

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0690

Reversed & Remanded

PROCEDURAL HISTORY: On July 14, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant filed late claims for unemployment insurance benefits for the weeks from March 29, 2020 through December 5, 2020 (weeks 14-20 through 49-20) and therefore was not entitled to benefits for those weeks (decision # 133013). Claimant filed a timely request for hearing. On August 18, 2021, ALJ Wyatt conducted a hearing, and on August 19, 2021 issued Order No. 21-UI-172995, affirming decision # 133013. On August 24, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's arguments 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 arguments to the extent they were based on the record.

The parties may offer new information, such as the information contained within claimant's written arguments, 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) During the first week of December 2020, claimant contacted the Department in an attempt to file an initial claim for Pandemic Unemployment Assistance (PUA) benefits.

(2) On January 4, 2021, the Department contacted claimant to inform her that she needed to re-file her initial claim for PUA benefits due to a "glitch." Transcript at 15.

(3) On March 1, 2021, claimant requested that the Department backdate her claim to the week of March 29, 2020 through April 4, 2020 (week 14-20). Thereafter, the Department determined that claimant was ineligible for PUA benefits because she had sufficient wages in her base year to qualify for a valid regular unemployment insurance claim.¹ Claimant subsequently filed an initial claim for regular benefits. The Department determined that the first effective week of claimant's claim for regular benefits was the week of December 6, 2020 through December 12, 2020 (50-20).²

(4) On May 25, 2021, claimant claimed regular benefits for the weeks from March 29, 2020 through December 5, 2020 (weeks 14-20 through 49-20), the weeks at issue. The Department did not pay claimant benefits for the weeks at issue.

CONCLUSIONS AND REASONS: Order No. 21-UI-172995 is set aside and this matter remanded for further development of the record.

OAR 471-030-0040 (January 11, 2018) provides:

(1) As used in these rules, unless the context requires otherwise:

* * *

(b) An "initial claim" is a new claim that is a certification by a claimant completed as required by OAR 471-030-0025 to establish a benefit year or other eligibility period;

* * *

(e) "Backdating" occurs when an authorized representative of the Employment Department corrects, adjusts, resets or otherwise changes the effective date of an initial, additional or reopened claim to reflect filing in a prior week. Backdating may occur based upon evidence of the individual's documented contact on the prior date with the Employment Department or with any other state Workforce agency, or as otherwise provided in this rule.

(2) For the purposes of filing an initial, additional, or reopened claim:

* * *

(d) When filed by Internet, the date of filing shall be the initial date of transmission of the online claim; or

¹ See Pub. L. 116-136, § 2102(a)(3)(A)(i).

² This determination notwithstanding, the Department's witness testified that the claims system indicated that claimant's claim for regular benefits was effective as of the week of November 29, 2020 through December 5, 2020 (week 49-20) because claimant's PUA claim was also effective week 50-20, and the system does not allow both claims to start on the same effective week. Transcript at 11.

(e) When filed by telephone, the date of filing shall be the date recorded in the completed telephone initial claim record of the agency system or by an employee completing the filing of the claim record.

* * *

(3) An initial, additional, or reopened claim must be filed prior to or during the first week or series of weeks for which benefits, waiting week credit, or noncompensable credit is claimed and prior to or during the first week of any subsequent series thereafter. An initial claim is effective the Sunday of the calendar week in which it is filed. An authorized representative of the Employment Department will backdate an additional or reopened claim to the calendar week immediately preceding the week in which the request to backdate was made when a claimant requests backdating of the additional or reopened claim.

* * *

Continued Claims

OAR 471-030-0045 (January 11, 2018) provides:

(1) As used in these rules, unless the context requires otherwise:

(a) "Continued Claim" means an application that certifies to the claimant's completion of one or more weeks of unemployment and to the claimant's status during these weeks. The certification may request benefits, waiting week credit, or non-compensable credit for such week or weeks. A continued claim must follow the first effective week of an initial, additional or reopen claim, or the claimant's continued claim for the preceding week;

* * *

(4) A continued claim must be filed no later than seven days following the end of the week for which benefits, waiting week credit, or noncompensable credit, or any combination of the foregoing is claimed, unless:

(a) The continued claim is for the first effective week of the benefit year, in which case the week must be claimed no later than 13 days following the end of the week for which waiting week credit is claimed, or

* * *

This case presents two related but distinct questions: first, whether claimant's claim for regular benefits should be backdated to week 14-20, and second, whether claimant timely filed continued claims for regular benefits for the weeks at issue. The record as developed does not contain sufficient information to resolve either question.

Under OAR 471-030-0045(1)(a), a continued claim for regular benefits must follow the first effective week of an initial, additional or reopen claim, or the claimant's continued claim for the preceding week. In other words, as the order under review concluded, "a claimant may not successfully claim benefits for a period prior to the effective date of their benefit year because no valid claim exists to which to attach the weeks claimed." Order No. 21-UI-172995 at 2. Therefore, a determination must first be made as to whether the weeks at issue followed the effective date of claimant's initial regular claim—which likewise requires a determination of the correct effective date of her initial regular claim. Otherwise, the question of whether claimant timely filed continued claims for the weeks at issue is moot.

OAR 471-030-0040(3) permits the backdating only of additional or reopened claims, and does not permit the backdating of initial regular claims. The rule notwithstanding, the Department's witness testified at hearing that the Department is permitted to backdate an initial regular claim when the claimant provides evidence that they had attempted to file an initial claim during the period they wish to have their initial claim backdated to. Transcript at 6. The record contains no indication that claimant attempted to file an initial claim prior to December 2020. The Department contended at hearing that claimant's first contact on record, on which she requested to backdate her initial PUA claim to December 6, 2020, was on January 4, 2021. Transcript at 7. However, claimant testified that she contacted the Department to file her initial PUA claim in the first week of December 2020, and that she filed it again on January 4, 2021 after the Department contacted her and told her to do so. Transcript at 15.

Claimant included with her written argument an email, which purports to show that she attempted to file an initial claim in early December 2020. On remand, claimant should be permitted to offer the email as an exhibit. If the email is offered and admitted as an exhibit, the ALJ should ask the Department witness to authenticate or otherwise explain the email, including its significance as relating to claimant's attempt to file an initial claim on that date and why the Department had no record of it. Additionally, a comment in claimant's claim record, dated July 20, 2021 indicates that the Department had some evidence of claimant having filed an initial claim in December 2020, although a comment dated the following day suggested that another Department representative was unable to find that evidence.³ On remand, the ALJ should ask the Department witness about these comments to determine their significance, and whether any such evidence exists. The ALJ should use evidence gathered from this inquiry to determine whether claimant's contact with the Department in early December 2020 constituted the filing of an initial claim.

Whether claimant first filed (or attempted to file) her initial PUA claim in December 2020, rather than January 2021, is significant because, prior to December 27, 2020, initial PUA claims were required to be backdated to the "first week during the Pandemic Assistance Period that the individual was unemployed, partially unemployed, or unable or unavailable to work because of a COVID-19 related reason listed in section 2102(a)(3)(A)(ii)(I) of the CARES Act."⁴ Initial PUA claims filed after December 27, 2020, by contrast, may only be backdated to December 1, 2020.⁵ Therefore, if the record on remand shows that

³ EAB has taken notice of these facts, which are contained in Employment Department records. OAR 471-041-0090(1). 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 facts will remain in the record.

⁴ See U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 16-20, Change 1 (April 27, 2020) at 5.

claimant either filed an initial PUA claim, or attempted to do so, prior to December 27, 2020, claimant's PUA claim should be backdated in accordance with the CARES Act and related U.S. Department of Labor (USDOL) guidance.

Even if the record on remand shows that claimant's initial PUA claim was eligible for backdating to week 14-20, further inquiry is required to determine whether the Department has authority to transfer the effective date of claimant's backdated initial PUA claim to her initial regular claim. The record as developed suggests that the Department retains such authority, as they backdated claimant's initial regular claim to the date of her earlier-filed initial PUA claim. On remand, the ALJ should ask the Department witness whether the Department would be able to complete such a transfer.

To the extent that the record on remand shows that claimant's initial regular claim should be backdated to week 14-20, further inquiry should also be made as to whether claimant filed timely continued claims for regular benefits for the weeks at issue. Claimant filed continued claims for regular benefits for all of the weeks at issue on May 25, 2021. Under OAR 471-030-0045(4), a continued claim for the latest of the weeks at issue, week 49-20, must have been claimed no later than December 12, 2020. Therefore, all of the continued claims for regular benefits filed on May 25, 2021 were late. The record suggests that claimant had, on some prior date, filed continued claims for the weeks at issue under her PUA claim, which the Department did not transfer to claimant's regular claim once they determined that she qualified for regular benefits. Transcript at 18. However, it is not clear from the record when claimant claimed those weeks on her PUA claim and whether, under applicable federal law and USDOL guidance, those continued claims either were filed timely or would have been considered timely had claimant's PUA claim remained valid. On remand, the record should be developed to resolve these questions.

Finally, even if claimant filed timely continued claims under her PUA claim for the weeks at issue, it is not clear from the record as to whether the Department is authorized to transfer those weeks to claimant's regular claim. On remand, the record should be developed to determine whether the Department would be able to complete such a transfer.

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 is eligible for backdating of her initial regular claim and, if so, whether she timely filed continued claims for regular benefits for the weeks at issue, Order No. 21-UI-172995 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-172995 is set aside, and this matter remanded for further proceedings consistent with this order.

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

⁵ See U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 16-20, Change 4 (January 8, 2021) at 26-27.

DATE of Service: October 1, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-172995 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



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 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.

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

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.