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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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<p>EMPLOYMENT APPEALS BOARD DECISION 2017-EAB-0983</p>
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Application for Review of Hearing Decision 17-UI-76925 ~ Dismissed
Hearing Decision 17-UI-89294 ~ Affirmed
Hearing Decision 17-UI-89292 ~ Reversed and Remanded

PROCEDURAL HISTORY: On December 29, 2016, the Oregon Employment Department (the Department) served notice of two administrative decisions, one assessing a \$2,950 overpayment, \$442.50 monetary penalty and 24 penalty weeks (decision # 193248), and the second concluding that claimant voluntarily left work without good cause (decision # 153650). On January 17, 2017, claimant filed timely requests for hearing on both decisions. On January 30, 2017, the Office of Administrative Hearings (OAH) mailed two notices of two hearings, both scheduled for February 14, 2017, at both of which claimant failed to appear. On February 14, 2017, ALJ R. Frank issued Hearing Decision 17-UI-76922, dismissing claimant's request for hearing on decision # 153650 for failure to appear, and Hearing Decision 17-UI-76925, dismissing claimant's request for hearing on decision # 193248 for failure to appear. On March 6, 2017, Hearing Decisions 17-UI-76922 and 17-UI-76925 became final with no record of claimant having filed a timely request to reopen with OAH or a timely application for review with the Employment Appeals Board (EAB).

Also on February 14, 2017, the Department served notice of an administrative decision that canceled decision # 193248, assessed a \$3,450 overpayment, \$531 monetary penalty and 28 penalty weeks (hereinafter referred to as "the overpayment decision"). On March 1, 2017, claimant filed a timely request for hearing on the overpayment decision. On June 8, 2017, OAH mailed notice of a hearing on the overpayment decision scheduled for June 29, 2017, at which claimant failed to appear. On June 29, 2017, ALJ Meerdink issued Hearing Decision 17-UI-86895, dismissing claimant's request for hearing on the overpayment decision for failure to appear. On July 19, 2017, Hearing Decision 17-UI-86895 became final without claimant having filed a timely request to reopen with OAH or a timely application for review with EAB.

On July 20, 2017, claimant filed a request to reopen what was construed as a late request to reopen the February 14, 2017 hearing on decision # 153650 and a late request to reopen the June 29, 2017 hearing on the overpayment decision. On August 1, 2017, ALJ Kangas reviewed claimant's requests and issued Hearing Decision 17-UI-89292, denying claimant's late request to reopen the February 14th hearing on

decision # 153650, and Hearing Decision 17-UI-89294, denying claimant's late request to reopen the June 29th hearing on the overpayment decision. On August 16, 2017, claimant filed an application for review of Hearing Decision 17-UI-76925, Hearing Decision 17-UI-89292, and Hearing Decision 17-UI-89294 with EAB.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-76925, 17-UI-89292, and 17-UI-89294. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0982, 2017-EAB-0983 and 2017-EAB-0984).

EAB considered claimant's written argument to the extent it was relevant and based upon the record in these matters.

CONCLUSIONS AND REASONS: For the reasons set forth below, claimant's application for review of Hearing Decision 17-UI-76925 is dismissed, Hearing Decision 17-UI-89294 is affirmed, and Hearing Decision 17-UI-89292 is reversed and remanded for additional proceedings.

Hearing Decision 17-UI-76925: The administrative decision underlying Hearing Decision 17-UI-76925, decision # 193248, was canceled and superseded by the Department's February 14th overpayment decision. As such, the issue of claimant's failure to appear at the February 14th hearing on decision # 193248 is moot, and claimant's application for review of Hearing Decision 17-UI-76925 therefore is dismissed.

Hearing Decision 17-UI-89294: ORS 657.270(5)(c)(B) provides that a party's hearing may be reopened if the party who failed to appear at the hearing "files the request within 20 days after the issuance of the written decision by the administrative law judge." In this matter, the ALJ issued a written decision dismissing claimant's request for hearing on the February 14th overpayment decision for failure to appear on June 29, 2017. The 20th day after June 29, 2017 was July 19th.

Although claimant signed her request to reopen on July 17, 2017, she sent her request to reopen through the mail, and the "filing date" of a document filed by mail is the "postmarked date affixed by the United States Postal Service." See *accord* OAR 471-040-0005(4)(b); OAR 471-010-0040(2). The postmark date on the envelope in which claimant filed her request to reopen was July 20th, meaning that her request to reopen was filed 21 days after the ALJ's decision was issued, making the request late.

ORS 657.875 provides that the period within which a party may request reopening may be extended "a reasonable time" "upon a showing of good cause therefor." OAR 471-040-0041(2) (February 10, 2012) defines good cause as "an excusable mistake" or "factors beyond an applicant's reasonable control." OAR 471-040-0041(4) requires that parties "set forth the reason(s) for filing a late request to reopen in a written statement" for OAH to "consider in determining whether good cause exists for the late filing, and whether the party acted within a reasonable time."

In this case, the written statement accompanying claimant's July 20th request to reopen did not identify any reason why she filed her request to reopen the June 29th hearing one day late. In the absence of such an explanation, claimant has not established that it was more likely than not that the reason(s) for her late filing were the result of an excusable mistake or factors beyond her reasonable control. Claimant's late request to reopen the June 29th hearing is, therefore, denied.

Hearing Decision 17-UI-89292: The ALJ denied claimant’s request to reopen the February 14th hearing on decision # 153650, reasoning that claimant filed her request to reopen that hearing on July 20th, over five months late, and that her “request includes no explanation of why she did not file the reopening request within the 20 days allowed.” Hearing Decision 17-UI-89282 at 3. We disagree that the record supports the ALJ’s conclusions.

Claimant wrote in her July 20th request to reopen that she “called to request a second hearing” after she “missed my 1st hearing” due to weather-caused mail delivery delays. She did not specify when that call occurred, but the context of her statement suggested that her call might have been placed on or around February 19, 2017, which was the date claimant signed a request for hearing form that was later filed and construed as a timely written request for hearing on the Department’s February 14th overpayment decision, or March 1, 2017, the date that claimant filed that form. Because a request to reopen the February 14th hearing made prior to March 6th would be a timely request to reopen in this case, and the contents of claimant’s call are relevant to this determination, additional inquiry is required before we can reach a decision about the date of claimant’s request to reopen the February 14th hearing.

On remand, the ALJ should ask claimant when she received Hearing Decision 17-UI-76922, which dismissed her request for hearing on decision # 153650, whether she read the hearing decision and any notices or advisories that were mailed with the hearing decision, whether she agreed or disagreed with the decision, and what she did next. The ALJ should ask claimant who, or which office, she “called to request a second hearing,” and ask her what the date of the call was. If relevant and the necessary parties are present at the remand hearing, the ALJ should ask the Department’s witness to review any relevant call records to corroborate claimant’s testimony, or review any relevant OAH call records if claimant’s call was to OAH. The ALJ should ask claimant and any other material witness what was said during claimant’s “call to request a second hearing,” what questions she asked, what she was told would occur as a result of her call, and whether she was told to do anything after the call ended.

The March 1, 2017 hearing request in the record of case number 2017-UI-62653 appears to consist only of one page, possibly faxed to OAH, upon which claimant marked boxes identifying herself as claimant and indicating she did not need an interpreter, provided her telephone number, then signed and dated the form February 19, 2017. The ALJ should ask claimant whether she sent anything else with the March 1, 2017 hearing request form and, if so, what she sent. The ALJ should ask claimant what she understood was the significance of submitting the March 1st form, and what she intended when she sent it. The ALJ should ask claimant if there is any significance to the fact that she dated the form February 19th, such as whether that was the date she received the Department’s February 14th overpayment decision, or whether that was the date she spoke with someone about that decision or “called to request a second hearing.” The ALJ should ask claimant why she completed that form on February 19th and waited over a week before sending it to OAH. The ALJ should also ask claimant why, if she thought she had “called to request a second hearing,” she also sent the request for hearing form. In addition to those questions, the ALJ should ask any other relevant or follow-up questions necessary to determine what date claimant filed her request to reopen the February 14th hearing on decision # 153650, and, if she waited past March 6th to request to reopen that hearing, why she filed her request to reopen late, and whether or not the late request was filed within the seven-day “reasonable time” period.

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 February 14th hearing on decision # 153650, Hearing Decision 17-UI-89292 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 17-UI-89292 is set aside, and this matter remanded for further proceedings consistent with this order. Hearing Decision 17-UI-89294 is affirmed. The application for review of Hearing Decision 17-UI-76925 is dismissed.

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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