

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0051-R

Request for Reconsideration Allowed

2023-EAB-0051 Reversed on Reconsideration ~ Application for Review Timely Filed

Order No. 22-UI-210037 Modified

Not Eligible for PUA Weeks 09-20 through 16-20, 31-20, 50-20 through 09-21, 12-21 through 22-21, 27-21 through 28-21, 30-21 through 31-21, and 35-21

PROCEDURAL HISTORY: On February 15, 2022, 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 27, 2020. On March 7, 2022, the February 15, 2022 PUA determination became final without claimant having filed a request for hearing. On March 15, 2022, claimant filed a late request for hearing. ALJ Kangas considered the request, and on June 15, 2022 issued Order No. 22-UI-196184, dismissing the request as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by June 29, 2022. On June 20, 2022 claimant filed a timely response to the appellant questionnaire. On August 11, 2022, the Office of Administrative Hearings (OAH) mailed a letter cancelling and vacating Order No. 22-UI-196184, and stating that a hearing would be held on whether claimant's late request for hearing should be allowed and, if so, the merits of the February 15, 2022 PUA determination. On August 31, 2022, ALJ Frank conducted a hearing, and on September 8, 2022 issued Order No. 22-UI-202259, dismissing claimant's late request for hearing as without good cause and leaving the February 15, 2022 PUA determination undisturbed. On September 23, 2022, claimant filed an application for review of Order No. 22-UI-202259 with the Employment Appeals Board (EAB).

On November 18, 2022, EAB issued EAB Decision 2022-EAB-0981, reversing Order No. 22-UI-202259 by concluding that claimant's late request for hearing was allowed and remanding the matter for a hearing on the merits of the February 15, 2022 PUA determination. On December 12, 2022, ALJ Frank conducted a hearing. On December 15, 2022 ALJ Frank issued Order No. 22-UI-210037, modifying the February 15, 2022 PUA determination by concluding that claimant was not eligible to receive PUA benefits for the weeks including December 27, 2020 through March 6, 2021, March 21, 2021 through June 5, 2021, July 4, 2021 through July 17, 2021, July 25, 2021 through August 7, 2021, and August 29, 2021 through September 4, 2021 (weeks 53-20 through 09-21, 12-21 through 22-21, 27-21 through 28-21, 30-21 through 31-21, and 35-21). On January 4, 2023, Order No. 22-UI-210037 became final without claimant having filed an application for review with EAB. On January 5, 2023,

claimant filed a written argument that EAB construed as a late application for review of Order No. 22-UI-210037. On February 8, 2023, EAB issued EAB Decision 2023-EAB-0051, dismissing claimant's application for review as late without good cause and leaving Order No. 22-UI-210037 undisturbed. On February 12, 2023, claimant filed a timely request for reconsideration of EAB Decision 2023-EAB-0051. This decision is issued pursuant to EAB's authority under ORS 657.290(3).

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence is claimant's request for reconsideration, 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.

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. Other than EAB Exhibit 1, EAB considered only information received into evidence at the hearing when reaching this decision as required by ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019). EAB considered claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) During 2019 and 2020, claimant engaged in a variety of activities to generate income. Claimant considered himself a handyman and, among other things, did "construction work and recycling, whatever cases arise." December 12, 2022 Audio Record at 21:27.

(2) In November 2019, claimant did some carpentry work on an individual's garage. That individual, J.O., paid claimant \$2,025 for the carpentry work. In January 2020, J.O. paid claimant \$310 to remove an iron bath tub and some other items from J.O.'s house and to recycle those items.

(3) On December 25, 2020, claimant filed an initial application for PUA benefits. Claimant stated on the application that he was self-employed and listed recycling as his business. At the time claimant filed the initial application, he was doing car mechanic work but that work was "hit and miss" so he also did construction and recycling. December 12, 2022 Audio Record at 22:40. On July 24, 2021, claimant filed a second initial application for PUA benefits. Claimant stated on the second application that he was self-employed and listed car repair and maintenance as his business under the name "JED Mobile Car Service." December 12, 2022 Audio Record at 15:34.

(4) Claimant claimed PUA benefits for the weeks including February 23, 2020 through April 18, 2020 (weeks 09-20 through 16-20), July 26, 2020 through August 1, 2020 (week 31-20), December 6, 2020 through March 6, 2021 (weeks 50-20 through 09-21), March 21, 2021 through June 5, 2021 (weeks 12-21 through 22-21), July 4, 2021 through July 17, 2021 (weeks 27-21 through 28-21), July 25, 2021 through August 7, 2021 (weeks 30-21 through 31-21), and August 29, 2021 through September 4, 2021 (week 35-21). These are the weeks at issue. The Department did not pay claimant PUA benefits for the weeks at issue.

CONCLUSIONS AND REASONS: Claimant’s request for reconsideration is allowed. Claimant’s application for review of Order No. 22-UI-210037 was timely. Order No. 22-UI-210037 is modified. Claimant was not eligible for PUA benefits for weeks 09-20 through 16-20, 31-20, 50-20 through 09-21, 12-21 through 22-21, 27-21 through 28-21, 30-21 through 31-21, and 35-21.

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.” 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) (May 13, 2019).

EAB Decision 2023-EAB-0051, issued February 8, 2023, dismissed claimant’s application for review as late without good cause. On February 12, 2023, claimant filed a request for reconsideration consistent with the requirements set forth in OAR 471-041-0145. The request for reconsideration is therefore allowed.

Late Application for Review. An application for review is timely if it is filed within 20 days of the date that OAH mailed the order for which review is sought. ORS 657.270(6); OAR 471-041-0070(1) (May 13, 2019). The 20-day filing period may be extended a “reasonable time” upon a showing of “good cause.” ORS 657.875; OAR 471-041-0070(2). “Good cause” means that factors or circumstances beyond the applicant’s reasonable control prevented timely filing. OAR 471-041-0070(2)(a). A “reasonable time” is seven days after the circumstances that prevented the timely filing ceased to exist. OAR 471-041-0070(2)(b). 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-210037 was due by January 4, 2023. On January 5, 2023 claimant filed a document that EAB construed as a late application for review. *See* Claimant’s Written Argument at 1. In claimant’s request for reconsideration, claimant asserted that he filed an application for review by fax from an Employment Department office on the January 4, 2023 deadline and that he intended the document filed on January 5, 2023 to be a written argument. EAB Exhibit 1 at 1. Claimant’s assertion is credible as the document filed on January 5, 2023 had the tone of an argument and was filed via a form designed for appellants who wish to file a written argument via the internet. Accordingly, claimant established that he filed an application for review by the January 4, 2023 deadline but, for unknown reasons, the application was not received. Therefore, claimant’s application for review was timely.

PUA Eligibility. The Department did not pay claimant benefits for the weeks at issue. Therefore, claimant had the burden to prove that he 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).

One of eleven 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. This is the COVID-19 qualifying reason potentially applicable to claimant’s circumstances. Regulations 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). 20 C.F.R. 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.”

Although the second element of “covered individual” status relies on self-certification, as part of its authority to investigate potential fraud, the Department was empowered to request documentation from claimant necessary to support his assertion that he was a self-employed individual experiencing 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 4 (January 8, 2021) at I-9 (“When investigating the potential for fraud and improper payments, the state has, and is encouraged to use, this authority to request supporting documentation about [the item (kk)] COVID-19 related reason.”). The record supports that the Department concluded claimant was ineligible for PUA benefits following an exercise of this authority, as the Department’s witness testified that the Department considered claimant’s PUA claim to be non-valid and expressed concerns that aspects of the affidavits claimant submitted to support eligibility appeared to her to be altered and were inconsistent with claimant’s initial applications. December 12, 2022 Audio Record at 8:01; 10:12.

Claimant failed to establish by a preponderance of evidence that he was a self-employed individual who experienced a significant diminution of services because of the COVID-19 public health emergency. Claimant’s activities did not meet the 20 C.F.R. Section 625.2(n) definition of “self-employed individual” because claimant did not show his activities amounted to services performed as part of his “own business” as required by the regulation.

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 certain claimants 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 claimant applied for PUA on December 25, 2020 and 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 (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[.]”). States have an independent authority to request supporting documentation for fraud prevention, which is separate from the substantiation requirement. UIPL 16-20, Change 4 at I-9.

At hearing, claimant described himself as a handyman who “d[id] everything” and “whatever it takes,” including recycling, construction, carpentry and mechanic work. December 12, 2022 Audio Record at 23:42; 22:44. Although these activities may have generated some income, they lacked the characteristics of a business. Claimant did not show, for example, that he held any business licenses, invested in any equipment, had a state or federal employer identification number, advertised his activities, established his activities as a business entity with the Oregon Secretary of State, or had any customers other than J.O. One would typically expect investment in construction equipment or car repair equipment and possibly licensure in a business offering such services. Although claimant presented his activities as “JED Mobile Car Service” on the second PUA application he filed, the record lacks evidence that he ever registered a business with the Oregon Secretary of State under that or any other name or otherwise operated as a business entity, such as a corporation or limited liability company.

As to the carpentry component of claimant’s activities, claimant worked on J.O.’s garage in November 2019 and removed some fixtures from J.O.’s home in January 2020. The record fails to show that claimant performed work for anyone other than J.O. Typically, unless one customer produces a substantial amount of business, an ongoing business concern will have more than a single customer, or, if its customer base is limited to one, will engage in active marketing efforts to gain more customers. Here, however, there is no evidence that claimant engaged in any advertising intended to expand his list of customers beyond J.O. Furthermore, for claimant’s activities to constitute a business, one would expect the work he did for J.O. to have been arm’s length transactions. However, the record raises doubt that the transactions between claimant and J.O. occurred between unaffiliated parties given that, as of the date of the hearing in this matter, the residence address of J.O. and claimant were the same, suggesting that the two were roommates and thus may not have been unrelated parties each acting in their own self-interest. *See* December 12, 2022 Audio Record at 29:39.

With respect to claimant’s recycling activities, claimant submitted a copy of a 2019 tax return, dated September 12, 2021, in which he listed “recycler” as his occupation and reported a total income of \$28,177. Exhibit 4 at 3-4. The reliability of the information shown on the form is diminished to a degree because the witness for the Department testified that the Department contacted the Oregon Department of Revenue, which had access to federal tax filing information, and as of December 5, 2022, was unable to verify that claimant had filed a 2019 tax return. December 12, 2022 Audio Record at 16:16 to 18:07. In any event, to the extent claimant’s recycling activities involved redeeming items, such as glass bottles and aluminum cans, for their refund value based on the deposit amounts assigned to them when sold in stores, it is not evident how this amounted to the performance of services. As such a process would involve redeeming items for their refund value, it is not clear that claimant would have performed a recycling service for a customer but instead would simply have received the refund value that the original purchasers were entitled to had they redeemed the items themselves. The record supports that at least some of claimant’s recycling activities involved recycling scrap metal given that claimant testified, “If you got, if metal needs to go in, I’ll take it. You know, whatever it takes.” December 12, 2022 Audio Record at 22:44. However, like claimant’s carpentry activities, J.O. was the only person for whom the record shows claimant recycled anything, as claimant removed the bath tub and other items from J.O.’s home and then recycled them. As with the carpentry work, however, the fact that the record fails to show that claimant performed work for anyone other than J.O. and the absence of evidence of any marketing efforts to gain additional customers weighs against concluding that claimant’s recycling activities constituted a business.

While no single one of the points raised above is dispositive, when considered collectively, they support the conclusion that claimant failed to meet his burden to show that his activities constituted the performance of services in his “own business.” Thus, the record does not show that claimant was a “self-employed individual” within the meaning of 20 C.F.R. Section 625.2(n). Claimant therefore did not establish that he was a self-employed individual who experienced a significant diminution of services because of the COVID-19 public health emergency per 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(kk) and federal guidance. Because claimant did not meet 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(kk), he was not a “covered individual” within the meaning of the CARES Act, and therefore was not eligible to receive PUA benefits for the weeks at issue.

The order under review concluded that claimant was not eligible to receive PUA benefits starting with the week of December 27, 2020 through January 2, 2021 (week 53-20). Order No. 22-UI-210037 at 3-4. In so concluding, the order under review failed to account for the fact that claimant had also claimed benefits for weeks 09-20 through 16-20, 31-20, and 50-20 through 52-20. Because claimant was not eligible to receive PUA for all the weeks at issue, including the aforementioned, the order under review is modified. Therefore, claimant was not eligible to receive PUA benefits for weeks 09-20 through 16-20, 31-20, 50-20 through 09-21, 12-21 through 22-21, 27-21 through 28-21, 30-21 through 31-21, and 35-21.

DECISION: Claimant’s request for reconsideration is allowed. On reconsideration, EAB Decision 2023-EAB-0051 is reversed, and claimant’s application for review of Order No. 22-UI-210037 is allowed. Order No. 22-UI-210037 is modified, as outlined above.

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

DATE of Service: April 5, 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.

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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 desisyong ito.

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

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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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