

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0748-R

Request for Reconsideration Allowed
Application for Review Timely
Request for Hearing Allowed
Reversed & Remanded

PROCEDURAL HISTORY: On May 20, 2021, 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 March 22, 2020. On June 9, 2021, the May 20, 2021 administrative decision became final without claimant having filed a request for hearing. On June 17, 2021, claimant filed a late request for hearing. On August 16, 2021, ALJ Frank conducted a hearing, and on August 24, 2021 issued Order No. 21-UI-173261, concluding that claimant's request for hearing was timely and affirming the May 20, 2021 administrative decision. On September 17, 2021, claimant filed a late application for review with EAB. On October 8, 2021, EAB issued EAB Decision 2021-EAB-0748, dismissing claimant's late application for review without prejudice, subject to his right to request reconsideration and provide additional evidence to EAB about the reason(s) for the late filing. On October 26, 2021, claimant filed a timely request for reconsideration of EAB Decision 2021-EAB-0748.

EVIDENTIARY MATTER: With claimant's request for reconsideration, he submitted information showing that he mailed an application for review to the Department on September 11, 2021. Because this evidence is necessary to complete the record, EAB has considered it when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). 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 our admitting EAB Exhibit 1 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 exhibit will remain in the record.

Additionally, the parties may offer new information into evidence, such as any documentary evidence substantiating claimant's planned commencement of employment, 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) In March 2020, claimant was scheduled to start a job at a deli. In late March 2020, following the onset of the COVID-19 pandemic, the deli closed before claimant could start working. The deli placed “a big sign in the[ir] window saying they had closed due to the pandemic.” Audio Record at 27:01.

(2) On August 16, 2020, claimant filed an initial claim for PUA benefits. When claimant filed his initial claim, the Department determined that claimant was not eligible for regular unemployment insurance benefits, extended benefits, or pandemic emergency unemployment compensation benefits.

(3) Claimant claimed PUA benefits for the weeks from March 22, 2020 through April 4, 2020 (weeks 13-20 and 14-20), and April 12, 2020 through August 7, 2021 (weeks 16-20 through 31-21). Those are the weeks at issue. The Department paid claimant benefits for weeks 13-20, 14-20, and weeks 16-20 through 15-21. The Department did not pay claimant benefits for weeks 16-21 through 31-21.

(4) On September 11, 2021, claimant mailed a hand-written application for review of Order No. 21-UI-173261 to the Department. EAB Exhibit 1 at 1. For unknown reasons, claimant’s September 11, 2021 application for review was either not received or not accurately processed.

CONCLUSIONS AND REASONS: Claimant’s request for reconsideration is allowed. Claimant filed a timely application for review of Order No. 21-UI-173261, and the application for review therefor is allowed. Order No. 21-UI-173261 is set aside, and this matter remanded for further development of the record.

Request for Reconsideration. ORS 657.290(3) authorizes the Employment Appeals Board, upon its own motion or at the request of a party, to reconsider any previous decision of the Employment Appeals Board, including “the making of a new decision to the extent necessary and appropriate for the correction of previous error of fact or law.” *See also* OAR 471-041-0145(1) (May 13, 2019). The request is subject to dismissal unless it is filed on or before the 20th day after the decision sought to be reconsidered was mailed. OAR 471-041-0145(2).

EAB dismissed claimant’s late application for review without prejudice and subject to him filing a timely request for reconsideration within 20 days after EAB’s dismissal decision was issued. Claimant filed a request for reconsideration consistent with the requirements set forth in OAR 471-041-0145. The request for reconsideration is, therefore, allowed.

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).

The application for review of Order No. 21-UI-173261 was due by September 13, 2021. Although claimant filed an application for review on September 17, 2021, which was late, claimant’s request for reconsideration shows that claimant filed an application for review on September 11, 2021 by mailing a

hand-written application for review on that date. Given that claimant filed an application for review by mail on September 11, 2021, which was before the September 13, 2021 deadline, claimant's application for review of Order No. 21-UI-173261 was timely, and therefore is allowed.

Merits of Order No. 21-UI-173261. Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review concluding that claimant's request for hearing was filed in a timely manner is **adopted**. The remainder of this decision shall address claimant's eligibility for PUA.

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, except the individual is unemployed, partially unemployed, or unable 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 "the individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency." Pub. L. 116-136, § 2102(a)(3)(A)(ii)(I)(gg).

The order under review concluded that claimant was not entitled to PUA benefits because he "failed to provide sufficient evidence of . . . qualifying for PUA." Order No. 21-UI-173261 at 4. The record as developed does not support that conclusion. The record shows that claimant provided sufficient evidence to suggest that, during the weeks at issue, he may have been scheduled to commence employment at a deli and did not have a job as a direct result of the COVID-19 public health emergency, which, if supported by the record on remand, could satisfy § 2102(a)(3)(A)(ii)(I)(gg) and qualify claimant as a "covered individual."

On remand, the ALJ should ask questions to assess the applicability of § 2102(a)(3)(A)(ii)(I)(gg). The record should be developed to determine the name, address and other identifying features of the deli business; when claimant applied for employment at the deli; when the deli made claimant an offer of employment and the terms of the employment such as rate of pay; when claimant and the deli intended claimant to commence employment at the deli; how claimant was notified that the deli had closed; whether the deli's closure was the reason claimant did not commence employment there; and, if so, whether the closure was a direct result of the COVID-19 public health emergency, such as if the business shut down due to an emergency declaration or due to necessary social distancing protocols.

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-173261 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-173261 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: December 2, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-173261 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 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

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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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