

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0779

Affirmed
Ineligible for Pandemic Unemployment Assistance

PROCEDURAL HISTORY: On August 16, 2021, the Oregon Employment Department (the Department) served a Notice of Determination for Pandemic Unemployment Assistance (PUA) concluding that claimant was not entitled to PUA benefits effective December 6, 2020. Claimant filed a timely request for hearing. On September 14, 2021, ALJ Janzen conducted a hearing, and on September 15, 2021 issued Order No. 21-UI-174767, affirming the August 16, 2021 administrative decision by concluding that claimant was not eligible for PUA benefits for the weeks including March 1, 2020 through September 4, 2021 (weeks 10-20 through 35-21). On September 27, 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 him 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) For several years prior to the COVID-19 pandemic, claimant performed part-time work for his landlord, providing services such as maintenance and repairs on her rental properties. The landlord paid claimant \$25 per hour for this work. Claimant's work for his landlord was not impacted by the pandemic.

(2) Additionally, prior to the pandemic, claimant earned approximately \$60 per month by collecting cans and other scrap metal and turning the materials in to recycling centers. Claimant did not perform this work on behalf of an employer. On April 15, 2020, claimant stopped performing his recycling work due to the stay-at-home order issued by Governor Brown.

(3) On January 14, 2021, claimant filed an initial claim for PUA benefits. The Department determined that the effective date of the claim was December 6, 2020. The Department also determined that claimant was not eligible for regular or extended unemployment insurance benefits or pandemic emergency unemployment compensation.

(4) Claimant claimed PUA benefits for the weeks including March 1, 2020 through September 4, 2021 (weeks 10-20 through 35-21). These are the weeks at issue. The Department did not pay claimant benefits for any of the weeks at issue.

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

To be eligible to receive PUA benefits under the CARES Act, 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, 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 is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency; or that the individual’s place of employment is closed as a direct result of the COVID-19 public health emergency. Pub. L. 116-136, § 2102(a)(3)(A)(ii)(I)(ee), (jj). Those reasons also include 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 listed under section 2102(a)(3)(A)(ii)(I) of the Act. Pub. L. 116-136, § 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.”

On December 27, 2020, the Consolidated Appropriations Act, 2020, including Division N, Title II, Subtitle A, the Continued Assistance for Unemployed Workers Act of 2020 (“Continued Assistance Act,” herein “CAA”), was signed into law and included certain changes to the PUA program through amendment of the CARES Act, as addressed herein. In relevant part, § 201(f) of the CAA modified the CARES Act such that initial PUA claims filed after December 27, 2020 may be backdated to an effective date of no earlier than December 6, 2020. U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 16-20 (UIPL 16-20), Change 4, (Jan. 8, 2021) at 26–27.

In his written argument, claimant asserted that the date of his initial claim should permit him to backdate the claim to the date of the stay-at-home order. However, the record shows that claimant filed his initial claim on January 14, 2021. Under § 201(f) of the CAA, initial claims for PUA benefits filed after December 27, 2020 may not be backdated to an effective date earlier than December 6, 2020. Therefore, the Department correctly determined that the effective date of claimant's claim is December 6, 2020 (week 50-20). For that reason, claimant is not eligible for PUA benefits for any of the weeks at issue prior to December 6, 2020.

Additionally, claimant has not met his burden¹ to show that he was a "covered individual" under § 2102(a)(3) of the CARES Act for any of the weeks at issue including or after December 6, 2020 (week 50-20). At hearing, claimant testified that he stopped engaging in his recycling activities once Governor Brown issued the stay-at-home order because he "couldn't go out and fend for" himself. Transcript at 10. However, claimant did not show that he was unemployed, partially unemployed, or unable or unavailable to work due to any of the circumstances contemplated under § 2102(a)(3)(A)(ii)(I) of the CARES Act, such as that his place of employment was closed as a direct result of the COVID-19 public health emergency. Indeed, federal guidance suggests that an individual who seeks PUA benefits on a theory that they are self-employed—as claimant has asserted in regards to his recycling activities—does not have a "place of employment" and therefore cannot qualify for PUA under § 2102(a)(3)(A)(ii)(I)(ee) or (jj) of the CARES Act. *See* U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 16-20 (April 5, 2020) (UIPL 16-20), at 13.

Further, to the extent that claimant premised his PUA eligibility on a theory that he was self-employed and experienced a significant diminution of services under § 2102(a)(3)(A)(ii)(I)(kk) of the CARES Act, he did not show that his recycling activities constituted self-employment under 20 C.F.R. 625.2(o). In order to qualify as a "self-employed individual" under that regulation, claimant must have, in relevant part, primarily relied on income from the performance of services in the claimant's own business. The record does not clearly show that claimant's recycling activities qualified as a "business." Moreover, prior to the pandemic, claimant earned approximately \$60 per month by recycling cans and other scrap metal. By contrast, claimant's landlord paid him \$25 per *hour* for work he performed for her—work that he performed both prior to the pandemic and during the weeks at issue. Although the record does not show how many hours per month claimant typically worked for his landlord, it is reasonable to conclude that his monthly pay from work for his landlord likely exceeded the income he had been receiving for his recycling activities. For that reason, claimant has not met his burden to show that he primarily relied on income from his recycling activities, and he therefore has not shown that he was self-employed for purposes of the PUA program.

For the above reasons, claimant was not a "covered individual" under § 2102(a)(3) of the CARES Act, and therefore was not eligible for PUA benefits for the weeks at issue.

DECISION: Order No. 21-UI-174767 is affirmed.

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

¹ *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).

DATE of Service: October 29, 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 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 الإستئناف 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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