

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1037

Hearing Decision 17-UI-90651 – Reversed, Late Request for Hearing Allowed
Hearing Decision 17-UI-90674 – Reversed and Remanded

PROCEDURAL HISTORY: On April 21, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work from June 19, 2016 to July 9, 2016 (decision # 81807). On May 11, 2017, decision # 81807 became final without claimant having filed timely request for hearing. On May 23, 2017, the Department served notice of an administrative decision assessing a \$1,011 overpayment claimant was required to repay (decision # 115753). On June 7, 2017, claimant filed a late request for hearing on decision # 81807 and a timely request for hearing on decision # 115753. On August 14, 2017, ALJ Logan conducted a hearing on decision # 81807, and ALJ Kangas conducted a hearing on decision # 115753. On August 17, 2017, ALJ Logan issued Hearing Decision 17-UI-90651, dismissing claimant's late request for hearing on decision # 81807, and ALJ Kangas issued Hearing Decision 17-UI-90674, affirming decision # 115753. On August 29, 2017, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-90651 and 17-UI-90674. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-1037 and 2017-EAB-1038).

FINDINGS OF FACT: (1) Sometime after the Department attempted to mail decision # 81807 to claimant's address of record, claimant received an envelope from the Department that contained blank pages. Claimant did not receive a copy of decision # 81807 in the mail.

(2) The Department successfully mailed decision # 115753, which referred to the substance of decision # 81807, to claimant's address of record. Claimant next checked her mail during the first week of June 2017, received that decision, and, by reading it, learned of the existence of decision # 81807. On June 7, 2017, claimant called the Department to request a hearing on decision # 115753 and a late request for hearing on decision # 81807.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant is entitled to a hearing on the merits of decision # 81807. Because decision # 115753 is based entirely upon the

finality of decision # 81807, decision # 115753 is remanded pending a determination of claimant's eligibility for benefits.

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 ALJ concluded that, while claimant had good cause to extend the filing deadline, she did not meet the "reasonable time" requirement because it took her more than seven days after the circumstances that had prevented a timely filing ceased to exist before she filed her late request for hearing. The ALJ based that finding upon the premise that the circumstances that prevented claimant from filing a timely request for hearing ceased when she "received" notice of decision # 115753 "by May 26 or May 27, 2017," the date the ALJ speculated decision # 114753 might have been placed in claimant's mailbox. *See* Hearing Decision 17-UI-90651 at 2. We disagree with the ALJ about whether claimant met the reasonable time requirement.

Although the U. S. Postal Service typically delivers first class mail such as the administrative decisions at issue in this case within one to three days of the date it was placed in the mail, and we regularly take notice of that generally cognizable fact, the fact of the matter is that mail service delays sometimes occur, and we cannot justify finding as fact that claimant constructively, let alone actually, received decision # 115753 on May 26 or May 27, 2017, or on any particular date. The facts as developed in this record fail to establish what date decision # 115753 was placed in claimant's mailbox, and claimant in fact testified that she received that decision when she checked her mail during the first week of June. The circumstances that prevented claimant's timely filing therefore ceased to exist in the first week of June. The record also shows that claimant filed her late request for hearing in this matter on June 7th, which was within seven days of the first week of June, and, therefore, within a "reasonable time." Because claimant established good cause to extend the filing period for decision # 81807, and filed her late request within the seven-day reasonable time period, her late request for hearing is allowed, and she is entitled to a hearing on the merits of decision # 81807.

The ALJ's determination in Hearing Decision 17-UI-90674 that claimant was overpaid benefits was based entirely on the determination in Hearing Decision 17-UI-90651 dismissing claimant's request for hearing on decision # 81807, and finding that decision final as a matter of law. Because we have concluded that claimant is entitled to a hearing about her eligibility for benefits for those weeks and, depending on the outcome of that hearing, may or 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-90674 must therefore be reversed and remanded pending a determination of claimant's eligibility for benefits.

We note that the failure of any party to appear at any subsequent hearings scheduled in these matters will not reinstate Hearing Decisions 17-UI-90651 or 17-UI-90674 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-90651 is set aside, as outlined above. Hearing Decision 17-UI-90674 is set aside, and this matter remanded for further proceedings consistent with this order.

J. S. Cromwell and D. P. Hettle.

DATE of Service: September 25, 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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