

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0641

Affirmed

Not Eligible for PUA Weeks 12-20 through 31-20 and Weeks 47-20 through 35-21

PROCEDURAL HISTORY: On February 23, 2023, 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 May 2 and 8, 2023, ALJ Ramey conducted a hearing, and on May 16, 2023 issued Order No. 23-UI-225048, affirming the February 23, 2023 PUA determination by concluding that claimant was not eligible for PUA benefits from March 15 through August 1, 2020 (weeks 12-20 through 31-20) and November 15, 2020 through September 4, 2021 (weeks 47-20 through 35-21). On June 5, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

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.

EVIDENTIARY MATTER: At the May 2, 2023 hearing, the ALJ admitted into evidence the documents offered by the Department, intending to mark the documents as Exhibit 1. May 2, 2023 Audio Record at 8:02 to 8:23. The ALJ also admitted into evidence the documents offered by claimant, intending to mark those documents as Exhibit 2. May 2, 2023 Audio Record at 10:30 to 10:46. Due to an apparent clerical error, however, the Department's exhibits were marked as Exhibit 2 and claimant's exhibits were marked as Exhibit 1. All references to the exhibits in this decision are to how they are actually marked, meaning Exhibit 1 refers to the documents offered by claimant and Exhibit 2 refers to the documents offered by the Department.

FINDINGS OF FACT: (1) Prior to June 2017, claimant was employed by an auto finance company. In June 2017, the owner of that company died and the company dissolved. Thereafter, claimant took a sabbatical from work.

(2) In December 2018, claimant began posting content on a video game streaming channel he started on Twitch, a live-streaming website. In 2019, claimant earned \$217.17 from the content he streamed on his Twitch channel, which Twitch regarded as non-employment income. On January 1, 2020, claimant closed his Twitch channel. Claimant stopped posting content on Twitch to focus on activities “that would bring in some meaningful money.” May 2, 2023 Transcript at 25-26. The COVID-19 pandemic did not affect claimant’s decision to close his Twitch channel.

(3) In late 2019 through January 2020, claimant made efforts to obtain employment from prospective employers in the fields of cannabis cultivation, debt collection, and data entry. None of the prospective employers offered claimant a job. In mid-2019, claimant and a partner conceived of an idea for a business to offer the service of buying past-due accounts from medical offices and then offering the debtors a repayment plan with the option to forgive some of the debt owed. Claimant named the business idea Restorative Credit Solutions.

(4) In December 2019, claimant and his partner began drafting a business plan for Restorative Credit Solutions, and in January and February 2020 continued working on the plan “here and there adding things that [they] saw fit.” May 2, 2023 Transcript at 27. As of the onset of the COVID-19 pandemic in March 2020, claimant had not “materially completed the business . . . or the business plan[.]” May 8, 2023 Transcript at 14. Claimant had not obtained any customers or clients for Restorative Credit Solutions and the business idea had not generated any income. Claimant’s business plan for Restorative Credit Solutions remained incomplete. Claimant did not form a business entity, like a limited liability company (LLC) to carry on the venture, or advertise Restorative Credit Solutions or register it with the Oregon Secretary of State. Claimant held some preliminary discussions with vendors who provide tools for medical collections, but claimant did not obtain tools from the vendors to use for credit reporting or collections.

(5) On March 13, 2020, claimant’s son’s school closed due to COVID-19 safety restrictions. Thereafter, claimant assisted his son with remote learning on weekdays from 7:00 a.m. to 6:00 p.m. Claimant was available to work during the evening hours and on weekends. Claimant’s wife was the family’s sole breadwinner, worked from home following the onset of the COVID-19 pandemic, and was available to watch claimant’s son in the evening and weekends. Claimant’s wife had an autoimmune disorder and took an immunosuppressant medication. Claimant’s wife’s doctors told her to be extremely careful to avoid a COVID-19 infection. However, the doctors did not tell claimant’s wife to quarantine.

(6) On March 30, 2020, claimant filed an initial claim for regular unemployment insurance (regular UI) benefits, and on his regular UI initial claim form listed his activities for Twitch. The Department determined that claimant’s income from Twitch did not constitute wages from employment subject to Oregon’s unemployment insurance program, and so did not earn him credit toward eligibility for regular UI. The Department also determined that claimant was not eligible for extended benefits (EB) or Pandemic Emergency Unemployment Compensation (PEUC) benefits.

(7) On April 28, 2020 claimant filed an initial application for PUA benefits. Claimant reported that he was self-employed and listed Twitch and Restorative Credit Solutions as his self-employment. The Department deemed claimant to have a valid claim for PUA benefits.

(8) On July 27, 2020, claimant began working a job in traditional employment for Scanscape, a company that collects information for grocery stores by scanning the bar codes of the products the stores sell. Claimant worked part time for Scanscape, travelling in person to Walmart and Albertson's stores to scan their products. Claimant performed this work during off-peak hours, and used masks and social distancing to minimize the likelihood of COVID-19 exposure. In November 2020, claimant's wife began taking a second immunosuppressant medication. Claimant believed that positive COVID-19 cases were increasing and decided to quit working for Scanscape to limit the risk of spreading COVID-19 to his wife. Claimant's last day working for Scanscape was November 18, 2020.

(9) On March 29, 2021, claimant filed a second initial application for PUA benefits. In the second initial PUA application, claimant reported his employment for Scanscape and the reason he quit working for them.

(10) Claimant claimed PUA benefits for the weeks from March 15 through August 1, 2020 (weeks 12-20 through 31-20) and November 15, 2020 through September 4, 2021 (weeks 47-20 through 35-21). These are the weeks at issue. The Department paid claimant PUA benefits for the weeks at issue.

(11) On January 17 and 18, 2023, a Department investigator sent claimant emails advising that claimant's PUA claim was under review, that claimant was potentially liable for an overpayment, and requesting that claimant answer a series of questions and provide a copy of his business plan for Restorative Credit Solutions within 48 hours. Claimant responded that he did not think the investigator's questions pertained to him. On January 18, 2023, claimant sent another response email stating that he could try to track down the business plan if it would be helpful but might need more than 48 hours to do so. The investigator did not respond. On February 23, 2023, the Department served the notice of PUA determination concluding that claimant was not entitled to receive PUA benefits.

CONCLUSIONS AND REASONS: Claimant was not eligible for PUA benefits for the weeks from March 15 through August 1, 2020 (weeks 12-20 through 31-20), and November 15, 2020 through September 4, 2021 (weeks 47-20 through 35-21).

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).

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). This decision does not reach the substantiation element because the decision concludes that claimant was ineligible to receive PUA for failure to meet a COVID-19 qualifying reason. States have an independent authority to request supporting documentation for fraud prevention, which is separate from the substantiation requirement. U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 16-20, Change 4 (January 8, 2021) (UIPL 16-20, Change 4), at I-9.

One of the 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 (UIPL 16-20), Change 2 (July 21, 2020) at 2. This is the COVID-19 qualifying reason potentially applicable to claimant’s remunerative activities for Twitch and his business idea for Restorative Credit Solutions. 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). The applicable regulation defines “self-employment” as “services performed as a self-employed individual.” 20 C.F.R. Section 625.2(o). 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 information 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.”); *see also* UIPL 16-20 Change 2 at I-9. The record shows that the Department concluded claimant was ineligible for PUA benefits following an exercise of this authority. The Department issued the February 23, 2023 notice of PUA determination concluding that claimant was ineligible for PUA shortly after an investigator, on January 17 and 18, 2023, emailed claimant a series of eligibility questions, requested a copy of claimant’s business plan, and advised claimant of his potential overpayment. Exhibit 1 at 12-14, Email Exchange.

Claimant did not constitute a “covered individual” entitled to PUA benefits. Although claimant met the first element of PUA eligibility because he was not eligible for regular unemployment insurance, extended benefits, or PEUC during the weeks at issue, he nevertheless did not constitute a “covered individual” because his circumstances did not satisfy any of the COVID-19 qualifying reasons enumerated under 15 U.S.C. § 9021(a)(3)(A)(ii)(I).

As for claimant’s content creation for Twitch, claimant was not a self-employed individual who experienced a significant diminution of services because of COVID-19. At hearing, claimant candidly testified that “COVID did not affect . . . Twitch[.]” May 2, 2023 Transcript at 25. Claimant closed his Twitch channel in January 2020, prior to the onset of the COVID-19 pandemic. Exhibit 2 at 15, Transcription of March 30, 2020 call with Department representative. Claimant closed the channel because he had earned only \$217.17 from Twitch in 2019, and wished to “look for a job that would bring in some meaningful money.” May 2, 2023 Transcript at 25-26. Thus, claimant’s services were not reduced because of the COVID-19 public health emergency.

Nor did claimant’s business idea for Restorative Credit Solutions amount to self-employment. As claimant testified at hearing, as of March 2020, claimant had not “materially completed the business . . . or the business plan[.]” May 8, 2023 Transcript at 14. Claimant and his partner began drafting a business

plan in December 2019, but as of March 2020 the plan remained incomplete. Claimant had not obtained any customers or clients for Restorative Credit Solutions and the business idea had never generated any income. Claimant did not form a business entity, like an LLC, to carry on the business, nor did claimant advertise Restorative Credit Solutions or register the venture with the Oregon Secretary of State. Despite some preliminary discussions with vendors who provide tools for medical collections, claimant never obtained tools for credit reporting or collections. In sum, the only material progress claimant made on starting Restorative Credit Solutions was to give the potential venture a name and to have drafted part of the business plan. These efforts are not sufficient to establish that claimant was a self-employed individual within the meaning of 20 C.F.R. Section 625.2(n). Because it was materially incomplete, Restorative Credit Solutions was not claimant's "own business," nor did he rely on it for any income, or actually perform any services for anyone. Thus, with respect to Restorative Credit Solutions, claimant was not a self-employed individual experiencing a significant reduction in services because of the COVID-19 public health emergency under 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(kk).

In his written argument, claimant argued that he should be deemed eligible because he was unemployed, partially unemployed, or unable or unavailable to work because of the following circumstances recognized by the CARES Act:

(dd) a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work;

* * *

(ff) the individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19[.]

15 U.S.C. § 9021(a)(3)(A)(ii)(I)(dd) & (ff). *See* Written Argument at 3.

With respect to item (ff), the record shows that claimant was unemployed to begin with, and so had no place of employment for COVID-19 to make him unable to reach. Additionally, there is no evidence that claimant was ever advised to quarantine. On the other hand, item (dd) is potentially applicable. It is undisputed that on March 13, 2020, claimant's son's school closed due to COVID-19 safety restrictions and claimant had to assist his son with remote learning on weekdays from 7:00 a.m. to 6:00 p.m.

However, as the above discussion of Twitch and Restorative Credit Solutions show, claimant was not actually self-employed on March 13, 2020. Therefore, the circumstances listed in item (dd) did not render claimant unemployed, partially unemployed, or unable or unavailable to work as to any self-employment per 15 U.S.C. § 9021(a)(3)(A)(ii)(II), because claimant did not actually have any self-employment that could be impacted by COVID-19. Thus, while COVID-19 may have impacted claimant in the sense that it led to the closure of his son's school, the closure of claimant's son's school did not make claimant unemployed because claimant already was unemployed.

Nor did claimant have employment in a traditional employer-employee relationship for item (dd) to impact. The record shows that in 2017, after the owner of his then-employer died and the company dissolved, claimant took a sabbatical from working in a traditional employer-employee relationship. Claimant tried his hand at creating content in a nonemployee capacity for Twitch in 2019 but those efforts did not generate much income and by January 2020, claimant had closed his Twitch channel. Claimant then conceived of the idea for Restorative Credit Solutions and took some preliminary steps toward starting that venture but never materially completed it. He also made efforts to obtain traditional employment from prospective employers in the cannabis cultivation, collections, and data entry fields, without success. Accordingly, as of the onset of the COVID-19 pandemic, claimant was not made unemployed, partially unemployed, or unable or unavailable to work because COVID-19 closed his son's school. Just as with self-employment, as far as working in a traditional employment relationship was concerned, claimant was unemployed already and so was not made unemployed by the COVID-19-related closure of his son's school.

At hearing, claimant posited that the COVID-19 pandemic impacted his employment because it made looking for work harder. May 2, 2023 Transcript at 24. This is not sufficient to establish eligibility for PUA. Under federal guidance, “[a]n individual is only eligible for PUA if the individual is otherwise able to work and available to work but is unemployed, partially unemployed, or unable or unavailable for work for a listed COVID-19 related reason under Section 2102(a)(3)(A)(ii)(I) of the CARES Act. *Not being able to find a job because some businesses have closed and/or may not be hiring due to COVID-19 is not an identified reason.*” UIPL 16-20 Change 2 at I-6 (emphasis added).

Claimant eventually found a job at Scanscape scanning products in grocery stores. Claimant worked there beginning July 27, 2020 until he quit on November 18, 2020 because his wife started a second immunosuppressant medicine and claimant believed that positive COVID-19 cases were increasing. This implicates an additional COVID-19 circumstance recognized by the CARES Act:

(ii) the individual has to quit his or her job as a direct result of COVID-19[.]

* * *

15 U.S.C. § 9021(a)(3)(A)(ii)(I)(ii). Federal guidance instructs that someone “has to quit” within the meaning of 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(ii) when ceasing employment is an involuntary decision compelled by the circumstances. U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 16-20 (UIPL 16-20), April 5, 2020 at I-7. For example, where an individual is diagnosed with COVID-19 and the illness caused health complications that render the individual objectively unable to perform their essential job functions, the qualifying reason would be met. UIPL 16-20 at I-6. Further, guidance states that whether something is a “direct result” of COVID-19 is governed by 20 C.F.R. 625.5(c). Modified as called for by the CARES Act, that regulation provides that an individual's unemployment “is a direct result of the [COVID-19 public health emergency] where the unemployment is an immediate result of the [COVID-19 public health emergency] itself and not the result of a longer chain of events precipitated or exacerbated by the [pandemic].” 20 C.F.R. 625.5(c).

Applying these standards, the record does not show that claimant had to quit when he did or that he did so as a direct result of COVID-19. Claimant's decision to quit was not an involuntary decision compelled by the circumstances. Claimant had not been diagnosed with COVID-19, nor did he face

COVID-19 caused complications that made him unable to perform his job. The risk of harm to claimant's wife from COVID-19 was concerning, but she had not been diagnosed either, and it is reasonable to infer that the increased risk to her from COVID-19 had its limits, because her doctors had not advised her to quarantine. Moreover, claimant worked only part-time and had been taking precautions by scanning in the grocery stores during off-peak hours, and using masks and social distancing to minimize the likelihood of exposure. Given these factors, the record fails to show that claimant's decision to quit working for Scanscape was compelled or involuntary in nature or the immediate result of the COVID-19 public health emergency. Claimant therefore was not an individual who had to quit his job as a direct result of COVID-19.

For these reasons, claimant was not a "covered individual" within the meaning of the CARES Act, and therefore was not eligible for PUA benefits for the weeks at issue, the weeks from March 15 through August 1, 2020 (weeks 12-20 through 31-20), and November 15, 2020 through September 4, 2021 (weeks 47-20 through 35-21).

DECISION: Order No. 23-UI-225048 is affirmed.

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

DATE of Service: July 18, 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 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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