

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0182

Reversed & Remanded

PROCEDURAL HISTORY: On December 1, 2021, the Oregon Employment Department (the Department) served an Amended Notice of Determination for Pandemic Unemployment Assistance (PUA) concluding that claimant was not eligible to receive PUA benefits effective August 2, 2020 because the Department was missing information needed the process the claim. Claimant filed a timely request for hearing. On October 19, 2022, the Department served an Amended Notice of Determination for Pandemic Unemployment Assistance (PUA), concluding that claimant was not eligible to receive PUA benefits effective August 2, 2020 because he had been discharged from employment. On October 21, 2022, the Department served notice of an administrative decision, based in part on the October 19, 2022 administrative decision, concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and assessing an overpayment of \$7,175.00 in PUA benefits and \$6,000.00 in Federal Pandemic Unemployment Compensation (FPUC) benefits that claimant was required to repay to the Department, and a \$3,952.50 monetary penalty. Claimant filed timely requests for hearing on the October 19, 2022 and October 21, 2022 administrative decisions.

On January 13, 2023, ALJ Ramey conducted a consolidated hearing on all three administrative decisions. On January 20, 2023, ALJ Ramey issued Order No. 23-UI-213263, reversing the December 1, 2021 administrative decision by concluding that claimant was eligible to receive benefits for the weeks including August 2, 2020 through May 15, 2021 (weeks 32-20 through 19-21); Order No. 23-UI-213259, modifying the October 19, 2022 administrative decision by concluding that claimant was eligible to receive PUA benefits for weeks 32-20 through 19-21 but was not eligible to receive PUA benefits for the weeks including May 16, 2021 through July 31, 2021 (weeks 20-21 through 30-21); and Order No. 23-UI-213261, reversing the October 21, 2022 administrative decision by concluding that claimant did not willfully make a misrepresentation and fail to report a material fact to obtain benefits, and was not liable for an overpayment or a monetary penalty. On February 6, 2023, the Department filed

applications for review of Orders No. 23-UI-213263, 23-UI-213259, and 23-UI-213261 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 23-UI-213263, 23-UI-213259, and 23-UI-213261. For case-tracking purposes, this decision is being issued in triplicate (EAB Decisions 2023-EAB-0182, 2023-EAB-0181, and 2023-EAB-0183).

WRITTEN ARGUMENT: EAB considered the Department’s written argument when reaching this decision. In particular, the Department asserted that claimant should not be eligible for benefits for the week ending August 7, 2020 because claimant was in “DOC custody” during that time, and eligibility was therefore barred under ORS 656.160 and US Dep’t of Labor Unemployment Insurance Program Letter (UIPL) No. 16-22. Department’s Written Argument at 1. These assertions lack merit. ORS 656.160 relates to eligibility for *workers’ compensation* benefits while a claimant is incarcerated for commission of a crime, and is inapplicable to eligibility for unemployment insurance benefits. While UIPL 16-22 *does* apply to unemployment insurance programs, that program letter addresses administrative matters relevant to the state agency administering such benefits, and does not appear to contain guidelines for determining eligibility for PUA or any other type of unemployment insurance benefits.

FINDINGS OF FACT: (1) Starting in 2017, claimant was “self-employed intermittently” performing “freelance work” such as house-painting, window-washing, and pressure-washing for individuals. Transcript at 44–45.

(2) On July 12, 2019, claimant was convicted of a misdemeanor that he had been charged with committing in June 2018. Exhibit 3 at 22. On July 15, 2019, claimant was admitted into Department of Corrections (DOC) custody, and was released to post-prison supervision on August 7, 2020. Exhibit 5 at 1. Claimant was on “work release” during this period of custody. Transcript at 62.

(3) In or around early August 2020, one of claimant’s customers hired him to paint her house and trim her trees, and paid him \$275 to do so. The customer was “unable to hire [claimant] for future work” after that job because of COVID-19 related safety concerns. Exhibit 3 at 52–54. Claimant later provided the Department with affidavits signed by the customer confirming that he had performed this work.

(4) On October 14, 2020, claimant filed an initial application for PUA benefits. On the initial application, claimant reported that he worked 40 hours and earned \$600 in self-employment for each of the weeks including August 9, 2020 through September 12, 2020 and September 20, 2020 through September 26, 2020 (weeks 33-20 through 37-20 and 39-20). Exhibit 3 at 38–39.

(5) Claimant claimed benefits for the weeks including August 2, 2020 through May 15, 2021 (weeks 32-20 through 19-21). These are the weeks at issue. The Department paid claimant PUA benefits for weeks 32-20, 38-20, and 40-20 through 19-21, and also paid claimant FPUC benefits for most of those weeks. The Department did not pay claimant benefits for weeks 33-20 through 37-20 and 39-20 because he reported earnings in excess of his weekly benefit amount for those weeks.

(6) On May 10, 2021, a representative from the Department’s tax department determined that claimant was “self-employed and experienced a reduction due to COVID.” Transcript at 15. Nevertheless, the

Department subsequently issued several administrative decisions, including the December 1, 2021 and October 19, 2022 administrative decisions, concluding that claimant was not eligible to receive PUA benefits.

(7) On May 17, 2021, claimant began full-time work for an employer. Claimant did not claim PUA benefits for any week after 19-21.

CONCLUSIONS AND REASONS: Orders No. 23-UI-213263, 23-UI-213259, and 23-UI-213261 are set aside and these matters remanded for further development of the record.

Eligibility for PUA benefits. 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 9025, 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 9025” 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 11 listed reasons that relate to the COVID-19 pandemic. 15 U.S.C. § 9021(a)(3)(A)(ii)(I).

Further, an individual may also meet the definition of a “covered individual” if they are “self-employed... or otherwise would not qualify for regular unemployment or extended benefits... or pandemic emergency unemployment compensation... and meets the requirements” set forth under 15 U.S.C. § 9021(a)(3)(A)(ii)(I) of the Act. 15 U.S.C. § 9021(a)(3)(A)(ii)(II). One of the eleven COVID-19 impact reasons listed in § 9021(a)(3)(A)(ii)(I) is that “the individual meets any additional criteria established by the Secretary [of Labor] for unemployment assistance under this section.” 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(kk). Pursuant to federal guidance, “the Secretary provides coverage under item (kk) to those 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.

§ 9021(h) of the Act provides that regulations at 20 C.F.R. Part 625 apply to the PUA program, unless otherwise stated or contrary to the Act. 20 C.F.R. 625.2(o) defines “self-employment” as “services performed as a self-employed individual.” 20 C.F.R. 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.”

Order No. 23-UI-213263 concluded that claimant was eligible for benefits during weeks 32-20 through 19-21 because, in relevant part, “he was considered to meet the self-employment and COVID impacted requirements[.]” Order No. 23-UI-213263 at 3.¹ This conclusion was based in part on the fact that “the

¹ Order No. 23-UI-213263 also concluded that claimant was eligible for benefits on the basis that he had met the substantiation requirements under the PUA program. Order No. 23-UI-213263 at 3; *see* § 15 U.S.C. § 9021(a)(3)(A)(iii). However, the record supports the conclusion that claimant met the substantiation requirements, and it is therefore not necessary to examine that point further.

Department's tax department had determined claimant to have been self-employed and COVID-19 impacted." Order No. 23-UI-213263 at 3. Order No. 23-UI-213259 accepted these conclusions as the basis for concluding that claimant was eligible for benefits during weeks 32-20 through 19-21. Order No. 23-UI-213259 at 2-3.² The record as developed does not support these conclusions.

First, the record is unclear as to when claimant last performed self-employment work. The record shows that on August 1, 2020, claimant last performed work for the customer who provided the affidavits that claimant submitted to the Department. Transcript at 71; Exhibit 3 at 54. The affidavits indicate that claimant did not perform any other work for this customer after that date. However, the record does not show if claimant continued performing similar work for other customers after that date. On his initial application, claimant indicated that he worked 40 hours per week, earning \$600 per week, for each of weeks 33-20 through 37-20 and 39-20, all of which occurred after August 1, 2020. Similarly, the record contains no clear indication of how frequently claimant had been performing this work prior to August 2020, for how long, or how much he earned on average. Without such information, it is not possible to discern whether claimant's performance of this work met the definition of "self-employment" under 20 C.F.R. 625.2(o), such that he would be considered self-employed for purposes of the PUA program. On remand, the ALJ should develop the record to show how much work of this type claimant performed for the year or so prior to when he stopped performing it, how much he earned, and if claimant primarily relied on income derived from this work during that time.

Additionally, the record is unclear as to the terms of claimant's custody with DOC and the effect, if any, that custody had on claimant's ability to perform his work. The record shows that DOC reported to the Department that claimant was "admitted to DOC custody on 07/15/2019 and released to Post-Prison Supervision on 08/07/2020." Exhibit 5 at 1. At hearing, claimant testified that he was on "like work release under the supervision" and was "still able to work" during this time. Transcript at 62. However, it is not clear whether claimant was actually incarcerated at a DOC or other facility during that time, or whether he was actually enrolled in a "Work Release Program" as defined under OAR 291-149-0110(5) (June 17, 2019). This is relevant because while enrollment in such a program under that rule allows the enrollee to engage in certain types of work or other activities, it is not clear from the rule that freelance or self-employment work is permitted under such a program. On remand, the ALJ should further develop the record to clarify the scope of claimant's custody, incarceration, or confinement, and inquire as to the specifics of the program in which he was enrolled.

Finally, the record shows that a representative from the Department's tax department determined that claimant was "self-employed and experienced a reduction due to COVID." It is not clear what effect, if any, this finding had on the Department's determination of claimant's eligibility for PUA benefits. Furthermore, while the tax department presumably used some evidence to support this determination, this evidence is absent from the record. On remand, the ALJ should further inquire into the basis of the tax department's determination.

Overpayment. Order No. 23-UI-213261 concluded that claimant did not receive benefits to which he was not entitled. Order No. 23-UI-213261 at 6. However, as discussed above, the record is insufficiently developed to determine whether claimant was eligible for benefits during the weeks at issue. Therefore,

² Order No. 23-UI-213259 further concluded that claimant was not eligible to receive benefits for weeks 20-21 through 30-21. Order No. 23-UI-213259 at 3. However, claimant did not claim benefits for any of those weeks, and they are therefore not at issue here.

a determination of whether claimant was overpaid benefits for the weeks at issue cannot be made until the matter of his eligibility for benefits is settled on remand.

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 eligible for PUA benefits for the weeks at issue, and, if not, whether claimant was liable for an overpayment of benefits, Orders No. 23-UI-213263, 23-UI-213259, and 23-UI-213261 are reversed, and these matters are remanded.

DECISION: Orders No. 23-UI-213263, 23-UI-213259, and 23-UI-213261 are set aside, and these matters remanded for further proceedings consistent with this order.

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

DATE of Service: March 31, 2023

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Orders No. 23-UI-213263, 23-UI-213259, and 23-UI-213261 or return these matters to EAB. Only timely applications for review of the subsequent orders will cause these matters 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

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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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