

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0787

Late Application for Review Allowed
Reversed & Remanded

PROCEDURAL HISTORY: On July 29, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective February 23, 2020 (decision # 62050). Claimant filed a timely request for hearing. On November 5, 2020, ALJ Snyder conducted a hearing, and on November 13, 2020 issued Order No. 20-UI-156414, affirming the Department's decision. On December 3, 2020, Order No. 20-UI-156414 became final without claimant having filed a timely application for review with the Employment Appeals Board (EAB). On December 16, 2020, claimant filed a late application for review with EAB.

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence is contained on pages 3 and 4 of the written argument claimant submitted with her application for review. The additional evidence consists of claimant's statement that she did not receive Order No. 20-UI-156414 in the mail and filed the application for review after speaking to a representative of the Office of Administrative Hearings (OAH), who re-sent a service copy of the order to claimant's correct address. The additional evidence has been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to the admission of EAB Exhibit 1 into the record must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, EAB Exhibit 1 will remain in the record.

EAB did not consider the rest of claimant's written argument because claimant did not declare that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). Claimant's argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). Apart from the portions of claimant's written argument included in EAB Exhibit 1, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

The parties may offer new information into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

FINDINGS OF FACT: (1) Unitus Community Credit Union employed claimant as a customer service representative from July 2016 until February 24, 2020.

(2) Claimant lived in Gresham but worked at the employer's branch in downtown Portland. Claimant used public transportation to commute to work each day. Claimant's commute took about an hour in the mornings and about an hour in the evenings.

(3) In approximately January or February of 2020, claimant became concerned about the risk of exposure to COVID-19 while using public transportation to commute to work.

(4) Beginning on approximately February 1, 2020, claimant took a leave of absence from the employer for medical reasons.

(5) On February 24, 2020, claimant voluntarily quit working for the employer. Claimant left work because she was having psychological issues regarding COVID-19, and the "whole thing just freak[ed] [her] out." Audio Record at 15:13 to 15:30.

(6) On August 5, 2020, claimant submitted a request for hearing of decision # 62050 to OAH. Claimant included a note in her submission that provided her new mailing address and requested that OAH update her address in its system. Claimant's August 5, 2020 Request for Hearing at 1.

(7) On November 13, 2020, OAH served Order No. 20-UI-156414 on the parties by first class mail, but claimant did not receive the order because OAH mailed the service copy intended for claimant to claimant's old mailing address. Order No. 20-UI-156414 Certificate of Mailing Page.

(8) At some point during the week of December 6, 2020 to December 12, 2020, claimant called and spoke to a representative of OAH to inquire about the status of her appeal. EAB Exhibit at 1. During the conversation, claimant learned of the existence of Order No. 20-UI-156414, that a service copy of the order had been mailed to her old address, and that the time period to file a timely application for review with EAB had expired. The OAH representative told claimant that an application for review may still be considered if she included with the application for review a written statement explaining the circumstances. The OAH representative re-sent a service copy of Order No. 20-UI-156414 to claimant's correct address.

(9) On December 16, 2020, following receipt of a copy of Order No. 20-UI-156414 that the OAH representative sent to claimant's correct address, claimant filed an application for review of the order with EAB.

CONCLUSIONS AND REASONS: Claimant’s late application for review is allowed. Order No. 20-UI-156414 is reversed and the matter remanded for further development of the record.

Late Application for Review. An application for review is timely if it is filed within 20 days of the date that the Office of Administrative Hearings (OAH) mailed the order for which review is sought. ORS 657.270(6); OAR 471-041-0070(1) (May 13, 2019). The 20-day filing period may be extended a “reasonable time” upon a showing of “good cause.” ORS 657.875; OAR 471-041-0070(2). “Good cause” means that factors or circumstances beyond the applicant’s reasonable control prevented timely filing. OAR 471-041-0070(2)(a). A “reasonable time” is seven days after the circumstances that prevented the timely filing ceased to exist. OAR 471-041-0070(2)(b). A late application for review will be dismissed unless it includes a written statement describing the circumstances that prevented a timely filing. OAR 471-041-0070(3).

Claimant’s application for review was late, but she has shown good cause to extend the filing period a reasonable time. The deadline for claimant’s application for review to be timely filed was December 3, 2020. Claimant filed her application for review on December 16, 2020, making the application for review late. The record shows, however, that claimant was unaware of the December 3, 2020 deadline to file an application for review because she did not receive her service copy of Order No. 20-UI-156414 because OAH mailed it to claimant’s old address. The fact that OAH mailed claimant’s service copy of Order No. 20-UI-156414 to claimant’s old address – despite the fact that claimant had requested that OAH update claimant’s address in its system – was a circumstance beyond claimant’s reasonable control. Claimant therefore had good cause for the late filing. Claimant learned of the existence of Order No. 20-UI-156414 from an OAH representative at some point during the week of December 6, 2020 to December 12, 2020, and filed her application for review on December 16, 2020. It is more likely than not that claimant filed her application for review within 7 days of learning of the existence of Order No. 20-UI-156414, meaning the filing occurred within the required 7-day “reasonable time” period. Thus, because claimant had good cause to extend the filing period and filed her application for review within a reasonable time, claimant’s late application for review is allowed.

Voluntary Leaving. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). “Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work.” OAR 471-030-0038(4) (September 22, 2020). “[T]he reason must be of such gravity that the individual has no reasonable alternative but to leave work.” OAR 471-030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for their employer for an additional period of time. A claimant with a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h)¹ who quits work must

¹ 29 C.F.R. §1630.2(h) defines "physical or mental impairment" as:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

show that no reasonable and prudent person with the characteristics and qualities of an individual with such an impairment would have continued to work for their employer for an additional period of time. OAR 471-030-0038(4).

Order No. 20-UI-156414 concluded that claimant left work without good cause because claimant did not “face[] a grave situation with no reasonable alternative but to leave work.” Order 20-UI-156414 at 2. The order reasoned, in part, that claimant did not face a grave situation from the risk of COVID-19 exposure on public transportation because, at the time she quit, claimant was on leave for medical reasons and therefore was not taking public transportation to work. Order 20-UI-156414 at 2. The record does not support the order’s reasoning. Remand is necessary to develop the record regarding the nature and severity of claimant’s psychological issues regarding COVID-19, whether and when claimant was due to return to work from medical leave, and whether claimant’s medical leave was related to her psychological issues with COVID-19. On remand, these topics should be developed fully. Further inquiry is also required into claimant’s experiences with public transportation and what conditions existed on public transportation that made claimant concerned about the risk of exposure to COVID-19 at the time she voluntarily left work, and whether claimant’s circumstances were of such gravity that she had no reasonable alternative but to quit working for the employer.

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 further development of the record is necessary for a determination of whether claimant faced a situation of such gravity that she had no reasonable alternative but to leave work, Order No. 20-UI-156414 is reversed, and this matter is remanded.

DECISION: Order No. 20-UI-156414 is set aside, and this matter remanded for further proceedings consistent with this order.

S. Alba and D. P. Hettle.

DATE of Service: January 21, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-156414 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.



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 desisyong ito.

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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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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