

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0625

Reversed & Remanded

PROCEDURAL HISTORY: On November 5, 2021, 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 effective March 8, 2020. Claimant filed a timely request for hearing. On September 1, 2022, the Office of Administrative Hearings (OAH) served a notice of hearing scheduled for September 13, 2022. On September 13, 2022, claimant failed to appear at the hearing, and ALJ Scott issued Order No. 22-UI-202571, dismissing claimant's request for hearing for failure to appear and leaving the November 5, 2021 PUA determination undisturbed.

On September 21, 2022, claimant filed a timely request to reopen the September 13, 2022 hearing. ALJ Kangas considered claimant's request, and on February 13, 2023 issued Order No. 23-UI-215790, denying the request and leaving Order No. 22-UI-202571 undisturbed. On February 24, 2023, claimant filed an application for review of Order No. 23-UI-215790 with the Employment Appeals Board (EAB). On March 24, 2023, EAB issued EAB Decision 2023-EAB-0253, reversing Order No. 23-UI-215790 and remanding this matter for a hearing on the merits of the November 5, 2021 PUA determination. On May 16, 2023, ALJ Frank conducted a hearing, and on May 24, 2023 issued Order No. 23-UI-225975, affirming the November 5, 2021 PUA determination. On May 31, 2023, claimant filed an application for review of Order No. 23-UI-225975 with EAB.

FINDINGS OF FACT: (1) On March 20, 2020, claimant filed an initial application for regular unemployment insurance (regular UI) benefits with a benefit year ending March 13, 2021 (BYE 10-21). At that time, the Department determined that claimant's claim for regular UI benefits was not monetarily valid.¹

¹ EAB has taken notice of these facts, which are contained in Employment Department records and which are necessary to complete the record. OAR 471-041-0090(1) (May 13, 2019). Any party that objects to our taking notice of this information 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 noticed fact will remain in the record.

(2) For the fourth quarter of 2019, claimant had wages and hours reported from two employers, totaling \$2,146.12 in wages and 139 hours. For the first quarter of 2020, claimant had \$1,586.18 in wages and 142 hours reported from a single employer.²

(3) On November 17, 2020, claimant filed an initial claim for PUA benefits. Claimant subsequently claimed PUA benefits for the weeks from March 29 through July 11, 2020 (weeks 14-20 through 28-20) and November 15, 2020 through January 2, 2021 (weeks 47-20 through 53-20). These are the weeks at issue. The Department paid claimant PUA benefits for the weeks at issue.

(4) In early 2021, claimant filed a new initial claim for regular UI benefits with a benefit year ending January 1, 2022 (BYE 52-21). Using claimant's wages and hours reported for the fourth quarter of 2019 and the first quarter of 2020, above, as well as wages and hours reported for the third quarter of 2020, the Department determined that claimant's regular UI claim, BYE 52-21, was monetarily valid.³

(5) Sometime after determining that claimant's regular UI claim was not monetarily valid for a period including the weeks at issue, the Department determined that claimant qualified for a monetarily valid regular UI claim for that period.

(6) On September 2, 2022, a comment was entered into claimant's claim, stating:

HEARINGS: SENT IN MC COMBO REQUEST TO DO CLAIM SWAP BEGINNING Q2 OF 2020. DOUBLECHECKED MATH AND CLMT WAS INDEED ELIGIBLE FOR ABY REG UI CLAIM AT THAT TIME. WAS PAID PUA.

On April 13, 2023, a comment was entered into claimant's claim, stating:

WORKING GLEANING PROJECT- CLAIM SWAP REQUEST REJECTED, CLAIMANT IS NOT OWED ADDITIONAL FUNDS, ADMINISTRATIVE ADJUSTMENT WILL BE COMPLETED IN DUE COURSE.

On May 31, 2023, two comments were entered into claimant's claim, stating:

PTC, CLMT HAD HEARING FOR PUA DENIAL WHICH AFFIRMED THE DENY DECISION. CLMT STATED THE JUDGE INSTRUCTED HER TO CALL UI TO GET DENIAL LETTER OR REG UI CLAIM SHE APPLIED FOR IN MARCH 2020 AND APPLY FOR A NEW CLAIM TO BE BACKDATED FOR THE DATE SHE STARTED RECEIVING

² EAB has taken notice of these facts, which are contained in Employment Department records and which are necessary to complete the record. OAR 471-041-0090(1). Any party that objects to our taking notice of this information 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 noticed fact will remain in the record.

³ EAB has taken notice of these facts, which are contained in Employment Department records and which are necessary to complete the record. OAR 471-041-0090(1). Any party that objects to our taking notice of this information 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 noticed fact will remain in the record.

PUA BENEFITS. ADVISED CLMT SHE WAS NOT DENIED REG UI, THE CLAIM WAS NON VALID. ADVISED CLMT I WILL...CONT...

CHECK TO SEE IF ANYTHING CAN BE DONE AT THIS POINT BECAUSE IT WAS SO LONG AGO, I'M NOT SURE WHAT, IF ANYTHING, CAN BE DONE. I TOLD CLMT I WILL CALL HER BACK AND LET HER KNOW WHAT I FIND OUT. CLMT VERY CONCERNED SHE WILL HAVE NO "PROOF" OF OUR CONVERSATION OR STEPS TAKEN. ADVISED CLMT I UNDERSTAND AND WILL CALL WITH WHATEVER INFO I FIND OUT.⁴

(7) As of the date of this decision, no comments were entered into claimant's claim after May 31, 2023. As of the date of this decision, claimant's regular UI claim, BYE 10-21, remained monetarily nonvalid in the Department's claim system.⁵

CONCLUSIONS AND REASONS: Order No. 23-UI-225975 is reversed and this matter remanded for further development of the record to determine if claimant was eligible for regular UI benefits during the weeks at issue, such that claimant would not be considered eligible for PUA benefits for those weeks.

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 [15 U.S.C. § 9025]."

ORS 657.010 states, in relevant part:

(1) "Base year" means the first four of the last five completed calendar quarters preceding the benefit year.

* * *

(3) "Benefit year" means a period of 52 consecutive weeks commencing with the first week with respect to which an individual files an initial valid claim for benefits, and thereafter the 52 consecutive weeks period beginning with the first week with respect to which the individual next files an initial valid claim after the termination of the individual's last preceding benefit year

⁴ EAB has taken notice of these facts, which are contained in Employment Department records and which are necessary to complete the record. OAR 471-041-0090(1). Any party that objects to our taking notice of this information 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 noticed fact will remain in the record.

⁵ EAB has taken notice of these facts, which are contained in Employment Department records and which are necessary to complete the record. OAR 471-041-0090(1). Any party that objects to our taking notice of this information 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 noticed fact will remain in the record.

except that the benefit year shall be 53 weeks if the filing of an initial valid claim would result in overlapping any quarter of the base year of a previously filed initial valid claim.

(4) “Calendar quarter” means the period of three consecutive calendar months ending on March 31, June 30, September 30 or December 31, or the approximate equivalent thereof, as the Director of the Employment Department may, by rule, prescribe.

ORS 657.150 states, in relevant part:

(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.

(b) If the individual does not meet the requirements of paragraph (a)(A) of this subsection, the individual may qualify for benefits if the individual has worked a minimum of 500 hours in employment subject to this chapter during the base year.

ORS 657.173 states, in relevant part:

(1)(a) Notwithstanding ORS 657.010 (1), in the case of an individual who is not eligible for benefits under ORS 657.150 (2) using the definition in ORS 657.010 (1), “base year” means the last four completed calendar quarters preceding the benefit year, if use of this alternate definition of “base year” makes the individual eligible for benefits under ORS 657.150 (2).

(b) Notwithstanding paragraph (a) of this subsection, a determination of eligibility under ORS 657.150 (2) may not be made using paragraph (a) of this subsection if the individual qualifies or would qualify for regular benefits under the unemployment law of another governmental jurisdiction using that jurisdiction’s standard base year.

(c) Work and earnings in a calendar quarter that is included in a claim determined to be eligible using the base year as defined in paragraph (a) of this subsection cannot be included in the base year of a subsequent claim unless the subsequent claim’s base year is extended under ORS 657.170 to include the calendar quarter.

(2)(a) Except as provided in paragraph (b) of this subsection, the definition of “base year” that applies for the purposes of determining an individual’s eligibility for benefits under ORS 657.150 applies for all purposes under this chapter related to that individual’s claim.

(b) When making a finding under ORS 657.170 (1), “base year” has the meaning given that term in ORS 657.010 (1).

The order under review concluded that claimant was not eligible to receive PUA benefits for the weeks at issue because she was monetarily eligible for regular UI benefits during those weeks. Order No. 23-UI-225975 at 3. This conclusion apparently was based on the Department’s testimony essentially stating the same. Audio Record at 7:30. However, a review of Department records, as discussed in the Findings of Fact, suggests that claimant may *not* have been eligible for regular UI benefits for the weeks at issue.

The record shows that claimant had wages and hours which may have qualified her for a monetarily valid regular UI claim for the weeks at issue if she had filed an initial claim for regular UI benefits during the second quarter of 2020. However, there is no indication in the record that claimant *did* file an initial claim at that time. Instead, the wages and hours that otherwise might have been sufficient to qualify for a monetarily valid claim at that time were used for claimant’s regular UI claim, BYE 52-21. As such, it is not clear from the record whether claimant may be considered eligible for regular UI benefits for the weeks at issue, even if she might have been eligible at an earlier point in time.

Additionally, it is not clear from the record what remedy remains available to claimant in light of the above developments. At hearing, the Department’s witness testified that she “sent off” claimant’s claim for a “claim swap.”⁶ Audio Record at 8:02. However, the comments in claimant’s claim from September 2022 and April 2023 indicate that a “claim swap” had already been sought, and then rejected, prior to the hearing in May 2023. Thus, the record suggests that the Department has determined that claimant was both ineligible for regular UI during the weeks at issue, while simultaneously being ineligible for PUA during the weeks at issue because she was eligible for regular UI during that period.

On remand, the ALJ should develop the record to rectify this apparent contradiction and determine whether claimant was actually eligible for regular UI during the weeks at issue, in order to meet their burden to show that claimant should not have been paid PUA benefits for the weeks at issue.⁷ To this end, the Department may wish to produce a witness who can offer expert testimony on claimant’s eligibility for regular UI benefits during the weeks at issue, in relation to the circumstances discussed above. The ALJ should also inquire as to what remedy remains available to claimant if the record on remand shows that claimant was eligible for regular UI during 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

⁶ It is not clear from the record what a “claim swap” consists of, as the term is not defined under ORS Chapter 657 or the applicable administrative rules, but it is presumed that a “claim swap” might remedy claimant’s circumstances by converting her PUA claim to a regular UI claim.

⁷ *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).

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 regular UI benefits for the weeks at issue and therefore ineligible for PUA benefits, Order No. 23-UI-225975 is reversed, and this matter is remanded.

DECISION: Order No. 23-UI-225975 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: July 11, 2023

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 23-UI-225975 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 الاستئناف 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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