

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0950

Reversed
Requests to Reopen Allowed

PROCEDURAL HISTORY: On June 7, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$5,034 overpayment, \$755.10 monetary penalty, and 34 penalty weeks (decision # 194556). Claimant filed a timely request for hearing. On July 5, 2018, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for July 18, 2018, at which claimant failed to appear. On July 19, 2018, ALJ Murdock issued Order No. 18-UI-113397, dismissing claimant's request for hearing for failure to appear. On July 23, 2018, claimant filed a request to reopen the July 18th hearing. On July 31, 2018, OAH mailed notice of a hearing scheduled for August 14, 2018, at which claimant failed to appear. On August 14, 2018, ALJ Murdock issued Order No. 18-UI-114924, dismissing claimant's request to reopen the July 18th hearing for failure to appear. On August 21, 2018, claimant filed a request to reopen the August 14th hearing. On August 30, 2018, OAH mailed notice of a hearing scheduled for September 12, 2018. On September 12, 2018, ALJ Murdock conducted the hearing, and on September 14, 2018 issued Order No. 18-UI-116616, denying claimant's request to reopen. On September 28, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

This matter is before EAB on review of Order No. 18-UI-116616 and the underlying issues only. Although claimant has another case pending with OAH, case number 2018-UI-83876, which relates to the requests to reopen at issue in this case, EAB does not have jurisdiction over that case for two reasons. First, there is no basis upon which EAB could open that case because claimant did not specifically request that EAB review that case or express a present intent to appeal the ALJ Order that dismissed his request to reopen in that case, as required under OAR 471-041-0060(1). Second, because claimant failed to appear at the September 12th hearing in that case, ORS 657.270(5) and OAR 471-041-0060(4) require that OAH process any request by claimant as a matter of first impression. If claimant wants an opportunity to be heard about his September 12th failure to appear in case number 2018-UI-83876, the underlying requests to reopen, and, possibly, his work separation from Personnel Source, claimant must file with OAH a written request to reopen the September 12th hearing he missed. Claimant should contact OAH directly with any questions about how to file a written request to reopen or a late request to reopen, and what must be included in such a written request. EAB's decision in this case is confined to review of Order No. 18-UI-116616 and the underlying matters.

FINDINGS OF FACT: (1) At the time OAH mailed notice of the July 18th hearing to claimant, claimant was experiencing homelessness. When he was not working a 5-day live-in shift at his job, he was living in his car, camping, trying to find a place to camp, pursuing a BOLI claim against a former employer, or seeking work. Claimant generally checked his P.O. Box for mail just once each week because, given his circumstances, the P.O. Box was too far away to check more frequently.

(2) Because of claimant's circumstances, he sometimes had difficulty remembering to check his P.O. Box. Claimant did not check his P.O. Box the week prior to the July 18th hearing because, after working his 5-day live-in shift, he had to drive to Eugene for a work-related matter, he was trying to find a place to camp, and was generally preoccupied coping with his homeless situation. He therefore did not know that a hearing was scheduled for July 18th, and missed the hearing.

(3) Claimant filed a timely request to reopen the July 18th hearing. OAH mailed notice of a hearing scheduled for August 14th at 10:45 a.m. to claimant at his P.O. Box. Although claimant was still experiencing homelessness and living in his car, he received that notice prior to the hearing. He planned to attend the hearing, which was scheduled for one of his days off work. He entered the hearing conference phone number into his cell phone so he would have it ready. He kept the notice of hearing in his car, where he lived. He planned to have the notice of hearing, which contained the other information he needed to call into the hearing, ready at the time of his hearing.

(4) On August 13, 2018, claimant's employer unexpectedly called him in to work an emergency shift. One of the employer's clients was having a medical emergency; the employer did not have anyone else available and assigned claimant to stay with the client throughout the duration of the medical emergency. Once he arrived at work, claimant was not permitted to leave the client. Claimant was with the client from 10:00 p.m. on August 13th, and stayed overnight through 10:45 a.m. on August 14th.

(5) Claimant still wanted to participate in the August 14th hearing even though he was working and unable to leave his client. At the designated time, claimant tried to call into the hearing using the conference phone number he had stored in his phone. He was unable to join the hearing because he did not have the access code for his hearing with him at the time. The access code was located on the notice of hearing in his car, which he had planned to use at the time of the hearing, but claimant was unable to leave his client to go retrieve the access code from his car, and missed the hearing. Claimant timely filed a request to reopen the August 14th hearing.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant's requests to reopen in this case should be allowed. Claimant is entitled to a hearing on the merits of decision # 194556 (the overpayment and penalty decision).

ORS 657.270(5) provides that any party may request to reopen a hearing, and the request may be allowed if the party making the request failed to appear at the hearing, the request is timely, and the party shows good cause for failing to appear. OAR 471-040-0040(2) defines good cause as an "excusable mistake" or "factors beyond an applicant's reasonable control."

There is no dispute on this record that claimant failed to appear at the July 18th and August 14th hearings in this case, nor that he filed timely requests to reopen both of those hearings. The only remaining issue is whether he has shown good cause for failing to appear at the hearings. Claimant must first show good

cause for missing the August 14th hearing. The ALJ concluded that claimant did not, because although he testified that he planned to participate in the August 14th hearing despite being unexpectedly called into work, he “did not persuasively explain the reason he failed to also notate the access code and the alternate or back-up phone number” which was not beyond his reasonable control, nor was his failure “to ensure that he would be able to follow all of the instructions on the notice after dialing the initial phone number for the hearing” an excusable mistake. Order No. 18-UI-116616 at 4.

When claimant entered the initial phone number into his phone after receiving notice of the August 14th hearing, he did so with the intent of having the notice of hearing with him at the time he placed the call into the hearing. He never intended or planned to have all of the information he needed to call into the hearing entered into his phone so he could participate without having access to the notice of hearing, nor is there any requirement in law or rule that he do so. Notwithstanding, it was certainly within claimant’s reasonable control to have placed that information in his phone, or carried the notice of hearing with him when he was called into work on August 13th. We therefore agree with the ALJ that it was likely within claimant’s reasonable control to have done so.

However, we disagree with the ALJ that claimant’s failure to participate was not an excusable mistake. Generally speaking, an “excusable mistake” has occurred when the circumstances raise a due process issue, or when they were the result of inadequate notice, reasonable reliance on another, or the individual’s inability to follow directions despite substantial efforts to comply. In this case, it was arguably a mistake for claimant not to have entered the information into his phone in case he was separated from the notice of hearing, or a mistake for claimant to have left the notice of hearing in his car when he began his emergency shift at 10:00 p.m. the night before the hearing. However, the circumstances under which that occurred suggest that the mistake was excusable. For instance, claimant entered the information into his phone at a time when he planned to have the day off work and to have access to the notice of hearing when he called to participate in the hearing. He was called into work on an emergency basis with no evidence suggesting he knew or had reason to know when he was called in to work at 10:00 p.m. August 13th that he would still be at work and unable to leave his client’s side at 10:45 a.m. the following day. In other words, at the time he was called into work, there is nothing suggesting that claimant knew or should have known that he would need to bring the notice of hearing with him to work, or that he would not have access to the notice of hearing mid-morning the following day when he needed to call into the hearing. Claimant made substantial efforts to comply with the instructions OAH gave him for participating in the hearing, and, despite those efforts, he was unable to fully follow them. His failure to appear at the August 14th hearing was, therefore, an excusable mistake.

Turning to claimant’s failure to appear at the July 18th hearing, claimant missed the hearing because he did not collect the notice of hearing from his P.O. Box until after the hearing was held. Although claimant’s written statement and testimony about the reason he failed to collect his mail that week was somewhat inconsistent, there is no dispute that at the time of those events he was experiencing homelessness, living in his car, struggling to find places to camp or park his car when he was not working, preoccupied with matters related to his survival, and had to travel some distance to reach his P.O. Box to check his mail. Under those circumstances, claimant’s failure to check his P.O. Box during the week prior to the July 18th hearing appears to have been the result of claimant’s homelessness and attendant circumstances; despite his efforts to dispute the Department’s overpayment decision, and his intent to check his mail and participate in a hearing, he was unable to do so. His failure to appear at the

July 18th hearing was, therefore, also an excusable mistake, and claimant has established that he is entitled to a hearing on the merits of decision # 194556 (the overpayment and penalty decision).

DECISION: Order No. 18-UI-116616 is set aside, as outlined above.

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

DATE of Service: October 15, 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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