

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0293

Reversed & Remanded

PROCEDURAL HISTORY: On November 8, 2021, the Oregon Employment Department (the Department) served a Notice of Determination for Pandemic Unemployment Assistance (PUA) concluding that claimant was not eligible to receive PUA benefits effective March 22, 2020. Claimant filed a timely request for hearing. On February 8, 2022, ALJ Frank conducted a hearing, and on February 16, 2022 issued Order No. 22-UI-186649, affirming the November 8, 2021 administrative decision by concluding that claimant was not eligible to receive PUA benefits for the weeks including March 22, 2020 through September 4, 2021 (weeks 13-20 through 35-21). On March 4, 2022, 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.

The parties may offer new information, such as the documents attached to or submitted in reference to claimant's application for review, 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) On October 6, 2020, claimant filed an initial claim for PUA benefits. Claimant subsequently claimed PUA benefits for the weeks including March 22, 2020 through September 4, 2021 (weeks 13-20 through 35-21). These are the weeks at issue. On or prior to December 21, 2020, the Department paid claimant benefits for the weeks including March 22, 2020 through

December 19, 2020 (weeks 13-20 through 51-20).¹ The Department did not pay claimant benefits for the weeks including December 20, 2020 through September 4, 2021 (weeks 52-20 through 35-21). Claimant was not eligible for regular unemployment insurance (regular UI) benefits during the weeks at issue.

(2) Prior to the weeks at issue, claimant earned money by performing landscaping and similar services. From August 10, 2019 until March 24, 2020, claimant performed two to three hours of yard work for a client every Thursday, earning \$75 each time. On October 18, 2019, claimant was paid \$45 for having cleaned another client's gutters. Claimant submitted documentation of these services to the Department in order to support his PUA claim.

(3) On his October 6, 2020 initial claim, claimant stated that he stopped performing the above services after March 24, 2020 because he was "advised to stay home so [he could] stay healthy so [he] was not able to go to [his] clients," and had to "self quarantine" due to the governor's stay-at-home order. Exhibit 1 at 24.

CONCLUSIONS AND REASONS: Order No. 22-UI-186649 is set aside and this matter remanded for further development of the record.

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," but is rendered unemployed or unavailable to work because of one or more of 11 listed reasons that relate to the COVID-19 pandemic, including that the individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, or that they meet any additional criteria established by the Secretary of Labor. Pub. L. 116-136 § 2102(a)(3)(A)(ii)(I)(ff), (kk).

Further, an individual may also meet the definition of a "covered individual" if they are "self-employed . . . or otherwise would not qualify for regular unemployment or extended benefits . . . or pandemic emergency unemployment compensation . . . and meets the requirements" set forth under § 2102(a)(3)(A)(ii)(I) of the Act. Pub. L. 116-136 § 2102(a)(3)(A)(ii)(II). 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. § 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

¹ EAB has taken notice of this fact, which is contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). 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 fact will remain in the record.

whose primary reliance for income is on the performance of services in the individual's own business, or on the individual's own farm.”

Moreover, § 2102(a)(3)(A)(iii) of the CARES Act, as amended by Section 241(a) of the Continued Assistance Act (“CAA”), requires individuals to submit documentation to substantiate their employment or self-employment within a specified period of time in order to meet the definition of a “covered individual.” As explained by federal guidance, the provision requires that “individuals who have an existing PUA claim as of December 27, 2020” and “who receive PUA on or after December 27, 2020, must provide documentation within 90 days of the application date or the date the individual is instructed to provide such documentation by the state agency (whichever date is later).” U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 16-20, Change 4 (January 8, 2021) (UIPL 16-20, Change 4), at I-10. Acceptable proof of 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. If an individual fails to submit such documentation within the required timeframe, under Section 241(b)(2) of the CAA, the individual is not considered ineligible for PUA benefits received before December 27, 2020 but is otherwise not eligible for PUA and “the state may . . . establish an overpayment for those weeks of unemployment ending on or after December 27, 2020[.]” UIPL 16-20, Change 4 at I-11.

The order under review found that claimant “has not provided documentary proof of any self-employment preceding a COVID-19 impact date”; and, as a result, concluded that claimant was ineligible to receive PUA benefits for the weeks at issue because claimant could not establish that he became unemployed due to one of the reasons set forth in § 2102(a)(3)(A)(ii)(I) of the Act. Order No. 22-UI-186649 at 1, 3. The record as developed does not support this conclusion.

First, where the initial claim for PUA benefits was filed on or prior to December 27, 2020, the documentary substantiation requirements imposed by the CAA only apply to benefits that claimant claimed, or was paid, on or after December 27, 2020. The record shows that claimant’s initial claim was filed, and benefits for weeks 13-20 through 51-20 were paid, prior to December 27, 2020. Therefore, pursuant to the CAA, claimant was not required to substantiate his self-employment with documentation for those weeks.

Second, the record shows that claimant did, in fact, provide documentary proof of self-employment preceding a COVID-19 impact date: a receipt from a client whose gutters he cleaned in 2019, and an affidavit from another customer who attested to claimant’s having provided weekly yard work for them through March 24, 2020. Exhibit 1 at 29–30. This documentation is of the type indicated by the US Department of Labor’s guidance: business receipts and signed affidavits from persons verifying the individual’s self-employment.

At hearing, claimant testified that he had been “doing yard work, but not consistently enough to... run a business” prior to the issuance of the stay-at-home order in March 2020. Transcript at 10. Whether or not claimant considered himself to have been “running a business,” however, does not determine whether he was eligible for PUA benefits during the weeks at issue. Instead, claimant must show both that that he was a “self-employed individual,” as that term is defined under 20 C.F.R. 625.2(n), and that

he was unemployed or unavailable for work due to one or more of the “COVID-19 impact” reasons listed under Pub. L. 116-136 § 2102(a)(3)(A)(ii)(I). To the former, claimant must, in relevant part, show that he primarily relied on income derived from the performance of the services he described at hearing and in his documentary evidence. On remand, the ALJ should therefore inquire as to the full extent of claimant’s landscaping and similar services, including how many clients he had, how much he earned in total, how frequently he worked for his clients, and whether claimant primarily relied upon that work for his income or whether he primarily derived his income from elsewhere.

To the latter, despite claimant’s assertions that he stopped performing services because of the stay-at-home order, it is not clear from the record as to why claimant could not perform services that took place outside and, presumably, not in close proximity to clients or other people. Additionally, claimant testified at hearing that he “was working during the pandemic.” Transcript at 10. On remand, the ALJ should develop the record to determine whether claimant continued working at all after March 24, 2020; and, if supported by the record, the specific circumstances which led claimant to either stop working or work less after March 24, 2020.

Finally, it is not clear from the record either when the Department instructed claimant to submit his documentary evidence of self-employment, or when claimant actually did submit the documentary evidence that is in the record. As claimant was required by the CAA to submit the documents within 90 days of the Department’s instructions to do so,² the timing of these two events may determine whether claimant met the substantiation requirements of the CAA such that he may have been eligible for benefits for weeks 52-20 through 35-21. On remand, the ALJ should develop the record sufficiently to resolve those questions.

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 to receive PUA benefits for the weeks at issue, Order No. 22-UI-186649 is reversed, and this matter is remanded.

DECISION: Order No. 22-UI-186649 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: May 9, 2022

² It is presumed that the Department’s instructions to claimant, if any, followed claimant’s filing of his initial claim.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 22-UI-186649 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

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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