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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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<p>EMPLOYMENT APPEALS BOARD DECISION 2018-EAB-0980</p>
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Order No. 18-UI-117235 Affirmed ~ Late Request for Hearing Dismissed

*Order No. 18-UI-117241 Modified ~ \$7,020 Overpayment Assessed, Reversed and Remanded
for Overpayment Liability Determination*

PROCEDURAL HISTORY: On October 2, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was disqualified from benefits from July 2, 2018 to September 23, 2017 based upon her receipt of retirement pay (decision # 83426). On October 23, 2017, decision # 83426 became final without claimant having filed a timely request for hearing.

On August 23, 2018, the Department served notice of another administrative decision, based upon decision # 83426, assessing a \$7,020 overpayment that claimant was liable to repay (decision # 112435). On August 27, 2018, claimant filed a timely request for hearing on decision # 112435 and a late request for hearing on decision # 83426.

On September 20, 2018, ALJ R. Frank conducted a consolidated hearing. On September 26, 2018, the ALJ issued Order No. 18-UI-117235, dismissing claimant's late request for hearing on decision # 83426, and Order No. 18-UI-117241, affirming decision # 112435.

On October 5, 2018, claimant filed an application for review of both decisions with the Employment Appeals Board (EAB). Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order Nos. 18-UI-117235 and 18-UI-117241. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2018-EAB-0979 and 2018-EAB-0980).

FINDINGS OF FACT: (1) On June 6, 2017, claimant filed an initial claim for unemployment insurance benefits. At that time, the Department's system asked claimant whether she was receiving, or would receive within the next 12 months, retirement pay other than social security benefits. Claimant was not receiving retirement pay, and did not plan to apply for retirement pay. She answered "No" to the Department's question.

(2) Claimant subsequently claimed weekly benefits from July 2, 2017 through September 23, 2017 (weeks 27-17 to 38-17). The Department paid claimant \$7,020 in unemployment insurance benefits between July 2, 2017 and September 23, 2017.

(3) At some point after filing her initial claim for benefits, claimant decided to apply for monthly retirement benefit payments through the Public Employee Retirement System (PERS) and a lump-sum distribution of retirement benefits through the plan's Individual Account Program. She called the Department to discuss her application for benefits. Effective August 22, 2017, claimant began receiving monthly retirement benefit payments.

(4) On September 6, 2017, claimant contacted the Department by telephone to report that she was receiving retirement benefits. The Department began to investigate claimant's receipt of benefits, but did not suspend benefit payments to claimant. On September 11, 2017, claimant received a lump sum distribution of retirement benefits.

(5) By October 2, 2017, the Department completed its investigation into claimant's receipt of retirement pay and determined that she was "disqualified" from receiving unemployment insurance benefits beginning July 2, 2017. *See* Decision # 83426. The Department served claimant with written notice of that decision and, on October 10, 2017, during a telephone call, a Department employee read decision # 83426 to claimant. Claimant responded that she would call back if she wanted to request a hearing on that decision. She did not call back to request a hearing on decision # 83426 until August 27, 2018.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's late request for hearing should be dismissed, and that she was overpaid \$7,020 in benefits as a matter of law. We disagree with the ALJ that claimant is liable to repay the overpayment, however, and conclude that additional evidence is necessary for a determination about claimant's repayment liability.

Late Request for Hearing. ORS 657.269 provides that individuals have 20 days from the date an administrative decision is issued to request a hearing. ORS 657.875 provides that the deadline to request a hearing may be extended "a reasonable time" upon a showing of "good cause." "Good cause" is defined to include factors beyond an individual's reasonable control or an excusable mistake. OAR 471-040-0010(1).

In this case, it is likely that claimant received the copy of decision # 83426 that was mailed to her, and even if she did not, a Department employee read the decision to her over the phone on October 10, 2017 and asked her if she wanted to request a hearing. Claimant chose not to do so for reasons unknown, and did not show that those reasons involved factors beyond her reasonable control or an excusable mistake on her part.¹ She therefore did not show good cause to extend the filing period. As a result, decision # 83426, concluding that claimant was "disqualified" from benefits from July 2, 2017 through September 23, 2017 because of her retirement pay, is final.

¹ Generally speaking, an "excusable mistake" within the meaning of the administrative rules is a mistake that raises a due process issue, or one that is the result of inadequate notice, reasonable reliance on another, or the inability to follow directions despite substantial efforts to comply.

Overpayment. ORS 657.155(1)(d) provides that individuals are only eligible to receive benefits if they are “not disqualified from benefits or ineligible for benefits under any other section of” ORS chapter 657. In this case, claimant *was*, as a matter of law, disqualified from benefits from July 2, 2017 through September 23, 2017 for the reasons set forth in decision # 83426. The Department paid claimant \$7,020 in benefits during that period. Claimant was, therefore, overpaid \$7,020 as a matter of law.

Repayment. ORS 657.310(1) provides that if a claimant was overpaid because she made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of her knowledge or intent she is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to the individual under ORS chapter 657.

ORS 657.315(1) provides, however, that an individual who has been overpaid benefits because of an error *not* caused by her false statement, misrepresentation of a material fact, or failure to disclose a material fact, or because an initial decision to pay benefits is subsequently reversed by a decision finding she is not eligible for the benefits, she is only liable to have the amount deducted from any future benefits otherwise payable to her for any week or weeks within 52 weeks following the week in which the decision establishing the erroneous payment became final.

The ALJ concluded that claimant was liable to repay the overpayment in this case, stating, “Claimant was responsible for the overpayment in this case. Had she communicated accurate information to the Employment Department when filing her initial claim, it would have allowed the Department to adjudicate the matter promptly and avoid overpaying benefits, or at the very least, precluded attribution of an overpayment to claimant error.” Order No. 18-UI-117241 at 3.

However, the record fails to show that claimant did not fail to “communicate[] accurate information to the Employment Department when filing her initial claim.” In fact, claimant testified that when she filed her initial claim for benefits she had not and did not intend to apply for retirement benefits at all, and did not develop the intent until later in the summer. Audio recording at ~ 32:00-32:20. The record therefore fails to support the ALJ’s conclusion that claimant provided the Department with inaccurate information on June 6, 2017 when she filed her initial claim that caused her to be overpaid. To the contrary, the record shows that the information claimant provided to the Department at that time was accurate.

The record shows that claimant called the Department when she decided to apply for retirement and again on September 6, 2017 when she self-disclosed to the Department that she was receiving retirement benefits, thereby triggering the Department’s investigation. The record also suggests, however, that claimant might have been receiving retirement pay since July 1, 2017 and might have been delinquent in reporting her retirement pay to the Department. Additional information is required to reach a determination as to whether claimant caused the overpayment in this matter and is required to repay it, or if she was not at fault for the overpayment and is instead only liable to have it deducted.

The record was not fully developed as to when claimant initially applied for retirement pay distributions, when she found out that she would receive retirement pay, whether her receipt of retirement pay was prospective or retroactive to July 1st, what the August 22, 2017 PERS retirement notice and September 11, 2017 IAP lump sum letter the Department’s witness referred to stated about distribution of retirement pay to claimant, or when claimant’s obligation to notify the Department of her receipt of retirement pay – thus avoiding an overpayment – began. The record was also not fully developed as to

what specifically was claimant's alleged false statement, misrepresentation of a material fact, or failure to disclose a material fact that allegedly resulted in the overpayment of benefits to claimant. The ALJ should inquire as to those matters, and any other matter he deems necessary to fully develop the record as to claimant's repayment liability in this case.

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 should be liable to pay the \$7,020 overpayment to the Department under ORS 657.310 or have it deducted from future benefits otherwise payable to her under ORS 657.315, Order No. 18-UI-117241 is reversed, and this matter is remanded for development of the record.

DECISION: Order No. 18-UI-117235 is affirmed. The portion of Order No. 18-UI-117241 in which the ALJ concluded claimant was overpaid \$7,020 is affirmed. The portion of Order No. 18-UI-117241 in which the ALJ concluded that claimant was liable to repay the overpayment is reversed, and this matter remanded, as outlined above.²

J. S. Cromwell and S. Alba;
D. P. Hettle, 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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² **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate the portion of Order No. 18-UI-117241 addressing claimant's repayment liability or return that matter to EAB. Only a timely application for review of the subsequent Order will cause this matter to return to EAB.