

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0972**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On May 16, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 92430). Claimant filed a timely request for hearing. On June 6, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for June 19, 2017, at which claimant failed to appear. On June 19, 2017, ALJ Snyder issued Hearing Decision 17-UI-86019, dismissing claimant's hearing request for failure to appear. On June 23, 2017, claimant filed a timely request to reopen the June 19<sup>th</sup> hearing. On July 6, 2017, OAH mailed notice of a hearing scheduled for August 3, 2017. On August 3, 2017, ALJ Wyatt conducted a hearing, and on August 7, 2017, issued Hearing Decision 17-UI-89738, denying claimant's request to reopen. On August 11, 2017, claimant filed an application for review of Hearing Decision 17-UI-89738 with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Hearing Decision 17-UI-89738 should be reversed, and this matter remanded for additional information.

The ALJ concluded that claimant did not show good cause to reopen the June 19<sup>th</sup> hearing, finding as fact that claimant missed the June 19<sup>th</sup> hearing because he thought someone would be calling him to participate in the hearing and "did not read the hearing notice closely enough to note the procedure for calling in to the hearing, which emphasized the claimant must call in for his hearing . . .," nor did claimant call one of the other phone numbers on the notice of hearing. Hearing Decision 17-UI-89738 at 2. In a footnote, the ALJ also stated,

I note for the record that, after the Administrative Law Judge announced that claimant's reopen request was denied, claimant asserted that he had a disability that prevented him from reading the hearing notice carefully. Claimant was given a full opportunity to explain why he missed the June 19, 2017 hearing earlier in the August 3, 2017 hearing. Claimant did not testify about a disability when he had that opportunity, nor did he submit information about his disability in his written explanations (Ex. 1). The ALJ declined to consider additional evidence at the point when claimant attempted to offer that evidence, after the decision on the reopen request had already been announced during the hearing.

Hearing Decision 17-UI-89738 at 4. We disagree that the ALJ gave claimant a full opportunity to explain why he missed the hearing, and conclude that this matter must be remanded to allow claimant to explain his condition and why it caused or contributed to his failure to appear at the June 19<sup>th</sup> hearing.

The ALJ asked claimant at one point, “Is there anything else you’d like to add – anything extra you would like to say?” and claimant replied, “No.” Audio recording at ~ 17:25-18:35. The ALJ did not tell claimant that the evidentiary record was closed at that point, however, nor did he tell claimant that he was prepared to render his decision.<sup>1</sup> The ALJ then began a lengthy explanation about why claimant did not have good cause to reopen the hearing based on the information he had provided, without making it explicit that the record was closed or that he was explaining his decision in the case. He did not allow claimant’s attempt to ask a question or provide other information during that explanation until after approximately two and a half minutes, at which time claimant immediately mentioned his disability. Only at that point did the ALJ explain that the hearing had ended and he would not take additional evidence. Audio recording at ~ 20:30.

In sum, the record shows that the ALJ closed the record and decided the case – of a claimant whose very inexperience and failure to understand the hearing process caused him to need the reopen hearing in the first place – without telling claimant that he was doing so, and then used the closure of the hearing record to deny claimant the opportunity to fully develop the hearing record. Under the circumstances, the ALJ’s refusal to consider evidence about claimant’s disability and its effect on claimant’s failure to appear at the hearing was plain error. On remand, the ALJ must fully develop the record about claimant’s meningitis-caused brain injury that “interferes with a lot of my thought process,” as well as develop the record about the effect his condition might have had on his ability to read the notice of hearing and appear at the June 19<sup>th</sup> hearing. Audio recording at ~ 20:00.

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 accord 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 had good cause to reopen the hearing, Hearing Decision 17-UI-89738 is reversed, and this matter is remanded for development of the record.

**DECISION:** Hearing Decision 17-UI-89738 is set aside, and this matter remanded for further proceedings consistent with this order.<sup>2</sup>

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

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<sup>1</sup> We also note that the ALJ did not ask claimant during the reopen hearing whether or not any health or medical reason contributed to his failure to appear at the hearing. The circumstances of this case suggest that claimant was inexperienced with administrative hearings and would not necessarily have known to volunteer that information.

<sup>2</sup> NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-89738 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.

**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](http://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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