

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0444

Affirmed
Ineligible for Pandemic Unemployment Assistance

PROCEDURAL HISTORY: On November 18, 2020, the Oregon Employment Department (the Department) served Notice of Determination for Pandemic Unemployment Assistance (PUA) concluding that claimant was not entitled to receive PUA benefits effective February 3, 2020. Claimant filed a timely request for hearing. On May 13, 2021, ALJ Murdock conducted a hearing, and on May 19, 2021 issued Order No. 21-UI-167111, affirming the November 18, 2020 administrative decision and concluding that claimant was not eligible to receive PUA benefits for the weeks including March 15, 2020 through May 8, 2021 (weeks 12-20 through 18-21). On June 4, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) In 2018, claimant began developing her own business as an analytics consultant. In September 2019, claimant began actively seeking clients for her business, but had difficulty finding clients for her business due to market saturation. In early 2020, claimant changed the focus of her business to strategy and management consulting. Claimant was never able to sign up any clients for her business, and never derived any income from the business. Claimant did not have another source of income, and relied on loans from her husband.

(2) On March 16, 2020, the schools that claimant's two children attended were closed due to the COVID-19 pandemic. At the time, claimant's children were ages five and ten. Claimant was not able to work or look for work while her children were at home because they required her supervision.

(3) On August 21, 2020, claimant filed an initial claim for PUA benefits. Claimant subsequently claimed PUA benefits for the weeks including March 15, 2020 through May 8, 2021 (weeks 12-20 through 18-21). These are the weeks at issue. The Department did not pay claimant benefits for any of the weeks at issue.¹

CONCLUSIONS AND REASONS: Claimant was not eligible for PUA benefits for the weeks at issue.

Under the CARES Act, Pub. L. 116-136, to be eligible to receive PUA benefits, an individual must be a "covered individual" as that term is defined by the Act. Pub. L. 116-136, § 2102(a). In pertinent part, the Act defines a "covered individual" as an individual who "is not eligible for regular compensation or extended benefits under state or federal law or pandemic emergency unemployment compensation under section 2107, including an individual who has exhausted all rights to regular unemployment or extended benefits under state or federal law or pandemic emergency unemployment compensation under section 2107" and provides a self-certification that the individual "is otherwise able to work and available for work within the meaning of applicable State law," but is rendered unemployed or unavailable to work because of one or more of 11 listed reasons that relate to the COVID-19 pandemic. Pub. L. 116-136, § 2102(a)(3)(A). Those reasons include, in relevant part, that "a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work." Pub. L. 116-136, § 2102(a)(3)(A)(ii)(I)(dd).

An individual may also meet the definition of a "covered individual" if they self-certify that they are self-employed, seeking part-time employment, lack sufficient work history, or otherwise would not qualify for regular unemployment, extended benefits, or pandemic emergency unemployment compensation, so long as they otherwise satisfy the requirements listed under § 2102(a)(3)(A)(ii)(I) of the Act. Pub. L. 116-136, § 2102(a)(3)(A)(ii)(II). § 2102(h) of the Act provides that regulations at 20 C.F.R. Part 625 apply to the PUA program, unless otherwise stated or contrary to the Act. 20 C.F.R. 625.2(o) defines "self-employment" as "services performed as a self-employed individual." 20 C.F.R. 625.2(n) defines "self-employed individual" as "an individual whose primary reliance for income is on the performance of services in the individual's own business, or on the individual's own farm."

Claimant asserted in her written argument that she was "self-employed." Claimant's Written Argument at 4. While this may be true in a broad sense, in that she was engaged in developing her own business, the record does not show that claimant was "self-employed" for purposes of the PUA program. In order to be considered "self-employed" under § 2102 of the Act, claimant must meet the definition of a "self-employed individual" per 20 C.F.R. 625.2(n). As claimant did not derive any income from her own business, it cannot be said that her "primary reliance for income is on the performance of services in the

¹ EAB has taken notice of this fact, which is contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). Any party that objects to our taking notice of this information 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, the noticed fact will remain in the record.

individual's own business." For that reason, claimant was not a "self-employed individual" under 20 C.F.R. 625.2(n) and therefore was not "self-employed" for purposes of § 2102(a)(3)(A)(ii)(II) of the CARES Act.

Despite not meeting the definition of "self-employed," claimant might qualify for PUA benefits under § 2102(a)(3)(A)(ii)(II) of the Act if she was seeking part-time employment, lacked sufficient work history, or otherwise would not qualify for regular unemployment, extended benefits, or pandemic emergency unemployment compensation, so long as she otherwise satisfied the requirements listed under § 2102(a)(3)(A)(ii)(I) of the Act. Claimant suggested in her written argument that she qualified as a "covered individual" under § 2102(a)(3)(A)(ii)(I)(dd) of the Act because she was the primary caregiver for her two young children, and could not continue pursuing her business because the children's schools were closed. Claimant's Written Argument at 2. The record does not support the conclusion that claimant was eligible on this basis because it does not show that claimant was unemployed, partially unemployed, or unable or unavailable to work because she was taking care of her children who were home due to school closures. For about two years prior to the COVID-19 pandemic, claimant worked to develop her own business; claimant testified that she had no income during that time. Transcript at 12. While the record does not show that claimant performed services for an employer² during that period of time, because she spent the time developing her own business and did not earn income during that time, it is reasonable to conclude based on the record that she was unemployed³ for that period of time. While the record does not specifically show why claimant was unemployed in the two years prior to the pandemic, claimant has nevertheless failed to demonstrate⁴ that she was rendered unemployed *because* she was taking care of her two children who were home due to school closures. Rather, the record suggests that claimant was *already* unemployed at the beginning of the pandemic and, had the pandemic not occurred, she would have remained unemployed while continuing to develop her own business. Claimant has also not shown that she was unemployed, partially employed, or unable or unavailable to work for any of the other reasons enumerated under § 2102(a)(3)(A)(ii)(I) of the Act.

Similarly, claimant has not shown that she was "otherwise able to work and available for work within the meaning of applicable State law." At hearing, claimant testified that the work she had been seeking was as a "freelancer," but did not otherwise indicate that she was available for work for an employer.⁵ Transcript at 7. Because the work she was seeking, or would have otherwise sought, was limited to freelance work, claimant imposed conditions which substantially reduced her opportunities to return to

² See generally ORS 657.025, ORS 657.030.

³ An individual is deemed "unemployed" in any week during which the individual performs no services and with respect to which no remuneration for services performed is paid or payable to the individual, or in any week of less than full-time work if the remuneration paid or payable to the individual for services performed during the week is less than the individual's weekly benefit amount. ORS 657.100(1).

⁴ See *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (where the Department has paid benefits it has the burden to prove benefits should not have been paid; by logical extension of that principle, where benefits have not been paid claimant has the burden to prove that the Department should have paid benefits).

⁵ In order to be considered "available" for work for purposes of ORS 657.155(1)(c), notwithstanding temporary rules relating to the COVID-19 pandemic, an individual must, in relevant part, be willing to work full time, part time, and accept temporary work opportunities, during all of the usual hours and days of the week customary for the work being sought and must not impose conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time. OAR 471-030-0036(3) (August 2, 2020 through December 26, 2020).

work at the earliest possible time, and as a result she was not considered available for work under OAR 471-030-0036(3)(c). Claimant therefore was not available for work within the meaning of applicable State law.

For the above reasons, claimant was not a “covered individual” within the meaning of the CARES Act, and therefore was not eligible to receive PUA benefits during the weeks at issue.

DECISION: Order No. 21-UI-167111 is affirmed.

S. Alba and A. Steger-Bentz;
D. Hettle, not participating.

DATE of Service: July 12, 2021

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 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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