanation of Exhibit 1; in particular, he must testify how he calculated that he worked 328 hours for SVZ between January 13 and February 1, 2017, and offer into evidence any documents upon which he based this calculation. Claimant should present any and all other documents he has that show, tend to show, or directly or indirectly support the number of hour that he worked for SVZ during the first quarter of 2017, and the ALJ should make an inquiry sufficient to determine the reliability of any documents submitted. Because claimant testified that SVZ sometimes bypassed ADP and directly issued some paychecks to him, that SVZ made many errors in paying him, that SVZ issued checks to him in piecemeal fashion that were intended to compensate him for past pay periods for which he had not received a whole paycheck from it or ADP, and that the checks SVZ issued to claimant did not include information about the hours of work for which the paychecks were intended to compensate him, it appears that claimant did not have and may not be able to obtain records from SZP or ADP that, analyzed together, would set out the hours he worked during the time he was employed by SVZ, January 13, 2017 through March 23, 2017. Audio recording at 14:48, 15:51, 17:16, 18:50, 19:13, 19:58, 22:55, 25:22. With respect to the background of claimant's employment, the letter confirming the offer of employment that SVZ made to claimant on January 11, 2017, included in EAB Exhibit 1, includes no information about anticipated work hours. EAB Exhibit 1 at 1-2. The ALJ should inquire of claimant the number of hours he was expected to work each week to earn the offered salary of \$140,000 per year, the days of the week he was expected to be available for work and on which he might expect to work or be called upon to work and whether the offered employment was full-time or part-time. Claimant should provide any documents that he has in his possession that support any of these expectations about his hours of work and his anticipated work schedule such as, for example, a job announcement, a job description, any letters, emails or communications exchanged with SVZ or ADP about his job duties, expected hours of work and like information.

As to the hours that claimant actually worked for SVZ between January 13, 2017 and March 23, 2017, to the extent possible, claimant should provide specific information about those hours on a week by week basis or some other limited periods of time for which he can conveniently provide this information and which may conform to SVZ's pay periods. The type of documentary information claimant might

offer into evidence during the remand hearing as to the hours he actually worked might include, for example, emails, text messages or other communications with SVZ or ADP that provide information about hours actually worked, his anticipated upcoming hours of work or the number of hours he was expected to devote to particular work tasks with the associated dates for that work, and any forms or records he might have submitted to SVZ or ADP to document his entitlement to receive a paycheck for particular periods of time. These documents might further include, for example, personal calendars, memoranda, logs, records, agendas or notes showing or tending to show the hours that he worked or expected to work, the purpose of that work, the particular dates on which he worked or expected to work, work appointments that he attended, mileage logs or travel records that would indicate the dates on which traveled for employment-related purposes and expense reports providing similar information. The best evidence that claimant could provide to show the hours of that he actually worked would be documents that were created contemporaneously to the periods in which he worked or expected to work and for purposes related to that employment and not summaries generated for the specific purpose of any hearing(s) about the accuracy of the hours shown in the Department's wage and potential benefits report. The type of documents that would be relevant would be anything written or printed, regardless of how formal or informal, and might include, for example, screen shots of a Smartphone or iPhone calendar showing claimant's work schedule or hours or rough handwritten notes which claimant made to keep track of his work hours. We emphasize that the types of documents we are seeking are *anything* that would substantiate claimant's claim that he worked at least 500 hours between January 13, 2017 and March 23, 2017 and the documents may be as informal as penciled notes on a napkin. Audio recording at 15:30, 28:40. Claimant should serve whatever supporting documents he is able to locate on the Department and the ALJ in advance of the hearing. Claimant should be prepared at the hearing on remand to explain the documents he has produced and how they show he worked at least 500 hours during the first quarter of 2017. As appropriate, the ALJ should be prepared to conduct a sufficient inquiry of claimant during the remand hearing to allow a determination of whether the documents do or do not reliably demonstrate that claimant worked at least 500 hours during the first quarter of 2017.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant worked a minimum of 500 hours during the first quarter of 2017, Hearing Decision 17-UI-84728 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 17-UI-84728 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: July 18, 2017

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-85728 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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