

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0743

*Late Request for Hearing Allowed
Reversed & Remanded*

PROCEDURAL HISTORY: On February 9, 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 February 2, 2020. On March 1, 2021, the February 9, 2021 PUA determination became final without claimant having filed a request for hearing. On October 18, 2021, claimant filed a late request for hearing. ALJ Kangas considered claimant's request, and on November 2, 2021 issued Order No. 21-UI-178688, dismissing the request as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by November 16, 2021. On November 15, 2021, claimant filed a timely response to the appellant questionnaire. On February 17, 2022, the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 21-UI-178688 was vacated and that a new hearing would be scheduled to determine whether claimant had good cause to file the late request for hearing, and if so, the merits of the February 9, 2021 PUA determination. On June 6, 2022, ALJ S. Lee conducted a hearing, and on June 16, 2022 issued Order No. 22-UI-196367, allowing claimant's late request for hearing on the February 9, 2021 PUA determination and affirming the PUA determination by concluding that claimant was not eligible for PUA benefits from March 29, 2020 through September 4, 2021 (weeks 14-20 through 35-21). On June 30, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review allowing claimant's late request for hearing on the February 9, 2021 PUA determination is **adopted**. The remainder of this decision addresses whether claimant was eligible for PUA benefits during the weeks at issue.

FINDINGS OF FACT: (1) On November 29, 2020, claimant filed an initial application for PUA benefits. Claimant subsequently claimed PUA benefits for the weeks from March 29, 2020 through September 4, 2021 (weeks 14-20 through 35-21). These are the weeks at issue. The Department did not pay claimant benefits for these weeks.

(2) During 2019, claimant's primary source of income was from collecting recyclable materials such as appliances, metal scraps, and wood pallets, which she would bring to recycling centers. Claimant earned about \$2,500 from her recycling activities during 2019, and performed these activities in Oregon. Additionally, claimant collected bottles and cans and turned them in for deposit returns during that time. Also during 2019, claimant performed occasional housekeeping work in both Oregon and Washington. Claimant stopped being able to perform these activities around late March 2020.

(3) Claimant did not file a tax return on the income she received for any of the income-generating activities she performed in 2019, as she did not believe that she had earned enough to require filing taxes. Claimant did not provide documentation of any of these activities to the Department when she filed her initial claim.

(4) In August 2021, the Department advised claimant to submit documentation to substantiate that she had earned income from the above activities. Claimant provided the Department with an un-filed tax form, which the Department determined was insufficient to substantiate her claim. Claimant did not provide the Department with further documentation to substantiate her claim.

CONCLUSIONS AND REASONS: Order No. 22-UI-196367 is set aside and this matter remanded for further development of the record.

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 (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-certifies 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). Those reasons include, in relevant part, 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." 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." U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 16-20, Change 4 (January 8, 2021) at I-10.

In addition, § 2102(a)(3)(A)(iii) of the CARES Act, as amended by § 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. If an individual fails to submit such documentation, under § 241(b)(2) of the CAA, the individual is not considered ineligible for PUA benefits received before December 27, 2020 but “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. Further, “States must notify . . . individuals filing PUA continued claims on or after December 27, 2020 . . . of the requirement to provide documentation to substantiate their employment or self-employment. Such notice must include the applicable deadline and the ability to show good cause on or before the deadline for extending such deadline, and the disqualification for failure to provide required documentation, including the potential for an overpayment of benefits paid.” UIPL 16-20, Change 4 at I-12.

The order under review concluded that claimant was not eligible for PUA benefits during the weeks at issue because she “failed to provide any information or documentation to establish that she had employment earnings or was self-employed from January 1, 2019 until her filed impact date of March 29, 2020.” Order No. 22-UI-196367 at 6. The record as developed does not support this conclusion.

For claimant to have been eligible for PUA benefits during the weeks at issue, she must have, among other requirements, been unemployed or partially unemployed due to one of the reasons listed under § 2102(a)(3)(A) of the CARES Act. The record shows that prior to the COVID-19 pandemic, claimant traded in scrap materials¹ to recyclers as her main source of income, and that she stopped doing so around late March 2020. Thus, claimant may have qualified as a “covered individual” under § 2102(a)(3)(A)(ii)(I)(kk) as a self-employed individual who experienced a significant diminution of services because of the COVID-19 public health emergency. However, further development of the record is necessary to determine whether claimant was a “covered individual” for purposes of the Act. At hearing, claimant offered testimony that suggested that the “emergency situation. . . and COVID” caused her to stop her scrap recycling activities, but did not offer specific testimony to explain how the pandemic affected those activities. On remand, the ALJ should ask questions to specifically determine what circumstances kept claimant from continuing to pursue her recycling activities around March 2020, as well as when, if at all, those circumstances ceased to exist.

Additionally, the ALJ should note that the requirement for PUA claimants to substantiate their employment or self-employment derives from the passage of the CAA. As such, and because claimant already had an existing claim as of January 31, 2021, the substantiation requirement *only* applies to weeks of benefits that begin on or after December 27, 2020. Further, under the CAA, the deadline for claimant to have submitted supporting documentation to substantiate her self-employment was within 90 days of the application date or the date the individual was instructed to provide such documentation by

¹ Because the record shows that claimant’s trade in scrap materials was her primary source of income prior to the pandemic, it is not necessary to determine whether claimant was eligible for PUA benefits on the basis of income derived from trading in bottle and can deposits or performing housekeeping services.

the state agency, whichever was later. The record shows that the Department instructed claimant to provide substantiating documentation in August 2021 (which was later than within 90 days of claimant's November 29, 2020 PUA initial application date), and that claimant did not do so. The deadline for claimant to have fulfilled the substantiation requirement has therefore passed, and as a result claimant is not eligible for PUA benefits for the weeks at issue that start on or after December 27, 2020 (weeks 53-20 through 35-21). However, because the substantiation requirements do not apply to the weeks at issue before that date, the weeks from March 29, 2020 through December 26, 2020 (weeks 14-20 through 52-20), claimant may still be eligible for those weeks, pending further development of the record to determine whether she was a covered individual.

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 weeks 14-20 through 52-20, Order No. 22-UI-196367 is reversed, and this matter is remanded.

DECISION: Order No. 22-UI-196367 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: October 5, 2022

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 22-UI-196367 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymzmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



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

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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.