

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1166

Affirmed
Late Request for Hearing Dismissed

PROCEDURAL HISTORY: On July 6, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 143359). On July 26, 2017, decision # 143359 became final without claimant having requested a hearing. On August 3, 2017, claimant filed a late request for hearing. On August 8, 2017, ALJ Kangas issued Hearing Decision 17-UI-89872, dismissing claimant's request for hearing as untimely, subject to claimant's right to renew his request by responding to an appellant questionnaire by August 22, 2017. On August 15, 2017, claimant filed a timely response to the appellant questionnaire. On August 29, 2017, OAH issued a letter order cancelling and vacating Hearing Decision 17-UI-89872, and on September 13, 2017 scheduled a hearing on claimant's late request for hearing and, if necessary, the merits of decision # 143359, for September 27, 2017. On September 27, 2017, ALJ Murdock conducted a hearing, and on September 29, 2017 issued Hearing Decision 17-UI-93524, re-dismissing claimant's request for hearing on decision # 143359. On October 4, 2017, claimant filed a timely application for review of Hearing Decision 17-UI-93524 with EAB.

FINDINGS OF FACT: (1) Claimant's native language was Cantonese. Claimant did not read English well. Sometime in early June 2017, claimant was discharged from her job. Shortly thereafter, claimant filed a claim for unemployment benefits.

(2) Claimant claimed benefits for the weeks of June 11, 2017 through July 8, 2017 (weeks 24-17 through 27-17). The Department did not pay benefits to claimant for those weeks.¹ For each of those weeks, shortly after claimant claimed benefits, the Department mailed a letter to claimant informing her that her claim was pending but under review. When claimant received the first of those letters, she contacted her son to translate it for her because her command of written English was not sufficient to allow her to understand it. From her son's translation, claimant understood that her claim was "not

¹ EAB takes notice of this fact, which is contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed facts will remain in the record at EAB.

approved yet” and she should continue to claim benefits. Transcript at 8. Although claimant continued to receive letters every week from the Department after the first one, she assumed they were all the same in substance and did not have any of them translated to make sure they were the same.

(3) Around July 6, 2017, the Department mailed decision #143359 to claimant’s correct home address. That decision concluded claimant was disqualified from benefits based on her work separation beginning on June 4, 2016 (week 23-17). The decision was not returned to the Department as undeliverable.

(4) After decision #143359 was mailed, claimant claimed benefits for the weeks of July 9, 2017 through July 29, 2017 (weeks 28-17 through 30-17). The Department continued not paying claimant benefits and sending letters to her each week explaining the basis for non-payment. Starting with the claim claimant made for the week beginning July 2, 2017, the letters the Department sent to her stated that she was not being paid benefits because an administrative decision had disqualified her from receiving benefits. Although claimant received these letters, she did not have them translated for her since she continued to think they were still the same in substance as the first letter from the Department that her son had translated for her. During week 30-17, the July 26, 2017 deadline by which claimant needed to file a request for hearing on decision # 143559 passed.

(5) Sometime before August 3, 2017, claimant learned that the Department had denied the unemployment insurance claims of some of her former coworkers who separated from work at around the same time as she had. Claimant decided she needed to contact the Department about the status of her claim. On August 3, 2017, in the course of a call to the Department, claimant learned of decision #143359 and filed a late request for hearing on it.

CONCLUSIONS AND REASONS: Claimant did not show good cause for the late filing of the request for hearing on decision # 143359, and her request for hearing therefore is dismissed.

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 (February 10, 2012) 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. Good cause for failing to file a timely request for hearing exists if a party shows that the Department failed to follow its own policies in providing service to a limited English proficient person, including the failure to communicate orally or in writing in a language that could be understood by the limited English proficient person upon gaining knowledge that the person needed or was entitled to such assistance. OAR 471-040-0010(2).

At the outset, claimant did not contend, and there is no evidence in the record suggesting, that the Department knew or should have been on notice that claimant was of limited English proficiency and was under a duty to communicate with claimant orally or in writing in a language other than English that she could understand. Absent such notice, the Department could not have known that claimant would have difficulty reading or understanding its English language communications.

Although claimant testified that decision # 143359 was mailed to her correct address, and claimant received numerous letters from the Department addressed to that address before and after decision #143359 was mailed to her, claimant contended that she never received decision # 143359 in the mail. However, documents sent through the United States Postal Service (USPS) are presumed to have been received by the addressee, subject to evidence to the contrary. OAR 137-003-0520(10) (January 31, 2012). While claimant testified that, on occasion, she did not receive some mail addressed to her until her neighbor “forwarded” it, she offered no explanation for why the neighbor might have chosen not to “forward” the administrative decision to her. Moreover, since claimant apparently did not read English, it is unclear how, amidst the weekly benefit denial letters she was receiving and not reading, she would remember not having received decision # 143359 with such particularity. On this record, claimant did not present sufficient evidence to rebut the presumption that decision # 143359 was delivered to her at her home address. And even if she had, claimant continued receiving weekly benefit denial letters throughout the weeks at issue, and very shortly after the issuance of decision # 143359 the writing of the benefit denial letters changed to alert her that she was not being paid the benefits she had claimed due to the issuance of an administrative decision.

When claimant’s son translated the first benefit denial letter that the Department sent to claimant, presumably shortly after the end of week 24-17, or around the week of June 18, 2017, claimant was aware that her claim was in question and being reviewed or investigated. Thereafter, claimant was the recipient of ongoing correspondence from the Department which she could not read, and continued not to receive benefit payments. Under the circumstances, claimant reasonably should have anticipated that the Department was going to make a decision after reviewing her claim, that the Department’s decision might not be a favorable one and, because she knew she was not able to read English well, she would not know when she received correspondence from the Department informing her of that decision. Reasonably, claimant should have had her son or someone else with English proficiency read and translate with more frequency the correspondence she was receiving from the Department or should have contacted the Department directly about the status of her claim, her limited English proficiency, and her inability to understand the English-language correspondence that was being sent to her. Had claimant taken these reasonable steps, she would have been alerted to decision # 143359 shortly after it was issued, been informed of the deadline to file the request for hearing and had ample time to file the request for hearing. On these facts, claimant did not show that factors or circumstances beyond her reasonable control prevented her from timely filing a request for hearing on decision # 143359. While claimant mistakenly assumed that all of the correspondence she was receiving from the Department was similar in substance to the first benefit denial letter that her son had translated for her, this was not an “excusable mistake” for purposes of establishing good cause for her late-filed request for hearing because the mistake did not raise due process issues and was not the result of inadequate notice, reasonable reliance on the advice of another person, or the inability to follow directions despite substantial efforts to comply.

Claimant did not show good cause for the late-filing of her request for hearing on decision # 143359. Her request for hearing therefore is dismissed.

DECISION: Hearing Decision 17-UI-93524 is affirmed.

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

DATE of Service: November 7, 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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