

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0929

Affirmed
Late Request for Hearing Dismissed

PROCEDURAL HISTORY: On January 5, 2017, the Oregon Employment Department (the Department) served notice of a wage and potential benefit report concluding claimant did not qualify to receive Trade Readjustment Allowance (TRA) payments because he did not timely enroll in an approved training program or obtain a necessary waiver. The administrative decision stated that a request for hearing had to be filed within 10 days to be timely. On January 15, 2017, the decision became final without claimant having filed a timely request for hearing. On June 8, 2017, claimant filed a late request for hearing on the Department's decision.

On June 16, 2017, ALJ Kangas issued Hearing Decision 17-UI-85846, dismissing claimant's late request for hearing, subject to his right to renew the request by responding to an appellant questionnaire by June 30, 2017. On June 27, 2017, claimant responded to the appellant questionnaire and the Office of Administrative Hearings (OAH) cancelled Hearing Decision 17-UI-85846. On July 7, 2017, OAH scheduled a hearing to address the timeliness of claimant's hearing request and, if appropriate, the merits of the underlying decision on appeal.

On July 19, 2017, ALJ Murdock conducted the scheduled hearing, and on July 26, 2017, issued Hearing Decision 17-UI-88867, re-dismissing claimant's late request for hearing, leaving the Department's January 5 decision undisturbed. On August 3, 2017, claimant filed a timely application for review of Hearing Decision 17-UI-88867 with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On January 5, 2017, the Department mailed to claimant at his address of record on file with the Department a Wage and Potential Benefit Report (WPBR) that notified him that he did not qualify to receive Trade Readjustment Allowance (TRA) payments he had applied for because he did not timely enroll in an approved training program or obtain a necessary waiver. The WPBR notified him that the decision would become final unless claimant requested a hearing within 10 days of the mailing date. DR Exhibit 2.

(2) Claimant likely received the Department's January 5, 2017 (WPBR) between January 6 and January 9, 2017.¹ The deadline for requesting a hearing on the decision expired on January 15, 2017 without claimant having requested a hearing on it.

(3) Claimant had been communicating with a Department representative about the TRA application he filed in December 2016 primarily by email and the representative had told him she intended to send copies of the documents she had emailed to him by mail as required, which she did and which claimant received. The representative did not email the Wage and Potential Benefit Report to claimant or notify him by email that she intended to do so. For that reason, claimant did not review all of the documents mailed by the Department and received by claimant at his address of record, including the WPBR in question.

(4) When claimant's benefits ran out around May 2017, he determined from conversations with the Department that it had mailed the January 5 WPBR to him at that time and he had not requested a hearing. Subsequently, claimant filed his late request for hearing on June 8, 2017.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's late request for hearing is subject to dismissal.

ORS 657.266 provides, in part, that an initial or amended determination become final unless a request for hearing is filed not later than 10 days after the mailing of the initial or amended determination. ORS 657.875 provides that the 10-day deadline may be extended a "reasonable time" upon a showing of "good cause." OAR 471-040-0010 (February 10, 2012) provides that "good cause" includes factors beyond an applicant's reasonable control or an excusable mistake, and defines "reasonable time" as seven days after those factors ceased to exist.

In this case, the deadline for claimant to file a timely request for hearing on the January 5, 2017 WPBR expired on January 15, 2017; claimant did not file his request for hearing until more than four months later, on June 8, 2017, making his request late. In his responses to the appellant questionnaire, claimant asserted that he did not receive notification of the approaching TRA deadline or waiver option at any time. DR Exhibit 2. However, claimant did not deny that he received the January 5 WPBR shortly after it was mailed. Audio Record ~ 16:00 to 17:00. Nor did he assert that he had been experiencing any problems with his mail and admitted that he received other mailings from the Department at his address. Audio Record ~ 10:45 to 14:45. More likely than not, claimant did receive the WPBR in question within 1 to 3 days after it was mailed on January 5, 2017 but did not review it because the document was

¹ Under OAR 137-003-0520 (January 31, 2012), documents sent through the US Postal Service are presumed to have been received by the addressee, subject to evidence to the contrary.

We also take notice of the generally cognizable fact that first class mail shipped through the United States Postal Service generally takes 1-3 days to deliver to the designated recipient, making it more likely than not that claimant received the Department's Wage and Potential Benefit Report, mailed on January 5, 2017, between January 6 and January 9, 2017 (the third day, January 8, 2017, was a Sunday, and mail is not delivered on Sundays). See <https://www.usps.com/ship/first-classmail.htm>. 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.

not anticipated based on discussions with the Department representative with whom he had been communicating. However, it was within claimant's reasonable control to review his mail when received. Although his failure to read the mail he received from the Department was, more likely than not, a mistake that caused him to miss the deadline for requesting a hearing in this case, it was not an "excusable mistake" for purposes of establishing good cause for his late request for hearing because that mistake did not raise due process issues and was not the result of inadequate notice, reasonable reliance on another person or his inability to follow directions despite substantial efforts to comply. *See e.g. Appeals Board Decision 2017-EAB-0838 (August 8, 2017); Appeals Board Decision 2016-EAB-1435 (December 28, 2016).*

For that reason, we agree with the ALJ that claimant failed to show good cause for his late request for hearing on the January 5, 2017 WPBR and accordingly that late hearing request must be dismissed.

DECISION: Hearing Decision 17-UI-88867 is affirmed.

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

DATE of Service: August 22, 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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