

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0554

Affirmed
Ineligible for Pandemic Unemployment Assistance

PROCEDURAL HISTORY: On August 20, 2021, the Oregon Employment Department (the Department) served a Notice of Determination for Pandemic Unemployment Assistance (PUA) concluding that claimant was not eligible for PUA benefits effective December 6, 2020. Claimant filed a timely request for hearing. On March 4, 2022, ALJ Monroe conducted a hearing, and on April 11, 2022 issued Order No. 22-UI-191907, affirming the August 20, 2021 administrative decision by concluding that claimant was not eligible to receive PUA benefits for the weeks including December 6, 2020 through September 4, 2021 (weeks 50-20 through 35-21). On May 11, 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 her 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.

Claimant also asserted that the hearing proceedings were unfair or the ALJ was biased. EAB reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and (4) and OAR 471-040-0025(1) (August 1, 2004).

FINDINGS OF FACT: (1) Between approximately September 2018 and March 2020, claimant and her fiancé earned income by buying and re-selling cars using online platforms such as Facebook Marketplace and Craigslist. On March 23, 2020, the Governor issued Executive Order No. 20-12, a stay-at-home order meant to curb the spread of COVID-19. Immediately following the issuance of the order, demand for the vehicles that claimant and her fiancé were selling dropped significantly, causing them to lose business.

(2) On or around June 4, 2020, claimant began working for a restaurant. Claimant voluntarily quit that job on June 18, 2020 because she was being harassed by a coworker.

(3) On June 18, 2020, claimant's fiancé passed away due to complications from COVID-19.

(4) In late August or early September 2020, claimant took a temporary assignment working for a law firm. On September 18, 2020, that assignment ended.

(5) On February 2, 2021, claimant began working for Mid-Willamette Valley Community Action Agency. On February 13, 2021, claimant voluntarily quit that position because claimant stated she was "verbally assaulted and . . . threatened with physical violence" at work. Transcript at 36.

(6) On May 24, 2021, claimant was diagnosed with COVID-19.

(7) On July 16, 2021, claimant filed an initial application for PUA benefits, with an effective date of December 6, 2020. Claimant claimed PUA benefits for the weeks including December 6, 2020 through September 4, 2021 (weeks 50-20 through 35-21). These are the weeks at issue. The Department did not pay claimant benefits for the weeks at issue.

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

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). The Act defines a "covered individual" as an individual who (1) "is not eligible for regular compensation . . . under State or Federal law . . . including an individual who has exhausted all rights to regular unemployment . . . under State or Federal law" and (2) self-certifies¹ that they are either "otherwise able to work and available to work within the meaning of applicable State law, except the individual is unemployed, partially unemployed, or unable or unavailable to work because" of one of eleven reasons related to the COVID-19 pandemic, or "is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular unemployment" and is rendered unemployed or unavailable to work because of one of the eleven listed reasons. Pub. L. 116-136, § 2102(a)(3)(A). The eleven listed COVID-19 impact reasons include the following:

(aa) the individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

* * *

(hh) the individual has become the breadwinner or major

¹ § 2102(a)(3)(A)(iii) of the CARES Act, as amended by Section 241(a) of the Continued Assistance Act ("CAA"), ended self-certification and added the requirement that individuals 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." Individuals who have an existing PUA claim as of December 27, 2020 (the enactment date of the Continued Assistance Act) OR who file a new initial PUA claim before January 31, 2021, 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.

support for a household because the head of the household has died as a direct result of COVID-19; [or]

(kk) the individual meets any additional criteria established by the Secretary for unemployment assistance under this section.

Pub. L. 116-136, § 2102(a)(3)(A)(ii)(I).

As stated above, one of the eleven COVID-19 impact reasons listed in Section 2102(a)(3)(A)(ii)(I) 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. Per USDOL guidance, “direct result” as used in § 2102 of the CARES Act is defined per 20 C.F.R. 625.5(c) to mean that “the unemployment is an immediate result of the major disaster itself, and not the result of a longer chain of events precipitated or exacerbated by the disaster. U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 16-20 (April 5, 2020) (UIPL 16-20), at I-7.

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.

The record does not show that claimant met the definition of “covered individual” under the CARES Act for the weeks at issue. As a preliminary matter, claimant filed her initial claim for PUA benefits on July 16, 2021. Under the CAA, claimant’s initial claim therefore may not be backdated to earlier than December 6, 2020. Thus, regardless of whether claimant might have otherwise been considered a covered individual under the CARES Act during, for instance, March 2020, claimant was not eligible to receive benefits for any dates prior to December 6, 2020 because her claim could not have been backdated earlier than that date.

At hearing and in her documentary evidence, claimant generally advanced three bases for finding that she was a covered individual under the CARES Act, and therefore eligible to receive PUA benefits. First, claimant asserted that she should be eligible due to the diminution in business that she and her fiancé experienced immediately following the issuance of the stay-at-home order in March 2020. Such circumstances might constitute eligibility for PUA benefits if the record showed that claimant was unemployed during the weeks at issue because, under Section 2102(a)(3)(A)(ii)(I)(kk) and federal guidance, she was a self-employed individual who experienced a significant diminution of services because of the COVID-19 public health emergency. Some questions remain in the record as to whether claimant was, for purposes of § 2102(a)(3)(A)(ii)(I)(kk) of the CARES Act and federal guidance, a self-

employed individual.² However, even assuming that claimant was a self-employed individual experiencing a significant diminution of services because of the COVID-19 public health emergency on March 23, 2020, that was not the reason that claimant was unemployed during the *weeks at issue*.

Claimant argues that her car buying and re-selling activities were negatively impacted by the stay-at-home order on March 23, 2020. Claimant then became re-employed at a restaurant on or around June 4, 2020, and worked there until she voluntarily quit on June 18, 2020. Once claimant became re-employed on or around June 4, 2020, she was no longer unemployed (or partially employed) due to the downturn in her car buying and re-selling activities. When claimant quit working for the restaurant on June 18, 2020, the actual cause of her becoming unemployed was not a direct result of the COVID-19 public health emergency, rather, it was the fact that she quit work.³

Claimant also asserted at hearing that she “became the sole wage earner in [her] household due to the death of the head of the household as a direct result of COVID.” Transcript at 41. Claimant was referring here to the death of her fiancé on June 18, 2020, and seemed to suggest that she should therefore be eligible for PUA benefits under § 2102(a)(3)(A)(ii)(I)(hh) of the CARES Act. That provision functions to include as covered individuals an individual who has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19. Again, it is not clear whether claimant’s circumstances qualify under this provision, largely because the record does not conclusively show that claimant’s fiancé contributed the majority of financial support to the household before his death or that claimant then became the person in the household expected to provide such financial support after his death. However, even if claimant did become the major support for her household following the death of her fiancé because of COVID-19, that would still not have been the cause of claimant’s unemployment *during the weeks at issue*.

The record shows that claimant became unemployed because she quit working for the restaurant on June 18, 2020, and that she became re-employed again in late August or early September 2020 when she started a temporary assignment with a law firm. She became unemployed again about two weeks later, on September 18, 2020. The record does not show that claimant either became employed again, or else was unemployed as a result of any other intervening cause, between September 18, 2020 and December 6, 2020. Therefore, the preponderance of the evidence shows that claimant was unemployed on December 6, 2020, the beginning of the period at issue, because her work assignment had ended on September 18, 2020, and not because she became the breadwinner or major support for her household following her fiancé’s death. While claimant again became employed in February 2021, and subsequently quit that job, she likewise did not quit for reasons that would qualify her as a covered individual at that point in time. Thus, during the weeks at issue, claimant was neither unemployed nor partially employed as a “direct result” of COVID-19 due to a reason set forth in § 2102(a)(3)(A)(ii)(I)(hh) of the CARES Act.

² Notably, the Employment Department was unable to verify the legitimacy of the business, there is no documentation in the record to substantiate that claimant had an ownership interest in the activities she performed buying and re-selling cars, and the record indicates that claimant worked as her fiancé’s “assistant.” See Transcript at 10, Exhibit 1 at 1.

³ The circumstances surrounding claimant’s decision to voluntarily quit this job, or any other job she held in 2020 or 2021, are not at issue in this matter. EAB therefore does not address whether those work separations constituted good cause for quitting or otherwise would have disqualified claimant from receiving regular unemployment insurance benefits under ORS 657.176.

Finally, claimant argues she is eligible for PUA because she was diagnosed with COVID-19. § 2102(a)(3)(A)(ii)(I)(aa) of the CARES Act provides for eligibility when “The individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis.” For (aa) to apply, claimant had to show that she was unemployed, partially unemployed, or unable or unavailable to work because she was diagnosed with COVID-19, or because she was experiencing symptoms of COVID-19 and seeking a medical diagnosis. At hearing, claimant testified that she was previously ill with COVID-19-like symptoms “at the beginning of” the pandemic, before testing was available. Transcript at 40. However, it is clear this first bout of illness took place before December 2020, and was therefore not during the weeks at issue.

The record also shows that claimant was diagnosed with COVID-19 on May 24, 2021, which *was* during the weeks at issue. However, claimant has not shown that she was rendered unemployed or unavailable to work *because* she was diagnosed with COVID-19. At hearing, when the ALJ asked claimant when she was sick or quarantined, claimant was unable to answer, instead testifying that she entered that information into the online claims system and no longer had that information available. Transcript at 39. In documentary evidence that claimant submitted prior to the hearing, claimant stated, “I documented the instances of Covid infection and the instances of quarantine in the OED’s online claim system and those were the only times I was not available to work[.]” Exhibit 1 at 1. Claimant’s statement here suggests that she was in fact sick with COVID-19, and unable to work as a result, on multiple occasions. Beyond claimant’s vague testimony about her initial illness and the evidence that she was also diagnosed with COVID-19 in May 2021, the record does not show which periods of time claimant was sick with COVID-19 and employed and unable to work as a direct result during the weeks at issue, nor does the record show that claimant had to quit any of her jobs as a direct result of COVID-19 because she tested positive for coronavirus.

Because the Department did not pay claimant benefits, claimant bears the burden to show that she should have been paid benefits for any of the weeks at issue. *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). As claimant did not offer evidence to show when she was rendered unemployed or unavailable to work during the weeks at issue as a direct result of COVID-19, claimant has not met that burden.

For the above reasons, claimant was not a covered individual under the CARES Act during the weeks at issue, and therefore is not eligible to receive PUA benefits for those weeks.

DECISION: Order No. 22-UI-191907 is affirmed.

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

DATE of Service: August 2, 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 desisyong ito.

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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄຳຕັດສິນນີ້.

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 الاستئناف 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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