

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-1090

Affirmed
Ineligible for Pandemic Unemployment Assistance

PROCEDURAL HISTORY: On September 1, 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 February 2, 2020. Claimant filed a timely request for hearing. On October 29, 2021, ALJ Monroe conducted a hearing, and on November 30, 2021 issued Order No. 21-UI-180707, affirming the September 1, 2021 administrative decision. On December 17, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Prior to November 3, 2020, S & J Reed Inc., aka Shop’Kart, employed claimant as a cashier. Claimant’s employment with S & J Reed Inc. ended on November 3, 2020.

(2) Shortly after claimant’s employment with S & J Reed Inc. ended, claimant scheduled a job interview with another employer but was unable to attend the interview because it “was cancelled due to the pandemic.” Transcript at 59.

(3) In early November 2020, claimant responded to a Craigslist posting and began performing landscaping work for a private individual. That work lasted for approximately six weeks until the private individual’s “holiday break” after which claimant stopped working for the private individual due to a decline in available work. Transcript at 27. The individual paid claimant for his services in cash, which claimant considered earnings from self-employment. Claimant did not obtain a business license or file a business tax return because he did not believe that he was operating a business. Claimant did not perform similar “self-employment” services for anyone else after working for the private individual. Transcript at 28.

(4) On December 21, 2020, claimant filed an initial claim for PUA benefits. The Department calculated claimant’s weekly PUA benefit amount at \$205. He claimed PUA benefits for the period November 1, 2020, through March 13, 2021 (weeks 45-20 through 10-21), and March 21, 2021, through September 4, 2021 (weeks 12-21 through 35-21). These are the weeks at issue. The Department paid claimant

PUA benefits for each of the weeks at issue, with the exception of weeks 46-20 through 52-20, and 27-21 through 35-21.

(5) While gathering information necessary to process the PUA claim, the Department determined that claimant had earned sufficient wages to establish a monetarily valid claim for regular unemployment insurance benefits. The Department determined that the claim (BYE 52-21) was effective January 3, 2021 (week 1-21) and calculated claimant's weekly benefits amount at \$151.

(6) Between approximately March 5, 2021 and March 25, 2021, claimant became ill with flu-like symptoms. He did not undergo diagnostic testing for COVID-19 or otherwise seek a medical diagnosis regarding his symptoms.

(7) On March 26, 2021, the Department issued an administrative decision concluding that on November 3, 2020, claimant voluntarily quit work with S & J Reed Inc. without good cause and was disqualified from receiving regular unemployment insurance benefits effective November 1, 2020 (week 45-20). Based on information claimant provided during the investigation regarding the work separation, the Department found that claimant quit work based on health concerns relating to a skin rash. Claimant did not undergo diagnostic testing for COVID-19 or otherwise seek a medical diagnosis regarding his skin rash. The investigator who conducted the investigation did not report having received any information from claimant asserting that he quit for a reason relating to COVID-19. Claimant did not appeal the administrative decision, which has become final. The Department was unable to determine if claimant had earned sufficient wages to overcome the regular benefits disqualification imposed by the March 26, 2021 administrative decision because claimant failed to provide necessary contact information regarding his November 2020 employment for the private individual he worked for at that time.

(8) Between approximately July 15, 2021 and August 1, 2021, claimant again became ill with flu-like symptoms. He did not undergo diagnostic testing for COVID-19 or otherwise seek a medical diagnosis regarding his symptoms.

(9) During the weeks at issue, claimant was not diagnosed with having COVID-19 and did not seek a medical diagnosis regarding the flu-like symptoms he occasionally experienced.

CONCLUSIONS AND REASONS: Claimant was not eligible for PUA benefits for the weeks including November 1, 2020 through March 13, 2021 (weeks 45-20 through 10-21), and March 21, 2021 through September 4, 2021 (weeks 12-21 through 35-21).

The Department paid claimant PUA benefits for weeks 45-20, 53-20 through 10-21 and 12-21 through 26-21 and for that reason had the burden to prove that claimant should not have been paid benefits for those weeks. Conversely, the Department did not pay claimant PUA benefits for weeks 46-20 through 52-20 and 27-21 through 35-21 and for that reason claimant had the burden to prove that he should have been paid benefits for those weeks. *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).

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 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).

Here, the record fails to show that claimant was a “covered individual” as that term is defined by the Act. Pub. L. 116-136, § 2102(a) because he was not rendered unemployed or unavailable to work during the weeks at issue because of one or more of 11 listed reasons that relate to the COVID-19 pandemic. Those reasons include, in relevant part that “the individual has to quit his or her job as a direct result of COVID-19. Pub. L. 116-136, § 2102(a)(3)(A)(ii)(I)(ii). Guidance from the U.S. Department of Labor states that this reason is satisfied where “[a]n individual was diagnosed with COVID-19 by a qualified medical professional, and although the individual no longer has COVID-19, the illness caused health complications that render the individual objectively unable to perform his or her essential job functions, with or without a reasonable accommodation.” U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 16-20 (April 5, 2020) at I-6. Here, the record shows that claimant quit work with S & J Reed Inc. on November 3, 2020 based on health concerns relating to a skin rash, therefore it fails to show that claimant quit as a direct result of COVID-19 or that he was ever diagnosed with COVID-19 by a qualified medical professional.

The COVID-19 impact reasons also include, in relevant part that “the individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis.” Pub. L. 116-136, § 2102(a)(3)(A)(ii)(I)(aa). Here, the record shows that although claimant became ill with flu-like symptoms similar to symptoms of COVID-19 in March and July of 2021 he never sought a medical diagnosis regarding those flu-like symptoms, and therefore did not establish eligibility based on this reason.

The COVID-19 impact reasons also 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). Here, claimant asserted that he had a scheduled a job interview with another employer but was unable to attend the interview because it “was cancelled due to the pandemic.” Transcript at 59. However, because claimant’s interview was a mere job interview and did not constitute a job offer or the actual commencement of employment, the cancellation of the interview does not meet the requirements of Pub. L. 116-136, § 2102(a)(3)(A)(ii)(I)(gg).

Finally, an individual may also meet the definition of a “covered individual” if they 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). Moreover, one of the COVID-19 impact reasons

is 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. 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”, 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 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 his performance of landscaping services as a result of the COVID-19 pandemic. This is because claimant did not establish that he was self-employed. Claimant’s income from those services was not his “primary” source of income and claimant did not obtain a business license or file a business tax return regarding his landscaping services because he did not believe that he was operating a business. Transcript at 38-40. Also, the record shows that claimant stopped performing such services after the private individual for whom he was working in November of 2020 went on a “holiday break” and thereafter stopped requesting claimant’s services due to a decline in available work. When claimant was asked if the private individual provided claimant with any additional details about his reduction in business around that time, claimant responded, “No. He didn’t.” Transcript at 27-28. Because claimant did not establish that he was self-employed as that concept is defined by 20 C.F.R. Part 625, and because the record shows that claimant stopped performing landscaping services for reasons unrelated to the COVID-19 public health emergency, claimant failed to establish PUA eligibility on a theory that he was self-employed and experiencing a significant diminution in services.

For the reasons explained, the record shows that claimant did not constitute a “covered individual” for purposes of § 2102(a)(3) of the CARES Act and was not eligible to receive PUA benefits for any of the weeks at issue.

DECISION: Order No. 21-UI-180707 is affirmed.

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

DATE of Service: January 28, 2022

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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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، می توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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