

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0576

*Late Request for Hearing Allowed
Reversed & Remanded*

PROCEDURAL HISTORY: On March 8, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant received benefits to which he was not entitled, and assessing an overpayment of \$136 in Pandemic Emergency Unemployment Compensation (PEUC) benefits, \$2,584 in Extended Benefits (EB), and \$1,200 in Federal Pandemic Unemployment Compensation (FPUC) benefits¹ that claimant was required to repay to the Department (decision # 95319). On March 27, 2021, decision # 95319 became final without claimant having filed a request for hearing. On March 30, 2021, claimant filed a late request for hearing on decision # 95319. ALJ Kangas considered claimant's request, and on April 26, 2021 issued Order No. 21-UI-165535, dismissing claimant's request for hearing as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by May 10, 2021. On April 30, 2021, claimant filed a timely response to the appellant questionnaire. On April 13, 2023, the Office of Administrative Hearings (OAH) sent notice of a hearing scheduled for April 26, 2023 to determine whether claimant had good cause to file his late request for hearing and, if so, the merits of decision # 95319.

On April 26, 2023, ALJ Sachet-Rung conducted a hearing, and on May 4, 2023 issued Order No. 23-UI-223935, allowing claimant's late request for hearing, canceling Order No. 21-UI-165535, and modifying decision # 95319 by concluding that claimant was overpaid \$136 in PEUC benefits, \$2,584 in EB, and \$2,400 in FPUC benefits that claimant was liable to repay to the Department. On May 19, 2023, claimant filed an application for review of Order No. 23-UI-223935 with the Employment Appeals Board (EAB).

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the portion of the order under review allowing claimant's late request for hearing is **adopted**. The rest of this decision addresses the overpayment of benefits.

¹ Decision # 95319 erroneously referred to these FPUC benefits as Pandemic Unemployment Insurance (PUA) benefits in the body of that decision.

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. EAB considered claimant's argument to the extent it was based on the record.

The parties may offer new information, including documentation of whether claimant performed work and earned wages during the preceding benefit year, 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 June 28, 2019, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant established a valid claim with a weekly benefit amount of \$624, effective June 23, 2019. Claimant was thereafter paid regular unemployment insurance (regular UI) benefits until those benefits were exhausted, then PEUC benefits for some of the following weeks.

(2) On June 20, 2020, the benefit year for the initial claim filed June 28, 2019 expired. Claimant continued to claim benefits after that date.

(3) For the week of June 21, 2020 through June 27, 2020 (week 26-20), claimant claimed benefits and was paid PEUC benefits of \$624 and FPUC benefits of \$900.

(4) For the weeks including July 5, 2020 through July 25, 2020 (weeks 28-20 through 30-20), claimant claimed benefits and was paid EB of \$624 per week, totaling \$1,872, and FPUC benefits of \$900 per week, totaling \$2,700.

(5) The FPUC payments for weeks 26-20 and 28-20 through 30-20 of \$900 per week, rather than the maximum benefit amount of \$600, were the result of a Department error.

(6) For the weeks of July 26, 2020 through November 14, 2020 (weeks 31-20 through 46-20), claimant claimed benefits and was paid \$624 in EB per week, totaling \$9,984.

(7) At some time after November 14, 2020, the Department determined that claimant had been eligible to file a second initial claim for unemployment benefits on June 21, 2020, immediately following the expiration of his earlier claim's benefit year. The Department filed this claim on claimant's behalf and determined it was valid with a weekly benefit amount of \$488. The claim was given retroactive effect to June 21, 2020, and claimant's weekly claims for weeks 26-20 and 28-20 through 46-20 were moved from the June 28, 2019 claim to this second claim. These are the weeks at issue.

CONCLUSIONS AND REASONS: Claimant was overpaid \$1,200 in FPUC benefits that he is liable to repay to the Department. Further development of the record is needed to determine if claimant was overpaid EB or PEUC benefits for the weeks at issue.

The order under review correctly concluded that claimant was paid \$3,600, but entitled to receive \$2,400, in FPUC benefits for the weeks at issue. Order No. 23-UI-223935 at 2. Due to what was likely a mathematical or scrivener's error, the order under review concluded that claimant was overpaid \$2,400 in FPUC, rather than \$1,200, the difference between what the order concluded claimant was paid and the amount to which he was entitled. Order No. 23-UI-223935 at 7. The record shows that claimant was overpaid \$1,200 in FPUC benefits.

The order under review also concluded that claimant received \$2,720 in EB and PEUC benefits to which he was not entitled and was liable to repay to the Department. Order No. 23-UI-223935 at 6. The record as developed does not support this conclusion.

Overpayment of FPUC benefits. Under the provisions of the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, 15 U.S.C. § 9023, claimant received FPUC benefits for weeks 26-20 and 28-20 through 30-20. FPUC is a federal benefits program that provided eligible individuals with \$600 per week, in addition to their regular UI weekly benefit amount, during the period of March 29, 2020 through July 25, 2020 (weeks 14-20 through 30-20). *See* U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 15-20 (April 4, 2020) at 6, (UIPL 15-20). Individuals were eligible to receive the full \$600 FPUC benefit if they were eligible to receive at least one dollar of regular UI, EB, or PEUC benefits for the claimed week. UIPL 15-20 at I-5.

For weeks 26-20 and 28-20 through 30-20, claimant was entitled to at least one dollar in either regular UI, EB, or PEUC benefits each week.² He therefore was entitled to \$600 in FPUC benefits for each of those weeks, totaling \$2,400. However, due to the Department's error, claimant was paid \$900 in FPUC for each of those weeks, totaling \$3,600. Accordingly, claimant was overpaid \$1,200 in FPUC benefits, the difference between the amount of benefits he was paid and the amount to which he was entitled.

United States Department of Labor guidance documents elaborate that while an FPUC overpayment may be offset by other State and Federal unemployment benefits payable during this three-year period, State agencies "must recover the amount of FPUC to which an individual was not entitled in accordance with the same procedures as apply to recovery of overpayments of regular [UI] paid by the State." UIPL 15-20 at I-7. "After three years, a State may continue to recover FPUC overpayments through means other than benefit offsets, according to State law." UIPL 15-20 at I-7. Therefore, because the provision of state law governing a claimant's regular UI overpayment is ORS 657.310(1), claimant is liable to repay the amount of his FPUC overpayment or have it deducted from any future benefits otherwise payable to claimant under ORS Chapter 657 during the five-year period following the date decision # 95319 becomes final.³

Overpayment of EB and PEUC benefits. Title II, Subtitle A, Section 2107 of the CARES Act provides:

² For these weeks, the hearing on remand will determine from which of these programs claimant was eligible to receive benefits. The Department has not alleged, and the record does not suggest, that claimant was entirely ineligible to receive any type of benefits for these weeks.

³ Claimant may have already repaid this overpayment, and he may confirm with the Department whether any outstanding FPUC balance exists which would be subject to recovery under these provisions.

(a) Federal-State Agreements.--

(1) In general.--Any State which desires to do so may enter into and participate in an agreement under this section with the Secretary of Labor (in this section referred to as the ``Secretary"). Any State which is a party to an agreement under this section may, upon providing 30 days' written notice to the Secretary, terminate such agreement.

(2) Provisions of agreement.--Any agreement under paragraph (1) shall provide that the State agency of the State will make payments of pandemic emergency unemployment compensation to individuals who--

(A) have exhausted all rights to regular compensation under the State law or under Federal law with respect to a benefit year (excluding any benefit year that ended before July1, 2019);

(B) have no rights to regular compensation with respect to a week under such law or any other State unemployment compensation law or to compensation under any other Federal law;

(C) are not receiving compensation with respect to such week under the unemployment compensation law of Canada; and

(D) are able to work, available to work, and actively seeking work.

(3) Exhaustion of benefits.--For purposes of paragraph (2)(A), an individual shall be deemed to have exhausted such individual's rights to regular compensation under a State law when--

(A) no payments of regular compensation can be made under such law because such individual has received all regular compensation available to such individual based on employment or wages during such individual's base period; or

(B) such individual's rights to such compensation have been terminated by reason of the expiration of the benefit year with respect to which such rights existed.

* * *

ORS 657.325 provides:

(1) An individual shall be eligible to receive extended benefits with respect to any week of unemployment in the individual's eligibility period only if the Director of the Employment Department finds that with respect to such week the individual:

(a) Is an exhaustee;

(b) Has satisfied the requirements of this chapter for the receipt of regular benefits that are applicable to individuals claiming extended benefits, including not being subject to a disqualification for the receipt of benefits; and

(c) Has been paid wages by an employer or employers subject to the provisions of this chapter during the base period of the individual's applicable benefit year in an amount equal to or in excess of 40 times the individual's applicable weekly benefit amount.

(2) The weekly extended benefit amount payable to an individual for a week of total unemployment in the individual's eligibility period shall be an amount equal to the weekly benefit amount payable to the individual during the applicable benefit year.

* * *

As used in ORS 657.321 to 657.329 unless the context requires otherwise:

(1) "Eligibility period" of an individual means:

(a) The period consisting of the weeks in the individual's benefit year that begin in an extended benefit period and, if the benefit year ends within the extended benefit period, any subsequent weeks that begin in the extended benefit period; or

(b) A period provided for by rule of the Employment Department under ORS 657.328.

(2) "Exhaustee" means an individual who, with respect to any week of unemployment in the individual's eligibility period:

(a) Has received prior to such week, all of the regular benefits that were available to the individual under this chapter or any other state law (including dependents' allowances and benefits payable to federal civilian employees and ex-servicemen under 5 U.S.C. chapter 85) in the current benefit year that includes such week (provided that an individual shall be deemed to have received all of the regular benefits that were available to the individual, although as a result of a pending appeal with respect to wages or employment that were not considered in the original monetary determination in the current benefit year, the individual may subsequently be determined to be entitled to added regular benefits); or

(b)(A) The individual's benefit year having expired prior to such week, has no, or insufficient, wages and employment to establish a new benefit year that would include such week;

* * *

ORS 657.150 provides:

(1) An individual shall be paid benefits for weeks during the benefit year in an amount that is to be determined by taking into account the individual's work in subject employment in the base year as provided in this section.

(2)(a) To qualify for benefits an individual must have:

(A) Worked in subject employment in the base year with total base year wages of \$1,000 or more and have total base year wages equal to or in excess of one and one-half times the wages in the highest quarter of the base year; and

(B) Have earned wages in subject employment equal to six times the individual's weekly benefit amount in employment for service performed subsequent to the beginning of a preceding benefit year if benefits were paid to the individual for any week in the preceding benefit year.

* * *

The Department paid claimant \$624 in PEUC benefits for week 26-20 and \$11,856 in EB for weeks 28-20 through 46-20. When the Department paid these amounts, it did so based on the Department's belief that claimant was ineligible for regular UI benefits during those weeks because claimant's June 28, 2019 initial claim had been exhausted and expired, which is a requirement for both EB and PEUC eligibility. After these benefits were paid, the Department determined that claimant had been eligible to file a new claim for regular UI benefits effective June 21, 2020, the day after his previous benefit year had expired. The Department established this second claim on claimant's behalf with a lower weekly benefit amount of \$488. Since it believed that claimant had been eligible for regular UI benefits for the weeks at issue, the Department concluded that claimant had not been entitled to EB and PEUC benefits for those weeks at the higher weekly benefit amount of \$624. Therefore, the Department determined that claimant had been overpaid the difference between the weekly benefit amounts for the two claims, \$136, for each of the 20 weeks at issue, totaling \$2,720.

At hearing, claimant asserted that he was not eligible to establish a second initial claim for benefits on June 21, 2020, and therefore was ineligible for regular UI benefits for the weeks at issue. Transcript at 28. This, in turn, made him eligible to receive the EB or PEUC benefits of \$624 per week that were paid as an extension of the previous claim. Claimant testified that he believed he was ineligible to establish the second claim because "the original Employer would be double dipped[.]" Transcript at 28. While no further inquiry was made into claimant's eligibility for regular UI benefits under the June 21, 2020 claim, it can be inferred from the record that claimant's assertion referred to the requirement of ORS 657.150(2)(a)(B) that when filing a second initial claim for benefits after the expiration of an earlier claim, a claimant must have earned wages from services performed on or after the effective date of the earlier claim in order for the second claim to be valid. In this case, as claimant's first initial claim was effective June 23, 2019, claimant must have earned six times his weekly benefit amount of \$488, or \$2,928, from services performed on or after June 23, 2019, in order for the June 21, 2020 claim to be valid.

Where the Department has paid benefits, it has the burden to prove benefits should not have been paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). It must therefore prove by a

preponderance of evidence that claimant was eligible for regular UI benefits for the weeks at issue to show that he was ineligible for EB and PEUC benefits for those weeks. The Department has not met its burden to show that claimant performed services in covered employment on or after June 23, 2019 or earned any wages from the performance of such services. Such a showing is necessary to establish that the June 21, 2020 claim was valid, and that claimant was therefore ineligible for the EB and PEUC benefits he received for the weeks at issue by virtue of his eligibility for regular UI benefits. Further development of the record is needed to determine if claimant earned wages in subject employment equal to six times his weekly benefit amount in employment for service performed subsequent to the beginning of the preceding benefit year, June 23, 2019. The parties should be given the opportunity to present other evidence or legal argument as to whether the June 21, 2020 claim was valid, and whether claimant was therefore eligible for regular UI, EB, or PEUC benefits for the weeks at issue.

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 overpaid EB and PEUC benefits for the weeks at issue, Order No. 23-UI-223935 is reversed and this matter is remanded.

DECISION: Order No. 23-UI-223935 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: June 23, 2023

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 23-UI-223935 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

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.

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