

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0824

Reversed & Remanded

PROCEDURAL HISTORY: On October 14, 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 February 2, 2020. Claimant filed a timely request for hearing. On May 12, 2022, ALJ Monroe conducted a hearing, and on July 6, 2022 issued Order No. 22-UI-197528, affirming the PUA determination by concluding that claimant was not eligible to receive PUA benefits for the weeks from November 29, 2020 through May 8, 2021 (weeks 49-20 through 18-21). On July 22, 2022, claimant filed an application for review of Order No. 22-UI-197528 with the Employment Appeals Board (EAB), which the Department failed to construe as an application for review. On July 27, 2022, claimant filed another application for review with EAB.

WRITTEN ARGUMENT: On August 29, 2022, claimant submitted to EAB a thread of emails between himself and representatives of the Department, which EAB has construed as a 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), with the exception of the additional evidence identified below and information from Department records EAB takes notice of in this decision, 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.

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1). The additional evidence is the written statement claimant provided with his July 27, 2022 application for review, 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 will remain in the record.

FINDINGS OF FACT: (1) On January 6, 2021, claimant filed an initial application for PUA benefits. Claimant claimed PUA benefits for the weeks from November 29, 2020 through May 8, 2021 (weeks

49-20 through 18-21). These are the weeks at issue. The Department did not pay claimant for the weeks at issue.

(2) On April 13, 2021, the Department served notice of an administrative decision concluding that claimant was not able, available, or actively seeking work from November 29, 2020 through April 10, 2021 (weeks 49-20 through 14-21), and that claimant therefore was ineligible to receive benefits for those weeks and until the reason for the denial had ended (decision # 133219). On May 3, 2021, decision # 133219 became final without claimant having filed a timely request for hearing.¹

(3) On May 25, 2021, the Department served notice of an administrative decision concluding that claimant was not entitled to PUA benefits effective February 2, 2020. Exhibit 2. Claimant filed a timely request for hearing. On July 22, 2021, ALJ Monroe conducted a hearing, and on July 26, 2021 issued Order No. 21-UI-171095, affirming the May 25, 2021 administrative decision by concluding that claimant was not eligible to receive PUA benefits for weeks 49-20 through 18-21. Exhibit 3. On August 16, 2021, Order No. 21-UI-171095 became final without claimant having filed an application for review with EAB.²

(4) On September 9, 2021, claimant contacted the Department and conveyed to the representative that he thought he would be eligible for PUA under an updated weekly continued claim form that the Department began using following the U.S. Department of Labor's announcement of additional eligibility criteria for the PUA program. Based on that discussion, the Department representative submitted claimant's inquiry to another section of the Department for eligibility review.³

(5) On October 14, 2021, the Department served notice of an administrative decision concluding that claimant was not entitled to PUA benefits effective February 2, 2020. Claimant filed a timely request for hearing. On May 12, 2022, ALJ Monroe conducted a hearing. At hearing, the ALJ briefly took testimony from a witness for the Department, but upon learning that the weeks at issue were the same as had been at issue in Order No. 21-UI-171095, the ALJ stopped taking testimony. Audio Record at 20:37. On July 6, 2022, ALJ Monroe issued Order No. 22-UI-197528, affirming the October 14, 2021 administrative decision by concluding that claimant was not eligible to receive PUA benefits for the weeks at issue.

¹ EAB has taken notice of these facts, which are contained in Employment Department records. OAR 471-041-0090(1). 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.

² EAB has taken notice of these facts, which are contained in Employment Department records. OAR 471-041-0090(1). 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.

³ EAB has taken notice of these facts, which are contained in Employment Department records. OAR 471-041-0090(1). 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.

(6) On July 22, 2022, claimant filed a late request for hearing on decision # 133219.⁴

CONCLUSIONS AND REASONS: Claimant filed a timely application for review of Order No. 22-UI-197528. Order No. 22-UI-197528 is set aside, and this matter remanded for further proceedings consistent with this order.

Application for Review. An application for review is timely if it is filed within 20 days of the date that the Office of Administrative Hearings (OAH) mailed the order for which review is sought. ORS 657.270(6); OAR 471-041-0070(1) (May 13, 2019). “An application for review may be filed in person, or by mail, fax, or electronic means to EAB, or any office of the Employment Department[.]” OAR 471-041-0060(2) (May 13, 2019). “An application for review may be filed on forms provided by OAH or the Employment Department and other similar offices in other states. Use of the form is not required, provided the applicant requests review of a specific ALJ Order, or otherwise expresses intent to appeal an ALJ Order.” OAR 471-041-0060(1). A late application for review will be dismissed unless it includes a written statement describing the circumstances that prevented a timely filing. OAR 471-041-0070(3).

The application for review of Order No. 22-UI-197528 was due by July 26, 2022. Claimant filed an application for review on July 27, 2022. Claimant provided a written statement with the July 27, 2022 late application for review. In it, claimant attached an email he sent the Department on July 22, 2022 in which claimant stated, “I need to Appeal the 3rd party judges decision that nothing changed for my PUA CLAIM NOT ANYTHING TO DO WITH REGULAR UNEMPLOYMENT. I’d like to do so, i’ve waited 3 months and received nothing in the mail.” EAB Exhibit 1 at 8.

Claimant’s statement in his July 22, 2022 email to the Department constituted an application for review. It was transmitted by electronic means to the Department, which is one method by which an application for review may be filed. Further, it is reasonable to interpret the statement as expressing an intent to appeal Order No. 22-UI-197528. The statement refers to the ALJ’s “decision that nothing changed for my PUA CLAIM,” which may be viewed as a reference to Order No. 22-UI-197528 as it appears to relate to the ALJ’s statement at hearing that “because this issue has already been addressed in a previous decision, then it wouldn’t be appropriate for us to proceed with additional testimony regarding those same weeks.” Audio Record at 20:37. Claimant’s statement also mentions that he “waited 3 months,” which is consistent with an intent to reference Order No. 22-UI-197528, given that the hearing in the matter was held in early May 2022, the hearing order was issued on July 6, 2022, and claimant’s email statement was sent on July 22, 2022. Because claimant’s July 22, 2022 email to the Department expressed an intent to appeal Order No. 22-UI-197528 by a filing sent by electronic means to the Department, it was an application for review. Because the application for review was filed on July 22, 2022, and therefore prior to the July 26, 2022 deadline, it was timely. Accordingly, claimant filed a timely application for review and assessing the merits of the appeal therefore is required.

Eligibility for PUA benefits. Under the CARES Act Pub. L. 116-136, to be entitled to receive PUA benefits, an individual must be a “covered individual” as that term is defined by the Act. Pub. L. 116-136, § 2102(b). The Act defines a “covered individual” as an individual who (1) “is not eligible for

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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).

One of the COVID-19 related reasons listed in Section 2102(a)(3)(A)(ii)(I) is that “the individual meets any additional criteria established by the [United States] Secretary [of Labor] for unemployment assistance under this section.” § 2102(a)(3)(A)(ii)(I)(kk). On February 25, 2021, the Secretary expanded PUA eligibility by including three additional COVID-19 related reasons under the authority of item (kk).⁵ U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 16-20 (UIPL 16-20), Change 5, (Feb. 25, 2021) at 1. The new additional criteria apply retroactively to the beginning of the PUA program, though individuals who did not file an initial PUA claim on or before December 27, 2020 are limited to receiving PUA benefits under the new additional criteria for weeks of unemployment beginning on or after December 6, 2020. IPL 16-20 Change 5 at 2. Federal guidance require states to advise individuals of the opportunity to self-certify to a complete list of COVID-19 reasons, including the new item (kk) additional criteria. IPL 16-20 Change 5 at 11. Per federal guidance, states were expected to need until “the end of March [2021] *or later*” to have the new COVID-19 related reasons in place. IPL 16-20 Change 5 at 9 (emphasis added). Eligibility for PUA is determined on a weekly basis and states must continue to assess an individual’s PUA eligibility for each week the individual claims PUA. IPL 16-20, Change 4, (Jan. 8, 2021) at I-9.

The order under review concluded, based on principles of issue preclusion, that claimant was not eligible to receive PUA benefits for the weeks at issue because claimant had already been determined ineligible to receive PUA benefits for the same weeks by the May 25, 2021 administrative decision that was affirmed by Order No. 21-UI-171095. Order No. 22-UI-197528 at 2-3. However, applying preclusion principles was not warranted in this case, and claimant is entitled to a full and fair inquiry into his eligibility to receive PUA benefits for the weeks at issue.

Although the May 25, 2021 and the October 14, 2021 administrative decisions each related to the same weeks, given the Department’s obligation to assess PUA eligibility on a weekly basis as well as the U.S. Department of Labor’s introduction of new additional COVID-19 qualifying reasons, a full and fair inquiry into the merits of claimant’s PUA eligibility for the weeks at issue is required. Because federal guidance contemplated that it could take until the end of March 2021 *or later* for states to have the new COVID-19 related reasons in place, it is reasonable to conclude that the Department issued the May 25, 2021 administrative decision without evaluating whether the new criteria applied. Therefore, it logically follows, claimant’s assertion to the Department representative on September 9, 2021 that he would be eligible for PUA under an updated weekly continued claim form that included the additional eligibility criteria triggered the Department to re-assess claimant’s eligibility for PUA, and led the Department to issue the new administrative decision on October 14, 2021. Given the Department’s obligation to assess

⁵ The new additional criteria relate to: (1) individuals who refuse to return to work that is unsafe or to accept an offer of new work that is unsafe; (2) certain individuals providing services to educational institutions or educational service agencies; and (3) individuals experiencing a reduction of hours or a temporary or permanent lay-off. IPL 16-20 Change 5 at 1.

an individual's PUA eligibility on a week-by-week basis, it is reasonable to conclude that the Department analyzed claimant's PUA eligibility under the full array of COVID-19 reasons when it issued the October 14, 2021 administrative decision denying PUA benefits for the weeks at issue. Accordingly, on remand, the ALJ must conduct a full and fair inquiry into claimant's eligibility for PUA benefits, including consideration of the full array of COVID-19 reasons and other PUA eligibility criteria set forth by statute and U.S. Department of Labor guidance.

On remand, the ALJ should ask questions to assess, on a week-by-week basis, whether claimant met the eligibility criteria to receive PUA benefits for the weeks at issue. As that inquiry requires an assessment of whether claimant was rendered unemployed, partially unemployed, or unavailable to work because of one or more of the COVID-19 reasons set forth by statute and federal guidance, OAH should consider consolidating this appeal with claimant's appeal of decision # 133219 (for which claimant filed a late request for hearing on July 22, 2022). Further, review of the record as developed suggests that claimant may have a learning disability or cognitive impairment. On remand, the ALJ should ask questions to determine whether this is so, and if it is, whether any such condition impacted his ability to file requests for hearing in a timely manner.

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 is eligible to receive PUA benefits for the weeks at issue, Order No. 22-UI-197528 is reversed, and this matter is remanded.

DECISION: Order No. 22-UI-197528 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: September 27, 2022

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 22-UI-197528 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 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 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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