

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0749-R

Request for Reconsideration Allowed
EAB Decision 2022-EAB-0749 Modified on Reconsideration
Eligible Weeks 12-20 through 25-20
Ineligible Weeks 06-20 through 11-20

PROCEDURAL HISTORY: On April 28, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant filed late claims for unemployment insurance benefits for the weeks from February 2, 2020 through June 20, 2020 (weeks 06-20 through 25-20) and therefore was denied benefits for those weeks (decision # 133258). Claimant filed a timely request for hearing. On June 9, 2022, ALJ Ramey conducted a hearing, and on June 15, 2022 issued Order No. 22-UI-196247, affirming decision # 133258. On July 1, 2022, claimant filed an application for review with the Employment Appeals Board (EAB). On September 30, 2022, EAB issued EAB Decision 2022-EAB-0749, reversing Order No. 22-UI-196247 by concluding that claimant had filed timely claims for weeks 06-20 through 25-20 and therefore was eligible for benefits for those weeks. On October 18, 2022, the Department filed a request for reconsideration of EAB Decision 2022-EAB-0749. This decision is issued pursuant to EAB's authority under ORS 657.290(3).

EVIDENTIARY MATTER: Under OAR 471-041-0090(1) (May 13, 2019), EAB has considered additional evidence necessary to complete the record when reaching this decision. The additional evidence is an April 1, 2020 Department internal guidance email, and has been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 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 exhibit(s) will remain in the record.

WRITTEN ARGUMENT: The Department filed a written argument on October 19, 2022. Claimant filed written arguments on July 1 and October 31, 2022. All three arguments contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the parties' reasonable control prevented them 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 the all three arguments to the extent they were based on the record.

FINDINGS OF FACT: On reconsideration, EAB adheres to the findings of fact set forth in EAB Decision 2022-EAB-0749, set forth below:

(1) In January 2021, claimant filed an initial claim for pandemic unemployment assistance (PUA) benefits. Following filing his initial application for PUA benefits, claimant learned that he was not eligible for PUA and that he was eligible for regular unemployment insurance benefits.

(2) In February 2021, claimant, with the assistance of his wife, filed an initial claim for regular unemployment insurance (regular UI) benefits. At that time, or shortly thereafter, again with his wife's assistance, claimant filed continued claims for regular UI benefits for the weeks including February 2, 2020 through June 20, 2020 (weeks 06-20 through 25-20). These are the weeks at issue. The Department did not pay claimant for the weeks at issue. Claimant filed his initial and continued claims through the Department's online filing system and afterwards received confirmation that he filed his claims.

(3) On April 27, 2021, after not receiving an update on his initial claim, claimant filed an initial application for PUA benefits a second time.

(4) On May 7, 2021, claimant filed continued claims for PUA benefits for weeks 06-20 through 25-20. However, claimant was not eligible to receive PUA benefits for weeks 06-20 through 25-20 because he was eligible for regular UI benefits for those weeks.

(5) On June 1, 2021, claimant filed continued claims for regular UI benefits for weeks 06-20 through 25-20 again because he had not received an update regarding his continued claims for those weeks that he filed in February 2021.

Additionally, EAB finds the following facts:

(6) At the time claimant filed his continued claims for regular UI benefits for weeks 06-20 through 25-20 in February 2021, the Department maintained an internal policy that allowed initial claims filed before March 15, 2021 to be backdated to the first effective week of an individual's unemployment, but no earlier than the week of March 15 through 21, 2021 (week 12-20). EAB Exhibit 1 at 1. The policy also allowed continued claims filed any time before March 15, 2021 to be treated as having been timely filed. These policies expired on March 15, 2021.

CONCLUSIONS AND REASONS: The Department's request for reconsideration is allowed. On reconsideration, claimant was eligible for benefits for the weeks from March 15, 2020 through June 20, 2020 (weeks 12-20 through 25-20), but was not eligible for benefits for the weeks from February 2, 2020 through March 14, 2020 (weeks 06-20 through 11-20).

Request for Reconsideration. ORS 657.290(3) authorizes the Employment Appeals Board to reconsider any previous decision of the Employment Appeals Board, including "the making of a new decision to the extent necessary and appropriate for the correction of previous error of fact or law." "Any party may request reconsideration to correct an error of material fact or law, or to explain any unexplained inconsistency with Employment Department rule, or officially stated Employment Department position, or prior Employment Department practice." OAR 471-041-0145(1) (May 13, 2019). The request is subject to dismissal unless it includes a statement that a copy was provided to the

other parties, and is filed on or before the 20th day after the decision sought to be reconsidered was mailed. OAR 471-041-0145(2).

The Department filed their request for reconsideration within 20 days after EAB Decision 2022-EAB-0749 was mailed, and the request included a statement that a copy was provided to claimant.¹ further, the Department filed the request in part to correct an error of fact or law, or explain an unexplained inconsistency with the Department's rule, position, or practice. As such, the Department's request for reconsideration is granted.

Backdating. ORS 657.155(1)(b) provides that an unemployed individual shall be eligible to receive benefits with respect to any week only if the individual has made a claim for benefits with respect to such week in accordance with ORS 657.260. ORS 657.260(1) provides that claims for benefits shall be filed in accordance with such regulations as the Department may prescribe.

OAR 471-030-0040 (January 11, 2018) provides:

(1) As used in these rules, unless the context requires otherwise:

* * *

(b) An "initial claim" is a new claim that is a certification by a claimant completed as required by OAR 471-030-0025 to establish a benefit year or other eligibility period;

* * *

(e) "Backdating" occurs when an authorized representative of the Employment Department corrects, adjusts, resets or otherwise changes the effective date of an initial, additional or reopened claim to reflect filing in a prior week. Backdating may occur based upon evidence of the individual's documented contact on the prior date with the Employment Department or with any other state Workforce agency, or as otherwise provided in this rule.

* * *

(3) An initial, additional, or reopened claim must be filed prior to or during the first week or series of weeks for which benefits, waiting week credit, or noncompensable credit is claimed and prior to or during the first week of any subsequent series thereafter. An initial claim is effective the Sunday of the calendar week in which it is filed. An authorized representative of the Employment Department will backdate an additional or reopened claim to the calendar week immediately preceding the week in which the request to

¹ Although the Department's October 18, 2022 request for reconsideration itself did not include a statement that a copy was served on claimant, the Department's October 19, 2022 written argument included such a statement. Additionally, the statement included with the request for reconsideration is reproduced verbatim on the Department's written argument. As such, and as the Department filed their written argument within 20 days after EAB Decision 2022-EAB-0749 was mailed, the Department has constructively met this requirement.

backdate was made when a claimant requests backdating of the additional or reopened claim.

* * *

Furthermore, OAR 471-030-0045 (January 11, 2018) provides, in relevant part:

(1) As used in these rules, unless the context requires otherwise:

(a) “Continued Claim” means an application that certifies to the claimant’s completion of one or more weeks of unemployment and to the claimant’s status during these weeks. The certification may request benefits, waiting week credit, or non-compensable credit for such week or weeks. A continued claim must follow the first effective week of an initial, additional or reopen[ed] claim, or the claimant’s continued claim for the preceding week[.]

* * *

(4) A continued claim must be filed no later than seven days following the end of the week for which benefits, waiting week credit, or noncompensable credit, or any combination of the foregoing is claimed, unless:

(a) The continued claim is for the first effective week of the benefit year, in which case the week must be claimed no later than 13 days following the end of the week for which waiting week credit is claimed[.]

* * *

(5) The Director may, with respect to individual claimants or groups of claimants, direct that continued claims be filed on any reporting schedule appropriate to existing facilities and conditions.

* * *

The order under review concluded that claimant’s continued claims for weeks 06-20 through 25-20 were not timely filed and therefore claimant was not eligible to receive benefits for those weeks. Order No. 22-UI-196247 at 2. The record does not support that conclusion.

At hearing, the parties disagreed about when claimant filed his initial claim and continued claims for regular UI benefits. The Department’s witness testified that claimant’s initial claim for benefits was filed on June 1, 2021. Audio Record at 8:10 to 8:22. Claimant, on the other hand, testified that he filed his initial claim and continued claims for weeks 06-20 through 25-20 in February 2021. Audio Record at 14:45 to 15:38. Claimant further testified that he filed online and received a confirmation message upon completion. Audio Record at 16:45 to 16:58. A witness for claimant corroborated these statements in her testimony. The witness testified that she assisted claimant in filing an initial claim for PUA in January 2021, that he then received a letter stating he was not qualified for PUA, and that she again assisted in

the subsequent filing of the regular UI initial and continued claims in February 2021. Audio Record at 20:16 to 20:51. Claimant also presented a second witness who further corroborated these statements by testifying that she was present when the regular UI claims were filed. Audio recording at 26:10 to 26:45.

When comparing these accounts, only the claimant and his witnesses offered first-hand testimony. The Department's witness based her testimony regarding the initial filing date on the records in the Department's filing system as well as a lack of records. Audio Record at 27:30 to 27:57. Claimant and the above-mentioned witnesses, on the other hand, provided first-hand accounts that he filed in February 2021. The weight of this evidence is in claimant's favor because of the enhanced reliability of first-hand testimony as well as the corroboration between claimant and his witnesses. Consequently, on the disputed issue of when claimant filed his initial and continued claims, EAB based its findings on claimant's evidence that he filed in February 2021.

The analysis thus turns to whether these claims were timely. Under OAR 471-030-0040(3), an initial claim for benefits must be filed prior to or during the first week or series of weeks for which benefits are claimed. Although claimant filed his initial claim in February 2021, which was after the weeks at issue, his initial claim was filed *before* March 15, 2021. Therefore, pursuant to the Department's internal policy, claimant's initial claim for regular UI benefits was filed prior to or during the first week or series of weeks for which benefits were claimed.

EAB concluded in EAB Decision 2022-EAB-0749 that, pursuant to the Department's internal backdating policy, claimant was eligible to have his initial claim backdated to the first effective week of his unemployment, which was found to be week 06-20. In so holding, EAB erred by overlooking a portion of the Department's backdating policy. In relevant part, that policy read:

Backdate initial claims to the week the claimant requests, *but no earlier than week 12/20*. Take the weekly certification(s) for the prior week(s) as instructed in the last screen of the telephone initial claim. Proceed with work search as instructed in the prior memo.

EAB Exhibit 1 at 1 (emphasis added). Under this policy, and in light of the fact that claimant filed his initial claim prior to March 15, 2021, claimant was eligible to have his initial claim backdated to week 12-20, not week 06-20. Claimant could not have been eligible to backdate his initial claim to an earlier week because the Department's policy did not permit further backdating. Accordingly, claimant's initial claim should be backdated to week 12-20.

Moreover, typically under OAR 471-030-0045(4)(a), a continued claim must be filed no later than seven days after the end of the week for which benefits are claimed (and in a limited situation may be filed no later than 13 days following the end of the week). However, under OAR 471-030-0045(5) the Director can allow for different filing schedules based on "existing facilities and conditions." Under this provision, the Department's internal policy allowed continued claims filed any time before March 15, 2021 to be treated as having been timely filed.

Since the record shows that claimant filed his continued claims for weeks 06-20 through 25-20 before the March 15, 2021 deadline, claimant's continued claims were timely filed. Accordingly, claimant filed his continued claims for benefits in accordance with OAR 471-030-0045. However, under OAR 471-030-0045(1)(a), a continued claim for benefits must follow "the first effective week of an initial,

additional or reopen[ed] claim.” As discussed above, claimant’s initial claim should be backdated to week 12-20. Because a continued claim must follow an initial, additional, or reopened claim, an individual cannot be eligible for benefits based on a continued claim that is filed prior to the first effective week of their claim, even if such a continued claim is otherwise filed timely. Claimant therefore cannot be eligible for benefits for any weeks prior to the first effective week of the claim, which in this case is week 12-20.

For the above reasons, claimant’s initial claim should be backdated to be effective week 12-20, claimant filed timely continued claims for weeks 12-20 through 25-20, and he therefore is eligible to receive regular UI benefits for those weeks. While claimant’s continued claims for weeks 06-20 through 11-20 were timely, they did not follow an initial, additional, or reopened claim, and claimant therefore is not eligible for benefits for those weeks.

DECISION: The Department’s request for reconsideration is allowed. On reconsideration, EAB Decision 2022-EAB-0749 is modified as outlined above.

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

DATE of Service: November 15, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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