

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0848

*Requests for Hearing Allowed
Reversed & Remanded*

PROCEDURAL HISTORY: On February 11, 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 15, 2020. Claimant filed a timely request for hearing. On April 20, 2021, the Department served a Notice of Determination for Pandemic Unemployment Assistance (PUA) concluding that claimant was not entitled to receive PUA benefits for the weeks including August 30, 2020 through December 12, 2020 (weeks 36-20 through 50-20). Also on April 20, 2021, the Department served a Notice of Determination for Pandemic Unemployment Assistance (PUA) concluding that claimant was not entitled to receive PUA benefits for the week of March 14, 2021 through March 20, 2021 (week 11-21). Also on April 20, 2021, the Department also served a Notice of Determination for Pandemic Unemployment Assistance (PUA) concluding that claimant was not entitled to receive PUA benefits for the weeks including March 22, 2020 through August 22, 2020 (weeks 13-20 through 34-20). On May 10, 2021, the three April 20, 2021 administrative decisions became final without claimant having filed a request for hearing.

On May 23, 2021, claimant filed late requests for hearing on the three April 20, 2021 administrative decisions. ALJ Kangas considered claimant's requests, and on June 10, 2021 issued Order No. 21-UI-168528, dismissing claimant's late requests for hearing on the three April 20, 2021 administrative decisions as late without a showing of good cause, subject to claimant's right to renew requests by responding to an appellant questionnaire by June 24, 2021.¹ On or about June 12, 2021, claimant filed a timely response to the appellant questionnaire. On July 14, 2021, the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 21-UI-164218 was vacated and a hearing would be scheduled to determine whether claimant had good cause to file the late requests for hearing and, if so, the merits of the underlying administrative decisions. On August 30, 2021, OAH mailed notice of a consolidated hearing scheduled for September 24, 2021 to consider the merits of the February 11, 2021 administrative decision, claimant's late requests for hearing on the three April 20, 2021 administrative decisions and, if granted, the merits of those three decisions as well.

¹ EAB presumes from the context of the record that Order No. 21-UI-168528 was meant to apply to all three of the April 20, 2021 administrative decisions.

On September 24, 2021, ALJ Murdock conducted a consolidated hearing on the February 11, 2021 administrative decision and the three April 20, 2021 administrative decisions. On September 28, 2021, ALJ Murdock issued Order No. 21-UI-175795, modifying the February 11, 2021 administrative decision by concluding that claimant was not eligible for PUA benefits for the weeks including August 23, 2020 through August 29, 2020; December 13, 2020 through December 19, 2020; January 3, 2021 through March 6, 2021; March 28, 2021 through April 10, 2021; and April 18, 2021 through June 19, 2021 (weeks 35-20, 51-20, 01-21 through 09-21, 13-21 through 14-21, and 16-21 through 24-21). Also on September 28, 2021, ALJ Murdock issued Orders No. 21-UI-175801, 21-UI-175802, and 21-UI-175798, finding that claimant's requests for hearing on the three April 20, 2021 administrative decisions were timely and affirming the merits of those decisions. On October 14, 2021, claimant filed applications for review of Orders No. 21-UI-175795, 21-UI-175801, 21-UI-175802, and 21-UI-175798 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 21-UI-175795, 21-UI-175801, 21-UI-175802, and 21-UI-175798. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2021-EAB-0847, 2021-EAB-0848, 2021-EAB-0849 and 2021-EAB-0850).

WRITTEN ARGUMENT: EAB considered claimant's written arguments when reaching this decision.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portions of Orders No. 21-UI-175801, 21-UI-175802, and 21-UI-175798 concluding that claimant had filed timely requests for hearing on the three April 20, 2021 administrative decisions are **adopted**. The remainder of these decisions address whether claimant was entitled to receive PUA benefits during the weeks at issue.

FINDINGS OF FACT: (1) In June 2014, claimant retired from a position with an Oregon school district. Upon his retirement, claimant immediately began receiving a pension from a Public Employees Retirement System (PERS) plan based upon his work with this Oregon school district.

(2) From December 2014 to June 19, 2021, claimant worked as a substitute teacher for a different Oregon school district ("the second school district"). The second school district contributed to the PERS pension plan from which claimant drew his pension.

(3) In 2020, claimant filed a claim for regular unemployment insurance (regular UI) benefits. The Department determined that claimant's regular UI weekly benefit amount was \$151, based in part upon the base-year wages paid to claimant by the second school district. The Department subsequently issued a decision concluding that claimant was ineligible for regular UI benefits because he was receiving weekly PERS retirement benefits from a plan contributed to by a base year employer which exceeded his regular UI weekly benefit amount.

(4) On November 21, 2020, claimant filed an initial claim for PUA benefits. The Department determined that claimant's weekly PUA benefit amount was \$205.

(5) Claimant claimed PUA benefits for the weeks including March 22, 2020 through December 19, 2020 (weeks 13-20 through 51-20), January 3, 2021 through March 6, 2021 (weeks 01-21 through 09-21), March 14, 2021 through March 20, 2021 (week 11-21), March 28, 2021 through April 10, 2021 (weeks 13-21 through 14-21), and April 18, 2021 through June 19, 2021 (weeks 16-21 through 24-21). These are the weeks at issue.

(6) During the weeks at issue, claimant continued to receive \$308 in weekly PERS retirement benefits from a plan contributed to by a base year employer.

CONCLUSIONS AND REASONS: Orders No. 21-UI-175795, 21-UI-175801, 21-UI-175802, and 21-UI-175798 are set aside and this matter remanded for further development of the record.

With respect to regular unemployment insurance benefits, ORS 657.205(1) provides that “. . . an individual is disqualified for benefits for any week with respect to which the individual is receiving, will receive, or has received a governmental or other pension, retirement or retired pay, annuity, or other similar periodic payment based on the previous work of the individual, if payment is received under a plan maintained or contributed to by a base year employer of the individual. ORS 657.205(5) provides, “If under this section the remuneration and payments, or the pro rata share thereof, in any week are less than the benefits which would otherwise be due under this chapter for such week, such individual is entitled to receive for such week, if otherwise eligible, benefits reduced by the amount of such remuneration and payments.” In other words, if during a week in which they have claimed regular UI benefits, a claimant has received pension payments from a plan maintained by or contributed to by an employer in the base year used to establish their claim, and if those payments equal or exceed the claimant’s weekly benefit amount, the claimant is disqualified from benefits for that week.

To be eligible to receive PUA benefits under the CARES Act (the 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” § 2102(a)(3)(A).

Each of the orders under review concluded that although claimant was “eligible for a regular claim” for unemployment insurance benefits, because his \$308 weekly retirement benefit was greater than his regular UI weekly benefit amount of \$151, by State law² his retirement income was deductible from his regular UI benefits and therefore “reduced his regular benefits to zero on a week-by-week basis.” Order No. 21-UI-175795 at 3; *see also* Order No. 21-UI-175801 at 4-5, Order No. 21-UI-175802 at 4, and Order No. 21-UI-175798 at 4. The orders under review then applied the same State law and reasoning to claimant’s PUA claim, concluding that because claimant’s weekly PUA benefit amount was \$205, it was less than his \$308 weekly retirement benefit, and therefore deducting claimant’s weekly retirement benefit from his weekly PUA benefit amount reduced claimant PUA benefit to zero. Order No. 21-UI-175795 at 3, Order No. 21-UI-175801 at 4-5, Order No. 21-UI-175802 at 4, and Order No. 21-UI-175798 at 4. The record as developed does not support these conclusions.

² Although the orders under review did not specify, it is presumed that the State law being applied was ORS 657.205.

As an initial matter, the record shows a discrepancy regarding the threshold question of whether claimant is a “covered individual” under the Act. At hearing, the Department’s representative testified that the underlying basis for the denial of claimant’s PUA claim was because claimant was eligible for regular UI benefits. Transcript at 8. This testimony was consistent with the determination made in the February 11, 2021 administrative decision that claimant was not entitled to PUA benefits *because* he was “eligible for a regular unemployment claim, extension, or extended benefits in Oregon or another state.” The record suggests that the Department may not have considered the retirement pay deductions to claimant’s regular UI benefit amount as otherwise making him “ineligible” for regular UI benefits; and that therefore, because he remained eligible for regular UI benefits, he was not a “covered individual” under the Act. However, later during the hearing, the Department’s representative “clarified” that had claimant’s deductible retirement income not been greater than his weekly PUA benefit amount, claimant would have received weekly PUA benefits at a reduced rate. Transcript at 53. This testimony was consistent with the three April 20, 2021 administrative decisions that determined that claimant was not entitled to PUA benefits during the weeks at issue because his retirement pay was equal to or more than his weekly benefit amount. Further, it suggests that the Department may have considered claimant’s retirement pay deductions to his regular UI weekly benefit amount, which reduced that amount to zero, as making him ineligible for regular UI benefits and therefore a “covered individual” under the Act. On remand, further development of the record is necessary to address this discrepancy on the threshold question of whether claimant was a “covered individual” under the Act.

If the record on remand shows that claimant was a “covered individual” under the Act, further inquiry is needed to address the specific provision(s) under the Act, or any other relevant laws, which make ORS 657.205 (or any Oregon administrative rules related to its administration) applicable to PUA benefit determinations under the Act. When asked this specific question at hearing, the Department’s representative responded that she did not know, at that moment, the specific provision(s) that were applicable but she could look it up. Transcript at 42. Because neither the record, nor the orders under review, articulate the connection and interplay between State law regarding deductions of retirement pay from regular UI benefits and an individual’s entitlement to PUA benefits under the Act, further development of the record on this issue is necessary.

If claimant was a “covered individual” under the Act, and if it is determined (and articulated) that 657.205 (or any Oregon administrative rules related to its administration) is applicable to an individual’s entitlement to PUA benefits, further development of the record is needed to address the impact, if any, of 26 USC 3304(a)(15) on claimant’s entitlement to PUA benefits. At hearing, claimant expressly argued that he was eligible for PUA benefits under the Act based on the applicability of that section, which is codified under the Federal Unemployment Tax Act (FUTA), because he did not perform any services for his base year employer that either affected his eligibility for his PERS pension or increased the amount of his PERS pension. Transcript at 45, 50.³ Claimant’s argument was not addressed at hearing or in any of the orders under review. If the record on remand shows that claimant was a “covered individual” under the Act but was otherwise not entitled to PUA benefits due to a finding that his retirement pay benefits were legally required to be deducted from the amount of any weekly PUA benefit, further inquiry is necessary to determine whether FUTA section 3304(a)(15)(A)(i)(II) is

³ Claimant acknowledged at hearing the inapplicability of FUTA section 3304(a)(15)(A)(i)(I) based on his understanding that it was not necessary for the contributing base year employer to make contributions to the retirement plan that benefit claimant directly. Transcript at 49.

applicable to claimant's circumstances and, if so, whether claimant qualifies for any benefit in light of the language of FUTA section 3304(a)(15)(A)(i)(II).

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, Orders No. 21-UI-175795, 21-UI-175801, 21-UI-175802, and 21-UI-175798 are reversed, and this matter is remanded.

DECISION: Orders No. 21-UI-175795, 21-UI-175801, 21-UI-175802, and 21-UI-175798 are set aside, and this matter remanded for further proceedings consistent with these orders.

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

DATE of Service: November 19, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Orders No. 21-UI-175795, 21-UI-175801, 21-UI-175802, and 21-UI-175798, or return this matter to EAB. Only a timely application for review of the subsequent orders 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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