

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1194-R

Request for Reconsideration Allowed
Order No. 18-UI-120220 Re-Affirmed on Reconsideration
Appeals Board Decision 2018-EAB-1194 Affirmed as Modified

FINDINGS OF FACT AND PROCEDURAL HISTORY: On May 15, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$4,059.00 overpayment that claimant was liable to repay (decision # 170310). On June 4, 2018, decision # 170310 became final without claimant having filed a timely request for hearing. On October 5, 2018, claimant filed a late request for hearing. On November 26, 2018, ALJ Kangas issued Order No. 18-UI-120220, dismissing claimant's late request for hearing subject to claimant's right to review the request by responding to an appellant questionnaire by December 10, 2018. On December 17, 2018, Order No. 18-UI-120220 became final without claimant having either responded to the questionnaire or filed a timely application for review of the order. On December 19, 2018, claimant filed a late response to the appellant questionnaire and a late application for review of Order No. 18-UI-120220 with the Employment Appeals Board (EAB). On January 7, 2019, EAB issued Appeals Board Decision 2018-EAB-1194, dismissing claimant's late application for review. On January 24, 2019, claimant filed a timely request for reconsideration with EAB. This decision is issued pursuant to EAB's authority under ORS 657.290(3).

CONCLUSIONS AND REASONS: On reconsideration, we adhere to Appeals Board Decision 2018-EAB-1194 except to the extent modified herein.

OAR 471-041-0145 provides,

- (1) Any party may request reconsideration to correct an error of material fact or law, or to explain any unexplained inconsistency with Employment Department rule, or officially stated Employment Department position, or prior Employment Department practice.
- (2) The request is subject to dismissal unless it:

- (a) Includes a statement that a copy has been provided to the other parties. Example: “I certify that on I mailed by first class mail a copy of this document to the opposing party, addressed as follows: ABC Company, 123 Main St., Portland, OR, 9XXXX.”
- (b) Is filed on or before the 20th day after the decision sought to be reconsidered is mailed.

Claimant filed a timely request for reconsideration, and because there is no opposing party to this case her request is not subject to dismissal. Claimant argued that EAB erred with respect to dismissing her application for review because, stating,

Your last denial asked why I was late in response...Oh, by 2 days for the record. Let me tell you. and you all probably don't want to know....I am a Mother of a Opiod [sic] addicted Son who is also homeless...He has taken all the oxygen out of me just to make sure he stays alive! * * * I have been distracted [sic] not only for days to meet deadlines, I have been distracted [sic], depressed and aging for a couple of years, and praying. No one, unless you have been there, can understand that you worry about where your child is sleeping when it's [sic] 35* (degrees) No matter what they have done or bridges that have been burned. I missed the deadline by trying to find [name omitted] a trailer, which I did, and finding a place to put it ect [sic], I got back to this paperwork asap, but I guess I was two days late!¹

Claimant's situation, as she described it, is very sad, and her distraction from the procedural requirements associated with her appeal is understandable. However, the issue is not just that claimant filed one response two days late, and EAB cannot fix claimant's case by allowing her late application for review.

First, EAB might have been able to find good cause for claimant's late application for review based on the information in her request for reconsideration. Unfortunately, claimant did not send that information to EAB. OAR 471-041-0070(3) requires that parties “shall” include with a late application for review “a written statement describing the circumstances that prevented a timely filing.” There are no exceptions and the rules do not allow EAB the discretion to waive the requirement. Because claimant did not comply with the rule, EAB did not err in dismissing claimant's late application for review.

Second, the problems in claimant's case are not as simple as just missing one filing deadline by two days. Prior to missing the application for review deadline, claimant missed the deadline to respond to the appellant questionnaire that was set out on the certificate of mailing page sent to her with the appellant questionnaire. That document stated that claimant “has until December 10, 2018 to provide additional information for consideration by the Office of Administrative Hearings.” Before that, claimant also missed the deadline for requesting a hearing on decision # 170310. Claimant stated with her application for review, on the late appellant questionnaire form, that she did not know she could have appealed. Notably, though, that decision instructed claimant that she had the right to appeal the decision if she disagreed with it. The decision also included information about her appeal rights.²

¹ See Claimant's request for reconsideration.

² See decision # 170310.

Third, even if EAB had found good cause for the late application for review, the outcome of this case would most likely have remained the same. Assuming for the sake of argument that EAB allowed claimant's late application for review, the only matter EAB would have jurisdiction to review would be a *de novo* review of the ALJ's decision to dismiss claimant's late request for hearing. EAB would not at that point have jurisdiction over whether she was overpaid benefits or required to repay them.

The ALJ's decision to dismiss claimant's late request for hearing was based on claimant's written request for hearing in which she said she decided not to appeal her case and did not see a point in appealing. The ALJ's decision to dismiss claimant's late request for hearing was not in error.

Claimant submitted a late questionnaire response to EAB with her application for review. It is unlikely that EAB would have been able to find a basis upon which to admit that into evidence under OAR 471-041-0090, EAB's additional evidence rule. And even if we had been able to admit it into evidence and considered it when determining whether claimant had "good cause" for the late request for hearing, we would have had to deny claimant's late request for hearing for the reasons that follow.³

ORS 657.875 allows the deadline for filing a request for hearing to be extended only for "good cause" and only for "a reasonable time." "Good cause" means "an excusable mistake or [] factors beyond an applicant's reasonable control" and "a reasonable time" means "seven days after the circumstances that prevented a timely filing ceased to exist." OAR 471-040-0010(1) and (3).

Claimant said in her questionnaire response that her failure to act sooner with respect to appealing her case was because the decision or decisions she needed to appeal were "final." That means the deadlines had already expired by the time she thought about appealing. As stated above, however, the Department's administrative decisions, such as decision # 170310 in this case, instruct parties about their right to appeal, identify the appeal deadline, and include other information with the decision instructing parties how to appeal administrative decisions. Claimant did not show that it was beyond her reasonable control to file a timely request for hearing. To any extent a mistake caused or contributed to the late filing it was not an "excusable" mistake within the meaning of OAR 471-040-0010(1) because it did not, for example, raise a due process issue, and was not the result of inadequate notice, reasonable reliance on another, or the inability to follow directions despite substantial efforts to comply. And even if it had been, the record on review does not contain the date upon which claimant realized she could file a late request for hearing in this case; as such, we cannot determine whether that date was within seven days of the date she filed her late request for hearing on October 5, 2018. Claimant therefore did not show good cause to allow her late request for hearing in this case, or establish that the late request for hearing was filed within a "reasonable time."

To any extent claimant's written statement or questionnaire response suggested that she was in contact with the Department about her case prior to the administrative decision deadline, she described her pre-deadline communications with the Department as asking for the repayment amount to be reduced. In order for any of claimant's pre-deadline communications to be construed as a request for hearing, she would have to have "specifically" requested a hearing or "otherwise express[ed] a present intent to

³ She referred to a letter she sent the Department about reducing her overpayment. That letter is not part of the record in this contested case hearing because claimant did not submit a copy of it into the record, so it is not available for review.

appeal.” OAR 471-040-0005(1). Nothing in claimant’s late request for hearing or late questionnaire response suggest that she did so.

For those reasons, even if claimant had filed a timely application for review, or had complied with the requirements set forth for all individuals filing late applications for review, we would have concluded that claimant did not establish that the deadline for filing her request for hearing should be extended under ORS 657.875. We would have dismissed claimant’s late request for hearing and the outcome of this case would therefore have remained the same.

Even if EAB could have overcome all of the procedural obstacles in this case and reviewed decision # 170310 as claimant wishes, it is still unlikely that the outcome of this case would change. Decision # 170310 involves an “overpayment as a matter of law.” That means that the overpayment was established because another administrative decision, issued on March 21, 2018, established that claimant was not eligible for benefits during a period of time. That March 21, 2018 decision, according to decision # 170310, is final as a matter of law. All decision # 170310 establishes is that the Department erroneously paid claimant benefits when she was not eligible for them as a matter of law, and why claimant is required to repay them.

That means that unless claimant successfully appeals that March 21, 2018 administrative decision and gets that decision overturned, she cannot legally establish that she was entitled to benefits during the period of disqualification established by the March 21st administrative decision. That decision is, however, final as a matter of law, so claimant would first have to establish that she has the right to file a late appeal of that decision. Furthermore, unless claimant did not actually receive the \$4,059 in benefits the Department is requiring her to repay, she cannot establish that she does not owe the overpayment identified in decision # 170310. However, claimant’s written statement and questionnaire response suggest that she is not disputing that she received the money, making that unlikely.

To any extent claimant’s intent in filing her late application for review and requesting reconsideration with EAB was to ask that EAB reduce the total overpayment amount or reduce her repayment installment amounts, EAB does not have the legal jurisdiction or discretion to do either.

As noted above, EAB recognizes that the circumstances that caused claimant to file a late application for review with EAB are unfortunate and regrets the necessity of having to dismiss the late application. For the reasons explained, though, we cannot conclude that EAB erred in dismissing claimant’s late application for review. Even if EAB had and overlooked every procedural barrier to EAB review resulting from claimant’s repeated untimely filings and responses, EAB ultimately would never have had the jurisdiction to change claimant’s overpayment or repayment obligations in this case, and our further review of this matter could never have resulted in an outcome favorable to claimant’s interests.

DECISION: On reconsideration, Order No. 18-UI-120220 is re-affirmed.

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

DATE of Service: February 8, 2019

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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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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