

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0949

Hearing Decision 17-UI-88355 – Reversed, Late Request for Hearing Allowed
Hearing Decision 17-UI-88354 – Reversed and Remanded

PROCEDURAL HISTORY: On February 6, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 94843) concluding that claimant failed to actively search for work from January 1 through 7, 2017 (week 1-17). On February 27, 2017, decision # 94843 became final, without a request for hearing having been filed. On March 15, 2017, the Department issued an administrative decision (decision # 101259) which concluded that claimant was overpaid \$211 in benefits for week 1-17, based on decision # 94843. On March 27, 2017, claimant filed an untimely hearing request on decision # 94843 and a timely hearing request on decision # 101259. On June 30, 2017, the Department issued an amended decision (decision # 101259) which concluded that claimant was overpaid \$590 in benefits for week 1-17, based on decision # 94843. On July 17, 2017, ALJ Triana conducted hearings, and on July 19, 2017, issued Hearing Decision 17-UI-88355, which dismissed claimant's late hearing request, and Hearing Decision 17-UI-88354, which affirmed decision # 101259. On August 4, 2017, claimant filed applications for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-88354 and 17-UI-88355. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0949 and 2017-EAB-0950).

FINDINGS OF FACT: (1) Claimant claimed benefits for week 1-17 (January 1 through 7, 2017), and was paid \$590 in benefits for that week. On January 14, 2017 he received a letter from the Department which stated that it appeared he was ineligible to receive benefits for week 1-17 because he had not actively searched for work; the letter asked that claimant provide the Department with additional information. Claimant timely responded to the Department's request for information.

(2) On February 6, 2017, the Department issued decision # 94843 which concluded that claimant was not eligible to receive benefits for week 1-17 because he failed to conduct an active work search. Claimant did not receive this decision.

(3) Claimant received decision # 101259 a few days after it was mailed on March 15, 2017. When claimant contacted the Department to request a hearing on decision # 101259, he learned about decision # 94843 and on March 27, 2017, requested hearings on both decisions.

CONCLUSION AND REASONS: Hearing Decision 17-UI-88355 should be reversed and the matter scheduled for a hearing on the merits of decision # 94843. Hearing Decision 17-UI-88354, which is based entirely on the determination in decision # 94843 that claimant was not eligible for benefits for week 1-17 being final, should be reversed and remanded pending the outcome of the hearing on decision # 94843.

ORS 657.269 provides that the Department's decisions become final unless a party files a request for hearing within 20 days after the date it is mailed. ORS 657.875 provides that the 20-day deadline may be extended a "reasonable time" upon a showing of "good cause." OAR 471-040-0010 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. The Department issued decision # 94843 on February 6, 2017. Claimant's request for hearing was filed on March 27, 2017, and was therefore late.

The ALJ found that the Department mailed decision # 94843 to claimant's correct mailing address, and noted that the record contained no evidence that the decision was returned to the Department as undeliverable. Hearing Decision 17-UI-88355 at 3. The ALJ also found that claimant's "assertion of non-receipt of a letter, without additional details is insufficient to rebut the presumption of delivery under OAR 137-003-0520(10)."¹ *Id.* Based on her determination that claimant failed to prove he did not receive decision # 94843 soon after it was mailed on February 6, she concluded he did not demonstrate that his late hearing request resulted from any factors beyond his reasonable control and dismissed his request for hearing as untimely. We disagree.

Other facts in the record support claimant's testimony that he did not receive a decision about his work search soon after it was mailed. Hearing Decision 17-UI-88355 record, audio recording at 20:23, 25:59. Claimant responded promptly to correspondence he received from the Department – he readily provided the information the Department requested in its January letter and contacted the Department within a few days of receiving the March 15 overpayment decision. Based on this conduct, we reasonably infer that claimant would have contacted the Department had he received decision # 94843. Because the record shows that claimant did not contact the Department until he received the March overpayment decision, we find it more likely than not that claimant never received decision # 94843, and only learned about it when he contacted the Department about the overpayment decision mailed to him on March 15, 2017. We therefore conclude that claimant demonstrated good cause for extending the deadline for filing his hearing request on decision # 94843.

The evidence suggests that claimant filed his late hearing request on decision # 94843 within the seven-day reasonable time period. Claimant testified that he prefers to "take care of stuff right as it comes in," indicating that he contacted the Department promptly after he received the overpayment decision and learned about decision # 94843 regarding his work search. Hearing Decision 17-UI-88355 record,

¹ OAR 137-003-0520(10) (January 31, 2012) provides that "[d]ocument sent through the U. S. Postal Service by regular mail are presumed to have been received by the addressee, subject to evidence to the contrary."

audio recording at 28:29. Having shown good cause to extend the deadline for requesting a hearing on decision # 94843 a reasonable time, claimant's request for hearing on that decision is allowed, and he is entitled to a hearing on the merits of that decision.

The ALJ's determination in Hearing Decision 17-UI-88354 that claimant was overpaid benefits for week 1-17 was based entirely on her dismissal of claimant's request for hearing on decision # 94843, and finding that decision (decision # 94843) final as a matter of law. Because we have concluded that claimant is entitled to a hearing about his ineligibility for benefits for week 1-17 and, depending on the outcome of that hearing, may not have been overpaid, we also conclude that there is an insufficient basis upon which to conclude that claimant was overpaid benefits. Hearing Decision 17-UI-88354 must therefore be reversed and remanded pending a determination of claimant's ineligibility for benefits for week 1-17.

Note: The failure of any party to appear at any subsequent hearings scheduled in these matters will not reinstate Hearing Decisions 17-UI-88354 and 17-UI-88355 or return these matters to EAB. Only timely applications for review of any subsequent hearing decisions will cause these matters to return to EAB.

DECISION: Hearing Decision 17-UI-88355 is set aside, as outlined above. Hearing Decision 17-UI-88354 is reversed, 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: August 24, 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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