

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0754

Reversed
Overpayment Not Assessed

PROCEDURAL HISTORY: On June 24, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant received \$2,611 in Extended Benefits (EB) to which she was not entitled and must repay by deduction from future benefits payable (decision # 161517). On July 14, 2022, decision # 161517 became final without claimant having filed a request for hearing. On November 15, 2022, claimant filed a late request for hearing. ALJ Kangas considered claimant's request, and on March 21, 2023 issued Order No. 23-UI-219655, dismissing the request as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by April 4, 2023. On April 4, 2023, claimant filed a timely response to the appellant questionnaire. On April 25, 2023, the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 23-UI-219655 was vacated and that a new hearing would be scheduled to determine whether to allow claimant's late request for hearing and, if so, the merits of decision # 161517. On May 30 and June 22, 2023, ALJ Lucas conducted a hearing, and on June 26, 2023 issued Order No. 23-UI-228642, allowing claimant's late request for hearing and affirming decision # 161517. On July 6, 2023, claimant filed an application for review of Order No. 23-UI-228642 with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's written argument in reaching this decision.

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence is decision # 111649, an administrative decision the Department issued on May 28, 2021 that concluded that claimant was not eligible to receive EB benefits for the weeks at issue in this case. Decision # 111649 has been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 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 exhibit will remain in the record.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review allowing claimant's late request for hearing on decision # 161517 is **adopted**. The remainder of this decision relates to the merits of decision # 161517.

FINDINGS OF FACT: (1) On November 1, 2019, claimant filed an initial claim for regular unemployment insurance (regular UI) benefits. The Department determined claimant had a valid regular UI claim with a first effective week of October 27, 2019. Thereafter, claimant claimed regular UI benefits each week for much of the remainder of 2019 and into 2020.

(2) Claimant eventually exhausted the balance of her regular UI claim and, on September 6, 2020, the Department placed claimant on a different benefits program, Extended Benefits (EB). The EB program was available only when an individual's regular UI claim was exhausted. Thereafter, claimant claimed and was paid EB benefits each week through October 24, 2020.

(3) On October 25, 2020, a new benefit year began for purposes of claimant's eligibility for regular UI and, as a result, claimant became eligible for regular UI benefits again. However, due to agency error, the Department did not initially recognize claimant's eligibility for regular UI and failed to switch claimant to a regular UI claim.

(4) Claimant claimed and received EB benefits for the weeks from October 25 through December 12, 2020 (weeks 44-20 through 50-20). These are the weeks at issue. The Department paid claimant \$373 per week of EB benefits for each of the weeks at issue for a total of \$2,611.

(5) The Department paid claimant for week 44-20 on or about November 3, 2020. The Department paid claimant for week 45-20 on or about November 12, 2020. The Department paid claimant for week 46-20 on or about November 19, 2020. The Department paid claimant for week 47-20 on or about November 30, 2020. The Department paid claimant for week 48-20 on or about December 4, 2020. The Department paid claimant for week 49-20 on or about December 14, 2020. The Department paid claimant for week 50-20 on or about December 21, 2020.

(6) Claimant was not eligible for the EB benefits she received for the weeks at issue because she was eligible for regular UI benefits for those weeks. On May 28, 2021, the Department issued administrative decision # 111649, concluding that claimant was not eligible to receive EB benefits for the weeks at issue. *See* EAB Exhibit 1. Claimant filed a late request for hearing on decision # 111649. The Office of Administrative Hearings (OAH) subsequently issued an order dismissing claimant's request for hearing as late without good cause, leaving decision # 111649 undisturbed. EAB ultimately affirmed that order. Claimant did not file a petition for judicial review of EAB's decision affirming the order.¹

(7) On June 24, 2022, the Department issued decision # 161517, which concluded that claimant received \$2,611 in Extended Benefits (EB) to which she was not entitled and must repay by deduction from future benefits payable. *See* Exhibit 1.

¹ EAB has taken notice of these facts, which are contained in Employment Department records. 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.

CONCLUSIONS AND REASONS: The Department was not authorized to amend the original decisions allowing EB benefits for weeks 44-20 through 50-20 or assess an overpayment for those weeks.

Payment of EB Benefits. ORS 657.315(1)(a) provides, in relevant part, that an individual who has been overpaid benefits because of an error not caused by the individual's false statement, misrepresentation of a material fact or failure to disclose a material fact, or because an initial decision to pay benefits is subsequently reversed by a decision finding the individual is not eligible for the benefits, is liable to have the amount deducted from any future benefits otherwise payable to the individual under this chapter for any week or weeks within five years following the week in which the decision establishing the erroneous payment became final.

Claimant received EB benefits to which she was not entitled during the weeks at issue. EB benefits are only available to individuals who have exhausted their eligibility for regular UI. *See* ORS 657.325(1)(a) ("An individual shall be eligible to receive extended benefits . . . if the Director of the Employment Department finds that with respect to such week the individual . . . Is an exhaustee[.]"). During the weeks at issue, claimant was eligible for regular UI benefits and therefore was not an exhaustee for purposes of ORS 657.325(1)(a). Moreover, claimant was not entitled to EB benefits during the weeks at issue for the additional reason that the effect of decision # 111649 remaining undisturbed is that its conclusion that claimant was not eligible to receive EB benefits for the weeks at issue is binding as a matter of law.

The Department paid claimant due to agency error. On October 25, 2020, a new benefit year began for purposes of claimant's eligibility for regular UI and, as a result, claimant became eligible for regular UI benefits beginning week 44-20. However, the Department did not initially recognize claimant's eligibility for regular UI and failed to switch claimant to a regular UI claim. As a result, when claimant claimed the weeks at issue, the Department erroneously paid out each week under the EB benefits program. Because the Department paid claimant due to agency error, the issue is governed by ORS 657.315. However, for the reasons that follow, the Department was not authorized to amend the original decisions allowing EB benefits for weeks 44-20 through 50-20 or assess an overpayment for those weeks.

Lack of Authority to Amend Allowing Decisions. ORS 657.267, with emphasis added, provides as follows:

(1) ***An authorized representative shall promptly examine each claim*** for waiting week credit or for benefits ***and, on the basis of the facts available, make a decision to allow or deny the claim.*** Information furnished by the claimant, the employer or the employer's agents on forms provided by the Employment Department pursuant to the authorized representative's examination must be accompanied by a signed statement that such information is true and correct to the best of the individual's knowledge. ***Notice of the decision need not be given to the claimant if the claim is allowed*** but, if the claim is denied, written notice must be given to the claimant. If the claim is denied, the written notice must include a statement of the reasons for denial, and if the claim is denied under any provision of ORS 657.176, the notice must also set forth the specific material facts obtained from the employer and the employer's agents that are used by the authorized

representative to support the reasons of the denial. The written notice must state the reasons for the decision.

(2) If the claim is denied under any provision of ORS 657.176, written notice of the decision must be given to the employing unit, or to the agent of the employing unit, that, in the opinion of the Director of the Employment Department, is most directly involved with the facts and circumstances relating to the disqualification.

(3) Notice of a decision that was wholly or partially based on information filed with the director in writing within 10 days after the notice provided for in ORS 657.265 must be given to any employing unit or agent of the employing unit that filed the information.

(4) *If a decision to allow payment made pursuant to this section does not require notice, that decision may be amended by an authorized representative.* The amendment must be made by written notice informing the recipient of the right of appeal pursuant to ORS 657.269. ***The amendment must be issued within one year of the original decision to allow payment, except in cases of alleged willful misrepresentation or fraud.*** A decision requiring notice, made pursuant to this section, may be amended unless it has become a final decision under ORS 657.269.

Order No. 23-UI-228642 concluded that claimant was overpaid \$2,611 in EB benefits for the weeks at issue and was required to repay the benefits in accordance with ORS 657.315. Order No. 23-UI-228642 at 7-8. However, the record does not show that the Department had authority to amend its original decisions to allow payment for each of the weeks at issue to a decision concluding that payment should not have been allowed, and therefore assess an overpayment, for those weeks.

The Department made its original decisions under ORS 657.267(1) to allow payment of claimant's weekly claims for benefits for weeks 44-20 through 50-20 by paying each of those claims on or before December 21, 2020. Because a decision to allow benefits does not require notice to claimant pursuant to ORS 657.267(1), the Department may only amend decisions allowing payment within one year of the decision to allow, "except in cases of alleged willful misrepresentation or fraud." ORS 657.267(4).

It is appropriate to regard decision # 161517, and not decision # 111649, as the amendment of the original decisions to allow EB benefits for the weeks at issue. First, the effect of decision # 161517 is to reverse the original decisions to allow payment through creation of liability for an overpayment, whereas decision # 111649 merely established the predicate for the resulting overpayment by concluding claimant was not eligible for EB benefits. Second, decision # 161517 actually cites ORS 657.267, whereas decision # 111649 cites to state and federal law authorizing the EB benefits program. *Compare* Exhibit 1 at 1, *with*, EAB Exhibit 1 at 1. Third, ORS 657.267(4) excludes amendments in cases of alleged fraud from the one-year time limitation. This implies that overpayment decisions—whether they be fraud, claimant fault but non-fraud, or, as is the case here, agency error—are what the statute contemplates as the amendment of the original decision to allow payment. Since the one enumerated (but excepted) type of case, an alleged case of fraud, takes the form of an overpayment decision, it follows that the one-year time limitation applies to claimant fault but non-fraud and agency error cases, and that ORS 657.267(4) contemplates the overpayment decisions that give rise to those kinds of cases as the amendment.

Thus, decision # 161517 amended the original decisions to allow EB benefits for the weeks at issue. The amendment was made on June 24, 2022, which was not within one year of December 21, 2020. The amendment was not made in a case of willful misrepresentation or fraud because, as discussed above, the Department paid claimant for the weeks at issue due to agency error, and not because of any misrepresentation on the part of claimant. Therefore, ORS 657.267(4) bars the amendment and the Department lacked authority to assess an overpayment for the weeks at issue.

For these reasons, Order No. 23-UI-228642 is reversed. Claimant is not liable to repay EB benefits for the weeks at issue.

DECISION: Order No. 23-UI-228642 is set aside, as outlined above.

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

DATE of Service: August 23, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



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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