

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0965

Reversed & Remanded

PROCEDURAL HISTORY: On August 18, 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 December 6, 2020. Claimant filed a timely request for hearing. On August 22, 2022, ALJ Frank conducted a hearing, and on August 31, 2022 issued Order No. 22-UI-201815, affirming the August 18, 2021 administrative decision by concluding that claimant was not eligible to receive PUA benefits for the weeks including February 2, 2020 through February 6, 2021 (weeks 06-20 through 09-21) and March 28, 2021 through September 4, 2021 (weeks 13-21 through 35-21). On September 16, 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.

The parties may offer new information, such as the documents enclosed with claimant's written argument, 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 January 19, 2021, claimant filed an initial application for PUA benefits. On February 25, 2021, claimant filed another initial application for PUA benefits. Claimant subsequently claimed PUA benefits for the weeks including February 2, 2020 through February 6, 2021 (weeks 06-20 through 09-21) and March 28, 2021 through September 4, 2021 (weeks 13-21 through 35-21). These are the weeks at issue. The Department did not pay claimant PUA benefits for the weeks at issue.

(2) Sometime in 2019, claimant became licensed as a realtor. In late 2019, claimant executed an independent contractor agreement with a real estate firm that engaged him as a realtor. Claimant later pursued a listing for a house that was to be sold. However, the sale of the house was delayed because of an eviction moratorium related to the COVID-19 pandemic.

(3) In 2019 and early 2020, claimant worked as an independent contractor with an automobile auction.

(4) On August 4, 2022, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for August 22, 2022 at 2:30 p.m. In “preparation for” the August 22, 2022 hearing, the Department’s witness contacted claimant in an attempt to obtain documentation that would substantiate claimant’s claims of work as an independent contractor. Audio Record at 8:05. Claimant subsequently provided the Department with a copy of his contract with the real estate firm, as well as documentation, which showed that he had an active real estate license. The contract was not notarized. Claimant did not provide the Department with proof of income with the real estate firm. Claimant did not provide the Department with proof of income from the automobile auction, as he was unable to locate the Form 1099’s that the auction had issued to him.

CONCLUSIONS AND REASONS: Claimant was not eligible for PUA benefits for weeks 06-20 through 49-20. Claimant provided sufficient documentation to substantiate his self-employment activities. Order No. 22-UI-201815 is remanded for further development of the record to determine whether, during the remaining weeks at issue, claimant was a “covered individual” under the CARES Act.

Under the CARES Act, 15 U.S.C. Chapter 116, to be eligible to receive PUA benefits, an individual must be a “covered individual” as that term is defined by the Act. 15 U.S.C. § 9021. 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 eleven reasons. 15 U.S.C. § 9021(a)(3)(A)(ii)(I). Per 15 U.S.C. § 9021(a)(3)(A)(ii)(II), an individual may also meet the definition of a “covered individual” if they are self-employed, seeking part-time employment, lack sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation under 15 U.S.C. § 9025 and otherwise meet the requirements listed under 15 U.S.C. § 9021(a)(3)(A)(ii)(I).

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.

Additionally, under § 241 of the CAA, an individual who receives a payment of PUA benefits on or after December 27, 2020 (the enactment date of the Continued Assistance Act) is required to submit documentation substantiating employment or self-employment, or the planned commencement of employment or self-employment. This includes any individual who receives any PUA payment on or after December 27, 2020, even if the payment is for a week of unemployment that occurred before that date. Such individuals must provide documentation within 90 days of the date on which the individual initially applied for benefits 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, UIPL 16-20, Change 4 at 17–18. 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. *Id* at 18. Proof of the planned commencement of self-employment includes, but is not limited to, business licenses, state or Federal employer identification numbers, written business plans, or a lease agreement. *Id* at 19. States have discretion to determine if the documentation an individual submits substantiates an individual's employment, self-employment, or planned commencement of employment or self-employment. *Id* at 19.

The order under review concluded that claimant was not eligible to receive PUA benefits for the weeks at issue because he did not establish that he was unemployed due to a reason set forth in 15 U.S.C. § 9021(a)(3)(A)(ii)(I) or that he had been employed in 2019 or 2020. Order No. 2022-UI-201815 at 3. The record as developed does not support this conclusion.

As a preliminary matter, the record shows that claimant first filed an initial application for PUA benefits on January 19, 2021. Under § 201(f) of the CAA, initial PUA claims filed after December 27, 2020 may not be backdated to a date earlier than December 6, 2020. Therefore, claimant cannot be eligible for PUA benefits for any week prior to the week of December 6, 2020 through December 12, 2020 (week 50-20), and as a result is not eligible for PUA benefits for weeks 06-20 through 49-20.

Next, the record shows that the documentation that claimant provided to the Department satisfied his obligation to provide documentation which substantiates his employment, self-employment, or planned commencement of employment or self-employment. Under § 241 of the CAA, claimant was required to submit substantiating documentation by 90 days following the *later* of either the date on which he initially applied for benefits or the date that the Department instructed him provide such documentation. The Department's witness contacted claimant at some point prior to the hearing in an attempt to obtain such documentation, and claimant provided the documentation he had prior to the hearing. The Department's witness did not indicate on what date she contacted claimant. However, as OAH only served notice of the scheduled hearing on August 4, 2022, it is reasonable to conclude that the Department's witness contacted claimant on or after this date. Further, as the hearing was held on August 22, 2022, and as the Department's witness testified at hearing about claimant's response and the documentation he provided, it is reasonable to conclude that claimant provided the documentation on or before that date. Audio Record at 8:05.

The record does not show that the Department had instructed claimant to provide this documentation prior to the contact made in advance of the hearing. It is thus reasonable to conclude that the Department first instructed claimant to provide it sometime between August 4, 2022 and August 22, 2022. Because claimant provided the documentation prior to the hearing, he did so within 90 days of the date on which the Department instructed him to do so.

Furthermore, the record shows that the documentation claimant provided met the substantiation requirements under § 241 of the CAA and accompanying Department of Labor guidance. The documents that claimant provided consisted of a contract between himself and a real estate firm, engaging his services as an independent contractor in late 2019; and proof that he was licensed as a realtor. At hearing, the Department’s witness testified that she reviewed this documentation and determined that claimant was “unable to provide proof of employment for [the real estate firm].” Audio Record at 8:45. The Department’s witness continued that claimant also told her that he had performed other work in self-employment, but that the documentation claimant provided for that work was not “acceptable.” Audio Record at 8:55. The Department’s witness explained that, in part, the copy of the contract that claimant provided was not sufficient because it was not notarized and there was “really nothing showing that anything was done.” Audio Record at 10:25.

As noted in UIPL 16-20 Change 4, States have discretion to determine if the documentation that an individual provides meets the substantiation requirement. However, implicit within the Department of Labor’s guidance on that point is that the Department’s discretion is not plenary, but must be exercised reasonably, and not in an arbitrary or capricious manner. That guidance gives no indication that documents like the contract that claimant provided must be notarized in order to be acceptable, and the Department has not explained why it determined in this case that notarization was required. The Department offered no any authority under Oregon law that requires a contract to be notarized to be enforceable, and EAB is not aware of any such authority. Therefore, it was not reasonable for the Department to reject the documentation on that basis.

Furthermore, the fact that claimant did not provide evidence that “anything was done”—i.e., that he engaged in realty work that led to remuneration—would only be dispositive if claimant was required to provide proof of self-employment. Because the record shows that claimant had been working towards a home listing that did not materialize due to the COVID-19 pandemic, it is reasonable to conclude that he was not yet self-employed in work that led to remuneration. Instead, it suggests that his pursuit of the listing was essentially work *towards* remunerative self-employment—i.e., *planned commencement* of self-employment. Under the applicable Department of Labor guidance, above, proof of the planned commencement of self-employment includes, among others, written business plans. As claimant had been engaged as an independent contractor with an already-existing business, the contract with the real estate firm is, more likely than not, the best documentary evidence of claimant’s intent to pursue work for that business. Therefore, the contract that claimant provided to the Department was sufficient to substantiate his planned commencement of self-employment.

However, even though the record shows that claimant planned to commence self-employment, further development of the record is necessary to determine whether that situation, or any other, was sufficient to qualify claimant as a “covered individual” for purposes of PUA eligibility. To that end, the ALJ should inquire as to the timeline of events from the execution of the contract with the real estate firm through the eviction moratorium that cancelled or delayed the real estate listing that claimant had been pursuing. The ALJ should also ask questions to determine whether the cancelled or delayed real estate listing was the direct result of the COVID-19 pandemic.¹ Additionally, the ALJ should inquire as to

¹ The “direct result” requirement is an element of several of the reasons that a covered individual may be unemployed, partially unemployed, or unable or unavailable to work. 15 U.S.C. § 9021(a)(3)(A)(ii)(I). Department of Labor guidance states that whether something is a “direct result” of COVID-19 is governed by 20 C.F.R. 625.5(c). Modified as called for by

whether claimant was unemployed, partially unemployed, or unable or unavailable to work due to any of the other reasons listed under 15 U.S.C. § 9021(a)(3)(A)(ii)(I).

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 a covered individual, and therefore eligible for PUA benefits during weeks 50-20 through 09-21 and 13-21 through 35-21, Order No. 22-UI-201815 is reversed, and this matter is remanded.

DECISION: Order No. 22-UI-201815 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: December 7, 2022

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 22-UI-201815 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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the CARES Act, that regulation provides that an individual’s unemployment “is a direct result of the [COVID-19 public health emergency] where the unemployment is an immediate result of the [COVID-19 public health emergency] itself and not the result of a longer chain of events precipitated or exacerbated by the [pandemic].” 20 C.F.R. 625.5(c). Part 625.5(c)(3) also states more specifically that something is a “direct result” of COVID-19 where the unemployment resulted from “loss of revenues,” provided that, “prior to the [pandemic]” the self-employment venture “received at least a majority of its revenue or income from . . . an entity in the . . . area closed by the federal, state, or local government in immediate response to the [pandemic].”



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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