

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0570

Reversed & Remanded

PROCEDURAL HISTORY: On December 9, 2020, the Oregon Employment Department (the Department) served a Notice of Determination for Pandemic Unemployment Assistance (PUA) concluding that claimant was not entitled to receive PUA benefits effective February 3, 2020. On December 29, 2020, the December 9, 2020 administrative decision became final without claimant having filed a request for hearing. On February 22, 2021, claimant filed a late request for hearing. ALJ Kangas considered claimant's request, and on March 10, 2021 issued Order No. 21-UI-162489, dismissing the request as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by March 24, 2021. On March 19, 2021, claimant filed a timely response to the appellant questionnaire. On May 10, 2021, the Office of Administrative Hearings (OAH) mailed notice to claimant stating that Order No. 21-UI-162489 was vacated. Also on May 10, 2021, OAH mailed a notice of a hearing scheduled for June 3, 2021 to consider whether claimant's late request for hearing should be allowed and, if so, the merits of the December 9, 2020 administrative decision.

On June 3, 2021, ALJ Monroe conducted a hearing, and on June 11, 2021 issued Order No. 21-UI-168620, granting claimant's late request for hearing and postponing consideration of the merits of the December 9, 2020 administrative decision for a later hearing. On June 14, 2021, OAH mailed notice of a hearing scheduled for June 28, 2021 to consider the merits of the December 9, 2020 decision. On June 28, 2021, ALJ Monroe conducted a hearing, and on July 6, 2021 issued Order No. 21-UI-169886, affirming the December 9, 2020 administrative decision and concluding that claimant was not eligible to receive PUA benefits from February 2, 2020 through June 12, 2021 (weeks 06-20 through 23-21). On July 14, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) In 2017, claimant ceased working as a metal fabricator for an employer because he sustained a hand injury. Thereafter, claimant had surgery and then sought to return to work for that employer but was not allowed to do so.

(2) At some point in 2019, claimant attempted to start a sheetrock venture but was unable to obtain a license or the bonding necessary to carry on the business because he had a record of felony convictions. As a result, claimant's sheetrock venture "never got a chance to get off the ground" and claimant did not perform any services in connection with it. Transcript at 12.

(3) Also beginning at least as early as 2019, claimant began regularly providing handyman services, like car repair and house painting, to individuals in the community. The handyman activities were claimant's main source of income, and claimant marketed the activities by buying advertisements on a marketing website. In 2019, claimant averaged two to three handyman jobs per week, earned \$25 to \$500 per job, and earned an annual income from the activities of between \$7,000 and \$8,000. Claimant did not file a federal income tax return for 2019.

(4) In March 2020, following the onset of the COVID-19 pandemic, claimant began experiencing difficulty carrying on his handyman activities. In mid-March 2020, an individual canceled a \$500 car motor repair job claimant had scheduled. Claimant completed a few minor handyman jobs during the spring but by mid-summer 2020 found that his handyman activities "went right down to almost zero." Transcript at 18. In mid-summer 2020, claimant withdrew his advertisements from the marketing website because he found they were no longer effective.

(5) On October 14, 2020, claimant filed an initial claim for PUA benefits. The Department determined that claimant had not earned sufficient wages in subject employment to be eligible for regular unemployment insurance benefits, extended benefits, or pandemic emergency unemployment compensation (PEUC) benefits. Claimant claimed PUA benefits for the weeks from February 2, 2020 through February 27, 2021 (weeks 06-20 through 08-21) and for the weeks of March 7, 2021 through June 12, 2021 (weeks 10-21 through 23-21).¹ Those are the weeks at issue. The Department did not pay claimant PUA benefits for any of the weeks at issue.

CONCLUSIONS AND REASONS: Order No. 21-UI-169886 is set aside and this matter is remanded for further development of the record.

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. § 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.² § 2102(a)(3)(A). Those

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.

² In addition, section 2102(a)(3)(A)(iii) of the CARES Act, as amended by Section 241(a) of the Continued Assistance Act, imposes an additional requirement for an individual to meet the definition of a "covered individual." Within a specified period of time after the initial PUA claim filing or after being directed to do so by the Department, the individual must "provide[] documentation to substantiate employment or self-employment or the planned commencement of employment or self-employment[.]" U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 16-20, Change 4 (Jan. 8, 2021) (UIPL 16-20, Change 4) at IV-7. This provision applies to an individual who files "a new application for PUA on or after January 31, 2021, or, if the individual applied for PUA before January 31, 2021 and receives PUA benefits on or after

reasons include, in relevant part, that “the individual meets any additional criteria established by the Secretary [of Labor] for unemployment assistance under this section.” § 2102(a)(3)(A)(ii)(I)(kk). Pursuant to federal guidance, “the Secretary provides coverage under item (kk) to those self-employed individuals who experienced a significant diminution of services because of the COVID-19 public health emergency.” U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 16-20, Change 2 (July 21, 2020) at 2.

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 set forth under section 2102(a)(3)(A)(ii)(I) of the Act. § 2102(a)(3)(A)(ii)(II). Section 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.” Pursuant to federal guidance, documentation sufficient to substantiate self-employment includes, but is not limited to, “state or Federal employer identification numbers, business licenses, tax returns, business receipts, and signed affidavits from persons verifying the individual’s self-employment.” UIPL 16-20, Change 4 at I-10. Other factors to consider in evaluating whether an individual is self-employed or whether their activities constitute their “own business” per 20 C.F.R. 625.2(n), include, but are not limited to, whether the individual prepared a business plan, formed a business entity (such as an LLC), or advertised their activities to potential customers.

The order under review concluded that claimant was not currently entitled to receive PUA benefits. Order No. 21-UI-169886 at 5. While the record supports this conclusion as to claimant’s sheetrock venture, it is insufficiently developed to support this conclusion as to claimant’s handyman activities.

The record does not support eligibility for PUA on a theory that claimant was self-employed and experiencing a significant diminution in services with respect to claimant’s sheetrock venture. The record shows that claimant did not perform any services in connection with the sheetrock venture because he was unable to obtain the necessary licensing and bonding to do so. Because claimant did not perform any services in connection with the sheetrock venture for reasons unrelated to the COVID-19 public health emergency, claimant failed to establish that he was eligible for PUA benefits on a theory that he was self-employed and experiencing a significant diminution in services with respect to his sheetrock venture.

Although the record supports the conclusion of the order under review as to the basis for PUA eligibility discussed above, the record as developed is insufficient to support that claimant was not entitled to receive PUA benefits for the weeks at issue as to claimant’s handyman activities. Applying the additional criteria set forth under Section 2102(a)(3)(A)(ii)(I)(kk) of the CARES Act, it is possible that claimant’s handyman activities constituted self-employment and that he experienced a significant diminution of services because of the COVID-19 public health emergency.

December 27, 2020[.]” UIPL 16-20, Change 4 at I-4. The provision does not apply to claimant because he filed his initial claim for PUA benefits before January 31, 2021 and has not been paid benefits for any of the weeks at issue.

To determine whether this additional criteria applies to claimant's handyman activities, the record on remand should be developed to assess whether, under 20 C.F.R. 625.2(n), claimant was a "self-employed individual." The record supports that claimant was primarily reliant upon his handyman activities for income beginning at least as early as 2019 when claimant began a regular practice of providing handyman services. However, the record is insufficient to determine whether claimant's handyman activities constituted his "own business," as necessary to meet the definition of "self-employed individual" under 20 C.F.R. 625.2(n). Therefore, the ALJ should inquire on remand as to whether claimant's handyman activities had the characteristics of a business by, for example, asking questions to determine whether claimant created a business plan, formed a business entity (such as an LLC), paid any business taxes, held any business licenses, produced any business receipts, or established a state or federal employer ID number. Claimant should be afforded the opportunity on remand to submit receipts from any transactions that occurred in connection with his handyman activities, as well as any signed affidavits from persons, such as individuals who used his handyman services, who may be able to verify that his handyman activities constituted self-employment.

To assess the applicability of the additional criteria, it is also necessary to develop the record to determine whether claimant's handyman services were significantly reduced because of the COVID-19 public health emergency. While the record shows that claimant's March 2020 car motor repair job was canceled and that claimant experienced a scarcity of handyman opportunities thereafter, further development of the record is necessary to determine more precisely what aspect, if any, of the COVID-19 public health emergency caused this reduction in claimant's handyman services. On remand, the ALJ should ask questions to determine whether, for example, claimant experienced a diminution in handyman services because of a pandemic-related state or municipal order restricting movement or due to concern about exposure to COVID-19 on the part of individuals who used his handyman services.

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 was eligible for PUA benefits during the weeks at issue, Order No. 21-UI-169886 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-169886 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: August 19, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-169886 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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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

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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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