

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0035

Ineligible for PUA Weeks 06-20 through 37-20

PROCEDURAL HISTORY: On March 3, 2022, 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 from February 2 through September 12, 2020 (weeks 06-20 through 37-20). Claimant filed a timely request for hearing. On December 6, 2022, ALJ Janzen conducted a hearing, and on December 9, 2022 issued Order No. 22-UI-209518, affirming the March 3, 2022 PUA determination. On December 29, 2022, claimant filed an application for review of Order No. 22-UI-209518 with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's written argument in reaching this decision.

FINDINGS OF FACT: (1) Beginning in October 2018 and continuing until early 2020, claimant provided live-in caregiving services to O.H., an elderly man unrelated to her who had congestive heart failure and chronic obstructive pulmonary disease. O.H. was severely ill with these conditions, and they had caused him to be hospitalized multiple times prior to 2018. As a caregiver, claimant made O.H.'s meals, picked up and administered his medications, and took him to doctors' appointments. O.H. paid claimant \$600 per month for her caregiving services and gave her free room and board in his home worth \$1,000 per month.

(2) During the period claimant was caregiving for O.H., she would go to apartment complexes during her breaks and collect discarded aluminum cans to redeem for their refund value based on the 10-cent per can deposit assigned to the cans when sold. Claimant earned \$800 per month from these activities in the summer months and about \$100 per month the remaining months of the year.

(3) On January 14, 2020, O.H. started grasping at his chest, became delirious, and was again hospitalized. He died on February 3, 2020. O.H.'s death certificate did not list COVID-19 as the cause

of his death. At some point after O.H.'s death, claimant spoke with O.H.'s attending physician. The physician expressed his "general opinion" to claimant that, "knowing what he knew now," O.H. "probably did have COVID-19" that worsened his underlying conditions and led to his death. Transcript at 39-40.

(4) Following the death of O.H., claimant looked for another paid caregiving position but could not find any work because everyone was staying home due to the governor's stay-at-home order. Claimant also experienced difficulty redeeming cans at redemption locations because of COVID-19 safety protocols.

(5) On September 21, 2020 claimant filed an initial application for PUA benefits with the Department. Claimant filed additional PUA initial applications on December 15, 2020, March 16, 2021, April 18, 2021, and August 25, 2021. Claimant listed different information in some of her initial applications. For example, in her first application claimant asserted she collected and redeemed cans whereas in one of her later applications, she stated she was a caregiver to O.H. Claimant listed different information because the process was confusing and some of the applications were filled out for her over the phone by Department representatives.

(6) Claimant claimed PUA benefits for the weeks from February 2, 2020 through September 12, 2020 (weeks 06-20 through 37-20). These are the weeks at issue. The Department did not pay claimant PUA benefits for any of the weeks at issue. Claimant was not eligible for regular unemployment insurance, extended benefits, or pandemic emergency unemployment compensation (PEUC) during the weeks at issue.

CONCLUSIONS AND REASONS: Claimant was not eligible to for PUA benefits from February 2 through September 12, 2020 (weeks 06-20 through 37-20).

The Department did not pay claimant benefits for the weeks at issue. Therefore, claimant had the burden to prove that she should have been paid benefits for those weeks. *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).

To be eligible for PUA benefits, an individual must be a "covered individual" as that term is defined by the CARES Act, as amended. 15 U.S.C. § 9021(b). In pertinent part, a "covered individual" is an individual who (1) "is not eligible for regular compensation or extended benefits . . . or pandemic emergency unemployment compensation" 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 because of one of the eleven listed reasons.¹ 15 U.S.C. § 9021(a)(3)(A)(i)-(ii). Regulations

¹ There is a third element of "covered individual" status, added to the Act via the Continued Assistance for Unemployed Workers Act of 2020, enacted on December 27, 2020. The third element requires a claimant to provide documentation substantiating their employment or self-employment within a required timeframe. 15 U.S.C. § 9021(a)(3)(A)(iii). However, the provision is not applicable in this case because although claimant applied for PUA before January 31, 2021, she was not paid for any of the weeks at issue. U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 16-20, Change 4

at 20 C.F.R. part 625, which pertain to the Disaster Unemployment Assistance program, apply to the PUA program, unless otherwise provided or contrary to the Act. 15 U.S.C. § 9021(h).

The COVID-19 related circumstances recognized by the CARES Act that are potentially applicable to this case include the following:

(bb) a member of the individual's household has been diagnosed with COVID-19;

(cc) the individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID-19;

* * *

(hh) the individual 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[.]

Another of the enumerated COVID-19 related reasons is that “the individual meets any additional criteria established by the [United States] Secretary [of Labor] for unemployment assistance under this section.” 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(kk). A circumstance approved via the Secretary’s item (kk) authority is for “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.

Claimant did not establish that she constituted a “covered individual” entitled to PUA benefits during the weeks at issue. Although claimant met the first element of PUA eligibility because she was not eligible for regular unemployment insurance, extended benefits, or PEUC during the weeks at issue, she nevertheless did not constitute a “covered individual” because her circumstances did not satisfy any of the COVID-19 qualifying reasons enumerated under 15 U.S.C. § 9021(a)(3)(A)(ii)(I).

As a preliminary matter, the fact that claimant listed different information in her initial applications, including different theories of PUA eligibility such as can redemption in one application and caregiving in another, was not out of the ordinary. Guidance instructs that PUA claimants are to provide a COVID-19 impact reason or reasons in their initial application and then certify each week that one of the eleven enumerated reasons applies, “even if the precise provision under which he or she initially qualified changes to another precise provision” of the Act. U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 16-20, Change 1 (April 27, 2020) (UIPL 16-20, Change 1) at I-12. Federal guidance also requires weekly claim forms to allow individuals both to select more than one COVID-19 related reason each week and to select different reasons each week. U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 16-20, Change 5 (February 25, 2021) at 10. Thus, while it was unnecessary for claimant to have filed multiple initial applications, federal guidance contemplates that situations will arise in which a claimant will assert multiple COVID-19 impact reasons, as claimant did in this case.

(January 8, 2021) (UIPL 16-20, Change 4), at 5 (“Individuals who applied for PUA before January 31, 2021 and receive a payment of PUA on or after December 27, 2020 . . . are required to provide documentation of employment or self-employment[.]”).

Nevertheless, claimant failed to meet her burden to show that she was unemployed during the weeks at issue because of a COVID-19 related circumstance recognized by the CARES Act. As to claimant's caregiving activities for O.H., the impact reasons listed at 15 U.S.C. § 9021(a)(3)(A)(ii)(I) (bb) and (cc) each require O.H. to have received a COVID-19 medical diagnosis. Guidance states that a positive test result for COVID-19 or any diagnosis from a qualified medical professional is sufficient to establish a qualifying diagnosis. UIPL 16-20, Change 1 at I-9. Claimant did not offer evidence of a COVID-19 positive test result for O.H. Further, claimant did not show by a preponderance of the evidence that the physician's statements to her after O.H.'s death constituted a COVID-19 diagnosis. Claimant testified that at some point after O.H.'s death, the physician expressed to her a "general opinion," based on "knowing what he knew now," that O.H. "probably did have COVID-19[.]" Transcript at 39-40.

That the physician's assessment was described as merely a general opinion, was offered an unknown length of time after O.H.'s death, and was couched in terms of the indefinite word "probably," raises doubts that it amounted to a qualifying COVID-19 diagnosis. That the physician's remarks were a diagnosis is undermined further by the fact that claimant acknowledged in email correspondence with the Department that it was inconclusive whether O.H.'s death was related to COVID-19. Exhibit 1 at 20 ("despite [O.H.]'s death related to covid 19 being inconclusive the covid 19 virus did impact finding employment after his death[.]"); *see also* Transcript at 36. Further, O.H.'s death certificate did not list COVID-19 as the cause of his death and it was certainly plausible for O.H.'s death to have occurred when it did independent of a COVID-19 infection given his advanced age, severe illnesses, and history of multiple hospitalizations. Additionally, the Department witness offered evidence that the first confirmed case of COVID-19 in Oregon was verified on February 28, 2020, some weeks after O.H. died on February 3, 2020. Transcript at 13. The absence of confirmed cases as of the date of O.H.'s death is not dispositive but tends to further undermine an argument that the physician's statements regarding O.H. were a COVID-19 diagnosis. Based on the foregoing, claimant did not establish that the general opinion expressed by the physician after O.H.'s death constituted a COVID-19 diagnosis.

Similarly, claimant did not show, per item (hh), that she became the major support for the household because O.H. was head of the household and died as a direct result of COVID-19. It is not evident that O.H. was "head of the household" in relation to the home that he and claimant lived in, given that the term has a familial connotation, and claimant's relationship to O.H. was that of a live-in caregiver, not of a family member. In any event, claimant did not meet this COVID-19 qualifying reason because she failed to prove that O.H. died as a direct result of COVID-19. As discussed above, O.H.'s death certificate did not list COVID-19 as the cause of his death, O.H.'s physician's "general opinion" regarding O.H. "probably" having COVID-19 was not a diagnosis, and claimant conceded in email correspondence with the Department that it was inconclusive whether O.H.'s death was related to COVID-19. Exhibit 1 at 20.

Next, claimant did not establish under item (kk) that she was a self-employed individual who experienced a significant diminution of services because of the COVID-19 public health emergency. This qualifying reason did not apply to claimant's caregiving activities for O.H.. While claimant's caregiving may have constituted self-employment, claimant failed to prove that her caregiving services were significantly reduced because of the COVID-19 public health emergency because she did not establish that O.H. ever had COVID-19 or died as a direct result of the virus. Moreover, the record does not support eligibility for PUA due to the fact that claimant could not find any other caregiving work after O.H. died because everyone was staying home due to the governor's stay-at-home order. Under

federal guidance, “[a]n individual is only eligible for PUA if the individual is otherwise able to work and available to work but is unemployed, partially unemployed, or unable or unavailable for work for a listed COVID-19 related reason under Section 2102(a)(3)(A)(ii)(I) of the CARES Act. *Not being able to find a job because some businesses have closed and/or may not be hiring due to COVID-19 is not an identified reason.*” U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 16-20, Change 2 (July 21, 2020) at I-6 (emphasis added).

Nor were claimant’s can redemption activities sufficient to establish that she was a self-employed individual who experienced a significant diminution of services because of the COVID-19 public health emergency. The applicable regulation defines “self-employment” as “services performed as a self-employed individual.” 20 C.F.R. Section 625.2(o). Section 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.” Claimant’s can redemption activities did not meet the 20 C.F.R. Section 625.2(n) definition of “self-employed individual.” First, claimant’s primary reliance for income was not on her can redemption activities. Claimant earned \$600 per month and received room and board worth \$1,000 per month for her caregiving but earned only \$800 per month redeeming cans in the summer months, which fell to about \$100 per month during the rest of the year. Because claimant earned more from caregiving than from can redemption, her primary reliance for income was not on her can redemption activities as required to be a “self-employed individual” under C.F.R. Section 625.2(n).

Further, claimant did not establish that can redemption was claimant’s “own business” per C.F.R. Section 625.2(n). While the can redemption may have been remunerative, claimant’s practice of redeeming the cans for their refund value based on the 10-cent per can deposit assigned to the cans when they were sold in stores did not have the characteristics of a business. Claimant did not show, for example, that she held any business licenses, had a state or federal employer identification number, advertised her can redemption activities, or established her activities as a business entity with the Oregon Secretary of State. Nor is it evident that claimant engaged in the performance of any services by redeeming cans. As the process involved collecting discarded cans and redeeming them for their refund value, the record does not show that claimant actually performed a recycling service for a customer or client but instead simply received the refund value that the original purchasers were entitled to had they redeemed the cans themselves. Thus, the record does not show that claimant was self-employed with respect to can redemption, and therefore does not establish that she was a self-employed individual who experienced a significant diminution of services because of the COVID-19 public health emergency.

For the above reasons, claimant did not constitute a “covered individual” and was not eligible for PUA benefits for weeks 06-20 through 37-20.

DECISION: Order No. 22-UI-209518 is affirmed.

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

DATE of Service: March 1, 2023

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 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.

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.