

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0258

Application for Review Allowed
Hearing Decision 17-UI-97694 Reversed
Request for Hearing Allowed

PROCEDURAL HISTORY: On September 21, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a 52-week penalty disqualification from future benefits otherwise payable (decision # 193671). Claimant's request for hearing was construed as late. On November 22, 2017, ALJ R. Frank conducted a hearing, and on November 28, 2017 issued Hearing Decision 17-UI-97694, dismissing claimant's request for hearing as late without good cause. On March 13, 2018, claimant filed an application for review with the Employment Appeals Board (EAB) that was construed as late.

FINDINGS OF FACT: (1) On September 21, 2017, the same day the Department served notice of decision # 193671 to claimant, claimant called the Department. During the call Department advised claimant that decision # 193671 existed and advised her of its outcome. The Department employee with whom claimant spoke also advised to "respond to the decision when she received it." Audio recording at ~13:15. The employee did not tell claimant she could request a hearing by phone during the call.

(2) Later on September 21, 2017, claimant left three voicemail messages for two Department employees in which she indicated that she disputed the decision. No one with whom claimant spoke on September 21, 2017 processed a telephone request for hearing on her behalf.

(3) On September 22, 2017 and approximately September 25, 2017, the two employees returned claimant's calls. Claimant told one employee that she was going to request a hearing; the employee did not process claimant's statement of intent to request a hearing as a telephone request for hearing. On October 2, 2017, claimant told a third Department employee that she was concerned if she asked for a

hearing on decision # 193671 that it would cause her problems with another matter she had pending with the Department. The claims taker told claimant she was within her rights to request a hearing, but did not take a telephone request for hearing at that time.

(4) On October 9, 2017, claimant signed a request for hearing form that the Department had enclosed in the envelope containing decision # 193671. *See* 10-14-17 request for hearing. On October 9, 2017, claimant also prepared and dated a handwritten “Note” on the schedule of adjustments in which she disagreed with the Department’s decision. *Id.* On October 9, 2017, claimant mailed those materials to the Department. *See* 10-14-17 request for hearing; Claimant’s written argument. Claimant did not receive a response to the mailing.

(5) Claimant was concerned that she did not receive a response from the Department after mailing her request for hearing on October 9th mailing. On October 14, 2017 and October 16, 2017, claimant re-requested a hearing by faxing her request for hearing form and other materials to the Department.

(6) On December 11, 2017, claimant filed materials with the Office of Administrative Hearings (OAH) that should have been construed as a timely application for review of Hearing Decision 17-UI-97694. Due to administrative error at EAB, claimant’s materials were not processed. On March 13, 2018, claimant filed another application for review of that matter with EAB.

CONCLUSIONS AND REASONS: Claimant’s late application for review is allowed. We disagree with the ALJ and conclude claimant’s late request for hearing should be allowed, and claimant is entitled to a hearing on the merits of decision # 193671.

Application for review. ORS 657.270(6) provides that parties have 20 days after the date a hearing decision was mailed to file an application for review, or the hearing decision becomes final. ORS 657.875 provides that the 20-day deadline may be extended “a reasonable time” upon a showing of “good cause.” OAR 471-041-0070(2) defines “good cause” as factors or circumstances beyond the applicant’s reasonable control, and “a reasonable time” as seven days after those circumstances cease to exist. In this case, EAB’s administrative error with respect to claimant’s December 11th submission was a factor or circumstance beyond her reasonable control that prevented a timely filing. It appears that claimant re-filed her application for review within the seven day “reasonable time” period after discovering the problem. Claimant’s application for review is, therefore, allowed.

Request for hearing. ORS 657.269 provides that parties have 20 days after the date an administrative decision was mailed to file a request for hearing, or the administrative decision becomes final. 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(1) defines good cause to include an excusable mistake or factors beyond her reasonable control. OAR 471-040-0010(3) defines “a reasonable time” as seven days after the circumstances that prevented a timely filing ceased to exist.

The ALJ concluded that claimant filed a late request for hearing and that her request must be dismissed. The ALJ found as fact that claimant wrote on an “appellant questionnaire” that she “had originally attempted to request a hearing on October 9, 2017 – a statement that she now considers incorrect.” Hearing Decision 17-UI-97694 at 2. The ALJ concluded that claimant’s evidence about her request for hearing was “inconsistent, unlikely and unreliable” and “did not serve to outweigh evidence of actual

contacts between the parties” the Department provided suggesting claimant’s “sustained [] refusal” to request a hearing “until discussing the matter further with the author and later, until finalizing the adjudication of another matter.” Hearing Decision 17-UI-97694 at 3-4. We disagree.

While claimant’s evidence was somewhat inconsistent during the hearing, it was not outweighed by other credible evidence. Claimant had some dates incorrect during the hearing because she was participating from her car without adequate paperwork; however, she did *not* indicate that she was incorrect about the October 9th date she previously provided in her written materials, and, in fact, stated the opposite.¹ Audio recording at ~ 23:20. The Department’s evidence of claimant’s “sustained [] refusal” to request a hearing consisted only of one voicemail message claimant left for a Department employee in which she indicated she wanted to speak with the employee “first.” Evidence that claimant was refusing to request a hearing until another matter was “finalized” consisted only of claimant’s expression of concern to a Department employee on one occasion that requesting a hearing could negatively affect the Department’s handling of another matter in which she was involved. In short, the ALJ erred in finding claimant’s evidence that she timely filed a request for hearing was outweighed by evidence suggesting that she intentionally delayed requesting a hearing, particularly where, as here, it is somewhat inexplicable that the Department employees with whom claimant interacted within the 20-day period following issuance of decision # 193671 did not accept a telephone request for hearing from her despite her demonstrated knowledge of the decision and disagreement with it.²

Claimant wrote on her October 14th re-request for hearing that she had filed a request for hearing by mail on October 9th. Because that statement was prepared only five days after October 9th, it represents a contemporaneous record of her actions on October 9th made close enough in time to those actions as to suggest accuracy. Claimant dated the request for hearing form and a written statement she included with the October 14th re-request as having been prepared on October 9th, which further corroborates claimant’s assertion that she was working on her request for hearing on October 9th, not on a later date, and suggests awareness of the deadlines involved. Finally, claimant did not provide any testimony that suggested she was uncertain about her actions on October 9th or that her October 14th written statement referencing her actions on October 9th was inaccurate. For those reasons, we conclude that claimant likely mailed a request for hearing on decision # 193671 on October 9th, which would have been timely.

It appears based upon information currently available that either the Department nor the Office of Administrative Hearings (OAH) received claimant’s timely October 9th hearing or, to any extent that the documents mailed to the Department or OAH were received, that either office identified the documents as a request for hearing on decision # 193671 or processed it as such. The failure of the Department or OAH to either receive claimant’s documents or identify them as a timely request for hearing amounted

¹ We also note that the record in this matter does not contain evidence of the “appellant questionnaire” document to which the ALJ referred as being the source of evidence about the October 9th date.

² The record shows that claimant had at least three conversations with Department employees after the Department issued this decision, but fails to show why none of those employees took claimant’s request for hearing by telephone as allowed under OAR 471-040-0050. Specifically, it appears the Department misadvised claimant on September 21st to “respond to the decision when she received it” rather than requesting a hearing by telephone during that call, and fails to show why the two Department employees with whom claimant subsequently spoke did not advise her that speaking “first” to the employee who made the decision would not change the decision or delay the period of time in which she could file a timely request for hearing, or that the employees could take claimant’s request for hearing over the telephone without affecting claimant’s other matter with the Department.

to a factor beyond claimant's reasonable control that prevented a timely filing, which means she had good cause to extend the filing period a reasonable time. The record shows that claimant re-requested a hearing on October 14th, only five days later, which was within the seven-day "reasonable time" period allowed by law.

For those reasons, claimant's late request for hearing should be allowed. Claimant is entitled to a hearing on the merits of decision # 193671.

DECISION: Hearing Decision 17-UI-97694 is set aside, as outlined above.

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

DATE of Service: March 19, 2018

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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