

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1083

Hearing Decisions 17-UI-91038 and 17-UI-91040 Reversed & Remanded

PROCEDURAL HISTORY: On March 24, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work from January 15, 2017 through February 4, 2017 (decision # 155205). On April 13, 2017, decision # 155205 became final without claimant having filed a request for hearing. On April 26, 2017, the Department served notice of an administrative decision assessing an \$824 overpayment based on decision # 155205 (decision # 122955). On May 8, 2017, claimant filed an untimely request for hearing on decision # 155205 and a timely request for hearing on decision # 122955. On August 16, 2017, ALJ Seideman conducted hearings, and on August 24, 2017 issued two hearing decisions, the first allowing claimant's untimely request for hearing on decision #155205 and affirming decision #155205 (Hearing Decision 17-UI-91040), and the second affirming decision # 122955 (Hearing Decision 17-UI-91038). On September 12, 2017, claimant filed applications for review of Hearing Decisions 17-UI-91038 and 17-UI-91040 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-91038 and 17-UI-91040. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-1082 and 2017-EAB-1083).

CONCLUSION AND REASONS: Based on a *de novo* review of the entire record in these cases, and pursuant to ORS 657.275(2), the ALJ's findings and analysis in Hearing Decision 17-UI-91040 with respect to allowing claimant's untimely request for hearing are **adopted**. However, Hearing Decision 17-UI-91038 and that portion of Hearing Decision 17-UI-91040 affirming decision # 155205 are reversed, and these matters remanded for further development of the record on those issues.

Hearing Decision 17-UI-91040. To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). For purposes of ORS 657.155(1)(c), an individual is actively seeking work when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity. OAR 471-030-0036(5)(a) (February 23, 2014). With limited exceptions individuals are "required to conduct at least five work seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual." *Id.* Work seeking activities include but are not limited to registering for job

placement services with the Department, attending job placement meetings sponsored by the Department, participating in a job club or networking group dedicated to job placement, updating a resume, reviewing the newspaper or job placement web sites without responding to a posted job opening, and making direct contact with an employer. OAR 471-030-0036(5)(a)(A). Direct contact with an employer means making contact with an employer in person, by phone, mail, or electronically to inquire about a job opening or applying for job openings in the manner required by the hiring employer. OAR 471-030-0036(5)(a)(B).

However, an individual who is on a temporary layoff for four weeks or less with the individual's regular employer and had, as of the layoff date, been given a date to return to work, is considered to have actively sought work by remaining in contact with and being capable of accepting and reporting for any suitable work with that employer for a period of up to four calendar weeks following the end of the week in which the layoff occurred. OAR 471-030-0036(5)(b)(A) (February 23, 2014).

In Hearing Decision 17-UI-91040, the ALJ found that claimant was not, under OAR 471-030-0036(5)(b)(A), exempt from the work seeking requirements set forth in OAR 471-030-0036(5)(a) and, because claimant did not perform at least five working activities per week, the ALJ concluded that he did not actively seek work during the weeks at issue, and is ineligible for benefits for those weeks. Hearing Decision 17-UI-91040 at 4. We agree with the ALJ that claimant was not, under OAR 471-030-0036(5)(b)(A), exempt from the work seeking requirements set forth in OAR 471-030-0036(5)(a). However, the record as it currently exists fails to support the ALJ's finding that claimant did not perform at least five working activities per week during the weeks at issue, or therefore that claimant did not actively seek work during, and is ineligible for benefits for, those weeks. Nor did the ALJ conduct a sufficient inquiry into the facts necessary for EAB to make that determination.

At hearing, the only evidence as to whether or not claimant conducted at least five work seeking activities per week during the weeks at issue was a brief part of the testimony of a Department representative who stated that during each of those weeks, claimant "provided only two job seeking activities instead of five." Audio of 1:30 p.m. Hearing at ~18:39. However, OAR 471-030-0036(5)(a) does not focus on what claimant reported to the Department about his work seeking efforts when he made his weekly claim reports, but what he actually did to look for work and whether he directly contacted two potential employers and undertook at least three other work seeking activities during each week. The ALJ should have, but did not ask the representative whether the two work seeking activities that claimant reported for each of the weeks at issue were employer contacts or other types of work seeking activities and, if so, what they were.

In addition, the ALJ did not ask claimant what work seeking activities he performed during the weeks at issue, even if he failed to report those activities to the Department as part of his weekly claim reports. The ALJ should ask claimant to describe specifically all work seeking activities in which he engaged during the weeks at issue, including whether those involved directly contacting potential employers, submitting applications for work, reviewing classified advertisements or websites that listed available jobs, reviewing job postings at WorkSource Oregon offices or on its website, consulting with WorkSource representatives or other sources about matters related to job seeking, updating a resume or participating in classes or meetings devoted to job placement, etc. If claimant testifies that he engaged in work seeking activities that he did not report to the Department, the ALJ should ask claimant why he did not report those activities when he reported at least two others during each of the weeks at issue.

The ALJ should develop the evidence on this issue sufficient to allow a determination of whether, for each of the three weeks at issue, claimant engaged five work seeking activities, of which at least two were direct employer contacts.

Hearing Decision 17-UI-91038. In Hearing Decision 17-UI-91038, the ALJ concluded that claimant was overpaid \$812 in benefits for the weeks at issue based on the disposition reached in Hearing Decision 17-UI-91040 that claimant did not actively seek work during, and therefore is not eligible for benefits for, those weeks. Because we have reversed and remanded Hearing Decision 17-UI-91040, and Hearing Decision 17-UI-91038 was based entirely on Hearing Decision 17-UI-91040, we have also reversed and remanded Hearing Decision 17-UI-91038 to take into account the results he may reach on remand of Hearing Decision 17-UI-91040.

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 actively sought work during the weeks at issue and was overpaid benefits for those weeks, Hearing Decisions 17-UI-91038 and 17-UI-91040 are reversed, and both matters remanded for further development of the record.

DECISION: Hearing Decisions 17-UI-91040 and 17-UI-91038 are set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: October 13, 2017

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decisions 17-UI-91038 and 17-UI-91040 or return these matters to EAB. Only a timely application for review of the subsequent hearing decisions will cause these matters to return to EAB.

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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