

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0233

Reversed & Remanded

PROCEDURAL HISTORY: On November 29, 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 27, 2020. Claimant filed a timely request for hearing. On January 21, 2022, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for January 31, 2022. On January 31, 2022, claimant failed to appear for the hearing, and ALJ Frank issued Order No. 22-UI-185253, dismissing claimant's request for hearing because of his failure to appear and leaving the November 29, 2021 PUA determination undisturbed. On February 9, 2022, claimant filed a timely request to reopen the January 31, 2022 hearing.

On April 1, 2022, OAH served notice of a hearing scheduled for April 26, 2022 to determine if claimant had good cause to reopen the January 31, 2022 hearing, and if so, the merits of the November 29, 2021 PUA determination. On April 26, 2022, claimant failed to appear for the hearing, and on April 27, 2022 ALJ Scott issued Order No. 22-UI-192310, dismissing claimant's request for hearing due to his failure to appear and leaving the November 29, 2021 PUA determination undisturbed. On May 17, 2022, Order No. 22-UI-192310 became final without claimant having filed a request to reopen the April 26, 2022 hearing.

On May 18, 2022, claimant filed a late request to reopen the April 26, 2022 hearing. On October 13, 2022, ALJ Frank conducted a hearing, and on October 20, 2022 issued Order No. 22-UI-205591, concluding that claimant did not have good cause to file the late request to reopen the April 26, 2022 hearing, and leaving Order No. 22-UI-192310 undisturbed. On November 2, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

On January 6, 2023, EAB issued EAB Decision 2023-EAB-0196, setting aside Order No. 22-UI-192310, allowing claimant's late request to reopen the April 26, 2022 hearing and request to reopen the January 31, 2022 hearing, and remanding the matter for a hearing on the merits of the November 29, 2021 PUA determination. On January 30, 2023, ALJ Frank conducted a hearing, and on February 3, 2023 issued Order No. 23-UI-214760, affirming the November 29, 2021 PUA determination. On February 21, 2023, claimant filed an application for review with EAB.

WRITTEN ARGUMENT: EAB considered claimant’s written argument when reaching this decision.

FINDINGS OF FACT: (1) Claimant filed initial claims for PUA benefits on June 7, 2020, August 16, 2020, and November 12, 2020. Claimant was not paid benefits for these weeks. In his applications, claimant asserted that his income prior to the COVID-19 pandemic was derived from collecting and redeeming containers for their deposits as well as from odd jobs he performed for cash, such as yardwork, dog walking, janitorial work, household moving, and housecleaning. Claimant provided no written documentation to substantiate how much he received from these activities, except for some container deposit redemption slips.

(2) As evidence of self-employment, claimant provided written statements from three acquaintances, D.B., D.C., and B.G. Exhibit 7 at 40-42. Claimant identified a fourth person, B.R., as his employer in the November 12, 2020 PUA application, but did not provide any evidence of performing work for this person. Exhibit 7 at 34.

(3) In his written statement, D.B. asserted that claimant worked for him during from March 1, 2018 until March 1, 2020 in household moving and landscape work, and that the work ended due to the pandemic. Exhibit 7 at 40.

(4) In her written statement, D.C. asserted she knew that claimant “does many gig jobs. In 2018 through 2019 he was painting and doing landscaping, also scrapping metal and dog walking. He was also housecleaning.” Exhibit 7 at 41.

(5) In her statement, B.G. asserted that she employed claimant as a maintenance person, writing, “[Claimant] worked for me each week from March 2019 to March of 2020, until the COVID-19.” Exhibit 7 at 42. Investigation by the Department revealed that B.G. lived in a rented apartment during this time. Transcript at 6-7

(6) Claimant variously alleged in his PUA applications that he became unemployed as a direct result of COVID-19 because he could not claim container deposits when the bottle redemption centers closed; because he was diagnosed with COVID-19 on February 25, 2020, or March 1, 2020; and because the people for whom he had performed odd jobs did not offer him additional work because they “would rather not have anyone around[.]” Exhibit 7 at 20, 26, 33, 35.

CONCLUSIONS AND REASONS: Order No. 23-UI-214760 is set aside and this matter remanded for further development of the record.

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 the eleven enumerated COVID-19 related reasons is that “the individual has been diagnosed with COVID-19 or is experiencing COVID-19 symptoms and seeking a medical diagnosis[.]” 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(aa). Another enumerated reason 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. These are the COVID-19 qualifying reasons potentially applicable to claimant’s circumstances based on the record. 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 this COVID-19 related reason.”).

The order under review concluded that claimant was not eligible to receive PUA benefits because he did not establish that he was unemployed due to an enumerated COVID-19 related reason. Order No. 23-UI-214760 at 4. The record is insufficient to support this conclusion and further development of the record is required.

Further development of the record is needed to determine, for each week claimed, if claimant was unemployed during that week due to an enumerated COVID-19 related reason. Claimant asserted in his PUA applications that he had been diagnosed with COVID-19 or was experiencing COVID-19

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 before January 31, 2021 and was not paid any benefits. 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.

symptoms and seeking a medical diagnosis on February 25, 2020 or March 1, 2020. Exhibit 7 at 20, 26, 33, 35. The record should therefore be further developed to determine if claimant was unemployed for any weeks due to the reason enumerated in 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(aa). As a preliminary matter, claimant has not established that he had traditional employment either immediately preceding the pandemic or at any time after the pandemic began, and as discussed below, further development of the record is needed to determine if claimant was “self-employed” during the period relevant to his claim. Employment or self-employment is necessarily a prerequisite to becoming unemployed for an enumerated COVID-19 related reason. If claimant was “self-employed” in February 2020 and March 2020, the record must be further developed as to whether he received a COVID-19 diagnosis that prevented him from engaging in his self-employment and, if so, for how long. While inquiring into the details of claimant’s assertions that such a diagnosis was made on February 25, 2020 or March 1, 2020, the record may be further developed as to whether these assertions are consistent with data from public health authorities or other reliable evidence regarding when the earliest COVID-19 cases were diagnosed in Oregon.

Similarly, the record must be further developed to determine whether claimant was a self-employed individual who experienced a significant diminution of services because of the COVID-19 public health emergency in accordance with item (kk). Additional inquiry is needed to determine if claimant’s activities met the 20 C.F.R. § 625.2(n) definition of “self-employed individual” because they amounted to services performed as part of his “own business” as required by the regulation.

In claimant’s first two PUA applications, he listed only container deposit redemption as his source of income. Exhibit 7 at 21, 32. 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. Accordingly, such activity did not amount to services performed as part of his “own business,” and therefore did not constitute self-employment.

However, in claimant’s third PUA application, claimant stated he earned income from work unrelated to container deposit redemption, and later submitted three written statements from individuals with knowledge of this work, D.C., D.B., and B.G. The record does not show that claimant possessed any business or professional licenses, formed or registered any business entity with the government, paid business taxes, filed tax returns with self-employment income, advertised publicly or solicited customers, or exhibited other characteristics of a business. Where silent, the record should be further developed as to whether such characteristics existed. However, even without these specific business characteristics, it is possible that the work alluded to in the three written statements amounted to services performed as part of claimant’s “own business.”

D.C. wrote in her statement that she was aware that claimant engaged in various “gig jobs” in 2018 and 2019. Exhibit 7 at 41. However, the statement did not describe the circumstances of this work sufficiently to determine whether claimant did the work as part of operating his “own business,” and, if so, whether he continued to operate the business after 2019. D.C.’s statement was therefore of little evidentiary value in determining whether claimant operated his “own business” at the beginning of or

during the pandemic in 2020 or 2021, or whether he experienced a significant diminution in services as a result of the pandemic. However, additional evidence may be considered regarding this “gig” work if relevant to the weeks claimed.

D.B.’s statement contained ambiguities as to the circumstances of claimant’s work for him from March 1, 2018 through March 1, 2020. The notations of “15 hr” and “10 hr” make the statement unclear as to whether claimant worked a total of 25 hours over the course of two years, or if those notations were merely references to different rates of pay for the two different types of work claimant performed in household moving and landscaping. Exhibit 7 at 40. That claimant only helped move “3 people” in two years according to the statement, perhaps amounting to only 15 hours of work, suggests that this moving work did not amount to claimant operating his “own business.” Exhibit 7 at 40. Even if it could be considered part of claimant’s business operation, it is unlikely that such business could have been significantly diminished by the pandemic, given the limited number of times claimant performed such work prior to the pandemic. Further, claimant referred to his work for D.B. as “day labor basically” that “extended [approximately] all summer[.]” Transcript at 17-18. If the landscaping or moving work was performed only during the summer, further inquiry is needed to determine how and when the work could have been subject to a significant diminution of services due to the pandemic, given its seasonal and apparently infrequent nature.

B.G.’s statement asserted that she employed claimant weekly as a maintenance person for one year, ending in March 2020. Exhibit 7 at 42. This statement, if accurate, is perhaps the strongest evidence that claimant was operating his “own business,” as it suggests that claimant engaged in a single type of work for the same customer on a weekly basis for a significant length of time. However, in light of conflicting evidence regarding this work, the record should be further developed to determine the accuracy of B.G.’s statement and the circumstances surrounding this work. The Department’s representative testified that an investigation revealed that during the year in which claimant is alleged to have performed this maintenance work, B.G. lived in an apartment she likely rented. Transcript at 9. The record does not show why B.G. would therefore have needed or desired to employ a weekly maintenance person at her own expense when the investigation suggested such maintenance would likely have been the responsibility of the apartment’s owner rather than B.G. Transcript at 9. While the statement implied that claimant’s work for B.G. ended due to COVID-19, the statement provided no details as to how specifically COVID-19 impacted the work, and how long that impact lasted. Further inquiry should therefore be made into the reliability of the statement and the circumstances of this work to determine if it constituted “self-employment,” and if so, whether claimant suffered a significant diminution of this work due to the pandemic.

Based on the written statements and other evidence suggesting that claimant may have met the criteria set forth under item (kk) for at least some weeks of his claim, the record must be further developed as to the details of claimant’s work as described in the statements to determine if claimant was operating his “own business,” and if so, whether he experienced a significant diminution in services as a result of the pandemic. Inquiry should therefore be made into how claimant’s work relationships with his customers began, how frequently the work was performed for each customer, how long it took claimant to perform the work on each occasion, how much claimant was paid for the work, the exact nature of the work, precisely when and why the work ceased, and the effect, if any, that the pandemic had on the work cessation. Any other evidence relevant to these determinations should also be considered.

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 a “covered individual” under the CARES act and therefore eligible to receive PUA benefits, Order No. 23-UI-214760 is reversed, and this matter is remanded.

DECISION: Order No. 22-UI-205591 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: April 13, 2023

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 22-UI-205591 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

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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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