

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0833

Request for Hearing Timely Filed
Reversed & Remanded

PROCEDURAL HISTORY: On October 13, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving benefits effective June 12, 2022 (decision # 143715). On October 20, 2022, claimant filed a timely request for hearing that the Department did not properly process or refer to the Office of Administrative Hearings (OAH). On November 14, 2022, claimant filed a second request for hearing that was late. ALJ Kangas considered claimant's second hearing request, and on January 22, 2024, issued Order No. 24-UI-246123, dismissing that request as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by February 5, 2024. On January 31, 2024, claimant filed a timely response to the appellant questionnaire. On March 27, 2024, OAH mailed a letter stating that Order No. 24-UI-246123 was vacated and that a hearing would be scheduled to determine whether to allow claimant's late request for hearing and, if so, the merits of decision # 143715.

On March 29, 2024, OAH served notice of a hearing scheduled for April 9, 2024, at 1:30 p.m. On April 9, 2024, claimant failed to appear for the hearing, and ALJ Christon issued Order No. 24-UI-251832, dismissing claimant's request for hearing on decision # 143715 due to his failure to appear. On April 16, 2024, claimant filed a timely request to reopen the hearing. On November 14, 2024, ALJ Chiller conducted a hearing interpreted in Haitian Creole at which the Department failed to appear. On November 26, 2024, ALJ Chiller issued Order No. 24-UI-274861, which did not address claimant's request to reopen, and dismissed claimant's request for hearing on decision # 143715 as late without good cause. On December 7, 2024, claimant filed a timely application for review of Order No. 24-UI-274861 with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant submitted written arguments on December 7 and December 10, 2024. The employer submitted a written argument on December 16, 2024. The parties did not declare that they provided copies of their arguments to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The arguments also contained information that went to the merits of decision # 143215, and was not relevant and material to EAB's determinations regarding claimant's request for hearing and request to reopen. Under ORS 657.275(2) and OAR 471-041-0090(1)(b)(A)

(May 13, 2019), EAB did not consider the parties' written arguments. EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

The parties may offer new information, such as the information contained in their written arguments, 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 October 13, 2022, the Department mailed decision # 143715 to claimant's address on file with the Department. Decision # 143715 stated, "You have the right to appeal this decision if you do not believe it is correct. Your request for appeal must be received no later than November 2, 2022." Exhibit 7 at 2. Claimant received decision # 143715 shortly after it was mailed.

(2) On October 20, 2022, claimant called the Department and spoke with a representative. At that time, the representative filed a timely request for hearing on decision # 143715 on claimant's behalf. However, the Department did not properly process or refer the hearing request to OAH.¹

(3) On October 31, 2022, claimant called and spoke again with a Department representative. The representative told claimant that a hearing on decision # 143715 had been requested and that it typically took three to six weeks to hear from OAH that a hearing request had been received. The representative suggested claimant contact OAH if he did not hear anything from them regarding the appeal within six weeks.²

(4) On or about November 10, 2022, claimant again called and spoke to a Department representative regarding decision # 143715. On November 10, 2022, that representative emailed OAH noting that they had spoken with claimant, that he had stated that his preferred language was Haitian Creole, and that due to language limitations, the representative "couldn't understand if [claimant] was trying to apply for a hearing or if he thought he already had one." Exhibit 6 at 3. On November 12, 2022, an OAH representative emailed back, advising that "OAH cannot locate a referral for this claimant." Exhibit 6 at 3.

(5) On November 14, 2022, claimant called the Department and spoke with a representative. The representative properly processed on claimant's behalf a telephone request for hearing on decision # 143715. This second request for hearing was dated November 14, 2022, and so was late. Exhibit 6 at 1.

¹ EAB has taken notice of the facts contained in this paragraph, which are contained in Employment Department records. OAR 471-041-0090(1). Any party that objects to EAB taking notice of this information must send their objection to EAB in writing, stating why they object, within ten days of EAB mailing this decision. OAR 471-041-0090(2). Unless EAB receives and agrees with the objection, the noticed fact(s) will remain in the record.

² EAB has taken notice of the facts contained in this paragraph, which are contained in Employment Department records. OAR 471-041-0090(1). Any party that objects to EAB taking notice of this information must send their objection to EAB in writing, stating why they object, within ten days of EAB mailing this decision. OAR 471-041-0090(2). Unless EAB receives and agrees with the objection, the noticed fact(s) will remain in the record.

OAH did not recognize that a timely request for hearing on decision # 143715 had already been filed on October 20, 2022.

(6) On March 29, 2024, OAH served notice of a hearing scheduled for April 9, 2024, on whether to allow claimant's late request for hearing and, if so, the merits of decision # 143715. On April 9, 2024, claimant was ill with nose congestion, a cough, and breathing problems. Exhibit 1 at 2. Because of this illness, claimant failed to appear for the March 29, 2024, hearing. Exhibit 1 at 2.

(7) On April 9, 2024, ALJ Christon issued Order No. 24-UI-251832, dismissing claimant's request for hearing on decision # 143715 due to his failure to appear. Claimant filed a timely request to reopen the April 9, 2024, hearing.

(8) On November 14, 2024, ALJ Chiller conducted a hearing at which the Department failed to appear and which was interpreted in Haitian Creole. During the hearing, the ALJ elicited testimony on the late request for hearing issue only, and did not ask claimant questions to develop the record regarding his failure to appear at the April 9, 2024, hearing. At the end of the hearing, the ALJ announced that inquiry on the late request for hearing issue was complete, and that an order would be issued either allowing or dismissing the late request for hearing. Transcript at 28. The ALJ stated that if the order allowed claimant's late request for hearing, the parties would reconvene for another hearing on whether to allow claimant's request to reopen and, if so, the merits of decision # 143715. Transcript at 29.

(9) On November 26, 2024, ALJ Chiller issued Order No. 24-UI-274861, which did not address claimant's request to reopen, and dismissed claimant's request for hearing on decision # 143715 as late without good cause.

CONCLUSIONS AND REASONS: Claimant filed a timely request for hearing on decision # 143715. Order No. 24-UI-274861 is set aside and remanded for hearing on whether to allow claimant's request to reopen the April 9, 2024, hearing and, if so, the merits of decision # 143715.

Late Request for Hearing. ORS 657.269 provides that the Department's decisions become final unless a party files a request for hearing within 20 days after the date the decision is mailed. ORS 657.875 provides that the 20-day deadline may be extended a "reasonable time" upon a showing of "good cause." OAR 471-040-0010 (February 10, 2012) provides that "good cause" includes factors beyond an applicant's reasonable control or an excusable mistake, and defines "reasonable time" as seven days after those factors ceased to exist. Under OAR 471-040-0005(1) (July 15, 2018), "A Request for hearing may be filed on forms provided by the Employment Department or similar offices in other states. Use of the form is not required provided the party specifically requests a hearing or otherwise expresses a present intent to appeal and it can be determined what issue or decision is being appealed."

The deadline to file a request for hearing on decision # 143715 was November 2, 2022. Because claimant filed his request for hearing on decision # 143715 on October 20, 2022, claimant filed a timely request for hearing.

The Department did not appear at hearing or provide an attestation in lieu of appearance. However, Department records show that on October 20, 2022, a representative recorded a claim comment that, per a telephone call with claimant, the representative had "requested a hearing for the claimant." Department

records further show that on October 31, 2022, another representative recorded a claim comment stating that, per a telephone call with claimant, the representative told claimant that a hearing on decision # 143715 had been requested and that it typically took three to six weeks to hear back from OAH. Thus, while the Department did not properly process or refer the October 20, 2022, hearing request to OAH, it is evident that claimant expressed a present intent to appeal decision # 143715 and that he did so before the November 2, 2022, deadline. Accordingly, claimant filed a timely request for hearing on decision # 143715.

Typically, when a party files a timely request for hearing, they are entitled to a hearing on the merits. Because of the unusual procedure followed in this case, however, claimant's request to reopen was not addressed by the ALJ. During the hearing, the ALJ elicited testimony on the late request for hearing issue only, and did not ask claimant questions to develop the record regarding his failure to appear at the April 9, 2024, hearing. The ALJ concluded the hearing stating that if claimant's late request for hearing was allowed, the parties would reconvene for another hearing on whether to allow claimant's request to reopen and, if so the merits of decision # 143715. Note that the threshold issue in this case was claimant's request to reopen the April 9, 2024, hearing. The best practice therefore would have been to first address the request to reopen issue, and then reach the late request for hearing issue only if the request to reopen was allowed.

As discussed below, remand is necessary to develop the record regarding the request to reopen issue.

Request to Reopen. ORS 657.270(5) provides that any party who failed to appear at a hearing may request to reopen the hearing, and the request will be allowed if it was filed within 20 days of the date the hearing decision was issued and shows good cause for failing to appear. "Good cause" exists when the requesting party's failure to appear at the hearing arose from an excusable mistake or from factors beyond the party's reasonable control. OAR 471-040-0040(2) (February 10, 2012). The party requesting reopening shall set forth the reason(s) for missing the hearing in a written statement, which the Office of Administrative Hearings (OAH) shall consider in determining whether good cause exists for failing to appear at the hearing. OAR 471-040-0040(3).

Virtually no testimony was elicited at hearing relevant to whether claimant's failure to appear at the April 9, 2024, hearing arose from an excusable mistake or from factors beyond claimant's reasonable control. However, in claimant's reopen request, he asserted that on the day of the hearing, he was ill with nose congestion, a cough, and breathing problems, and that he failed to appear because of this illness. Exhibit 1 at 2. Claimant's illness may have constituted factors beyond his reasonable control or an excusable mistake that would establish good cause for his failure to appear. However, further development of the record is necessary to determine whether claimant had good cause for failing to appear.

On remand, the ALJ should ask questions to develop the record as to precisely when claimant became ill, and the nature and severity of his symptoms. The ALJ should inquire whether the illness prevented claimant from participating in the April 9, 2024, hearing and, if so, to explain how and why that was the case. The ALJ should also inquire whether, and if so, how, the illness prevented claimant from contacting OAH to request the hearing be rescheduled. If the record on remand shows that claimant's failure to appear at the April 9, 2024, hearing arose from an excusable mistake or from factors beyond

his reasonable control, the request to reopen should be allowed and the ALJ should turn to the merits of the case.

Order No. 24-UI-274861 therefore is reversed, and this matter remanded for a hearing on whether to allow claimant's request to reopen and, if so, the merits of decision # 143715.

DECISION: Order No. 24-UI-274861 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: January 7, 2025

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 24-UI-274861 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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