

In the Matter of the Compensation of
TAWNIA M. DAVEY, Claimant

WCB Case No. 15-01414

ORDER ON REVIEW

Swanson Thomas Coon & Newton, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Curey, Lanning, and Somers.

Claimant requests review of Administrative Law Judge (ALJ) Mills's order that: (1) found that claimant's hearing request regarding an Order on Reconsideration was untimely filed; and (2) dismissed her hearing request. On review, the issue is the propriety of the ALJ's order.

We adopt and affirm the ALJ's order with the following supplementation.

On February 26, 2015, an Order on Reconsideration reduced claimant's permanent whole person impairment and work disability awards, which had been granted by a Notice of Closure. The thirtieth day after the reconsideration order issued was March 28, 2015, a Saturday. Therefore, claimant's appeal period ran until the end of the following Monday, March 30, 2015.¹

On Monday, March 30, 2015, a legal assistant at claimant's attorney's firm logged into the Board's website portal and prepared a request for hearing regarding the Order on Reconsideration. On March 31, 2015, the legal assistant logged into the Board's website portal to attend to another matter. She noticed that the portal indicated that the hearing request had been saved but not "submitted." Thereafter, she submitted the request. The request states that it was "received" by the Board on March 31, 2015, at 8:36 a.m. (Ex. 2-1).

The self-insured employer moved to dismiss claimant's hearing request as untimely filed. The ALJ concluded that the hearing request had been prepared and saved on the website portal on March 30, 2015, but that the Board had not received the appropriate portal version of the form until the March 31, 2015 submission. Therefore, the ALJ dismissed the hearing request as untimely filed.

¹ When the last day of the 30-day appeal period falls on a Saturday or legal holiday, including Sunday, the appeal period runs until the end of the next day that is not a Saturday or legal holiday. *See Bunny G. Johnson*, 54 Van Natta 198, 199 n. 1 (2002); *Eric W. Lundberg*, 52 Van Natta 1647 (2001). Because the thirtieth day from the ALJ's order fell on a Saturday, and the following day (Sunday) was a legal holiday, *see* ORS 187.010(1)(a), claimant's appeal period ran through Monday, March 30, 2015.

On review, claimant contends that the hearing request was timely filed because the Board received the appropriate portal version of the form when the hearing request was prepared and saved on its portal on March 30, 2015. Based on the following reasoning, we disagree with claimant's contention.

To be timely, a request for hearing on a reconsideration order must be filed within 30 days after the copies of the reconsideration order were mailed to the parties. ORS 656.268(6)(g); ORS 656.319(4). There is no "good cause" exception for an untimely filed request for hearing on an objection to an Order on Reconsideration under ORS 656.319(4). *Jerry M. Mouser*, 59 Van Natta 904 (2007).

A request for hearing may be filed through the Board's website portal. OAR 438-005-0046(1)(g)(A); *see also* ORS 656.726(5)(b) (Board may adopt rules to allow for the electronic transmission of filings). After a party completes the electronic version of the "Request for Hearing Form," the hearing request is deemed filed on "the date the Board receives the appropriate portal version of the form." OAR 438-005-0046(1)(h)(B), (D).²

Claimant contends that her hearing request was "completed" on March 30, 2015, and that the Board "received" the "appropriate portal version of the form" when the document was saved that day. As explained below, we conclude that the hearing request was "completed" and "received" on March 31, 2015.

Claimant's attorney's assistant testified to her process for filing an electronic hearing request. She recalled that she "hit submit" on the Request for Hearing form on March 30, 2015. (Tr. 38). She explained that when one "hits submit,"

² OAR 438-005-0046(1)(h) provides:

"To electronically file the things listed in subsection (g) of this section by website portal, a party shall:

"* * * * *

"(B) * * * complete the electronic version of the Workers' Compensation Board 'Request for Hearing Form,' * * *

"* * * * *

"(D) For the purposes of this rule, the date of a portal filing is determined by the date the Board receives the appropriate portal version of the form."

the screen changes to thank the user for the submission. (Tr. 38). However, she testified that, on the next day, March 31, 2015, the portal indicated that the request had not been “processed,” so she “hit submit again.” (Tr. 39). The assistant testified that she saw the Board’s notice acknowledging receipt of the hearing request form on March 30, 2015. (Tr. 41; Ex. 7).

Mr. Lowell, the Board’s electronic portal project manager, testified to the contrary. He testified that the Board’s records, including the webserver logs and the computer-generated electronic date stamp, showed that the request had been saved as a “work in progress” on March 30, 2015, and was submitted at 8:36 a.m. on March 31, 2015. (Tr. 9-13; Exs. 4c-5, -7, -9, 5).

On this record, we conclude that claimant’s hearing request was saved on March 30, 2015, but not submitted until March 31, 2015. In reaching this conclusion, we rely on Mr. Lowell’s testimony and the portal records. Further, we do not consider claimant to have filed her hearing request by preparing and saving it on the portal on March 30, 2015. Our reasoning for this conclusion follows.

Mr. Lowell testified that, before a user submits a request for hearing through the portal, the form is a “computer screen with various boxes” for the user to input information. (Tr. 16-17). He explained that the form includes “kind of the same information as” the final request for hearing form, but that the user’s submission of the request “puts [the request] in the exact form.” (*Id.*) He further clarified that an electronic date stamp is “computer generated onto the form” when the request for hearing is submitted. (Tr. 13). After the submission of a request, it is acknowledged by an automatic e-mail and a hearing date is set. (Tr. 22, 31). Here, this record establishes that the electronic date stamp was generated, and the acknowledgment e-mail was sent, on March 31, 2015. (Exs. 2, 4c-8, -9).

Mr. Lowell explained that a user can begin a request and save it as a “work in progress,” which the user can subsequently modify. (Tr. 15, 30-31). For example, he noted that a user could change the issues raised by the hearing request after it has been saved, but before it is submitted. (Tr. 30). He stated that the saved information is in the Board’s “possession” and is “viewable” by a Board employee with access to the portal. (Tr. 15). However, he explained that the Board does not acknowledge receipt of a saved document, and does not set a hearing, based on a saved “work in progress” document. (Tr. 26).

This testimony establishes that “the appropriate portal version of” claimant’s “portal” hearing request was not completed when the request was saved as a “work in progress” and could still be modified before its submission. Instead, the “portal” hearing request was finalized into the “appropriate portal version of the form” (including the computer-generated date stamp) when it was submitted. Thus, even if claimant had included all pertinent information in the saved “work in progress” version of the “hearing request” form, the Board did not “receive[] the appropriate portal version of the form” until the request was submitted and, thereby, finalized.³ Stated another way, timely filing occurs when a claimant completes and submits the portal hearing request form and the Board “receives the appropriate portal version of the form.”

Therefore, on this record, for the reasons expressed above, we conclude that claimant’s hearing request was filed when the request was submitted, and the Board “receive[d] the appropriate portal version” of the request, on March 31, 2015, one day after the last day for claimant to timely file a request for hearing. Accordingly, we affirm.

ORDER

The ALJ’s order dated July 23, 2015 is affirmed.

Entered at Salem, Oregon on April 19, 2016

³ In reaching this conclusion, we distinguish cases where a “jurisdictional” challenge to a timely filed request for hearing or review is raised based on the lack of particular information. *See Connie L. Cranston*, 63 Van Natta 2378, 2381 (2011) (request for hearing on reconsideration order timely filed under ORS 656.268(6)(g) and ORS 656.283(2) because the relevant section of the “Request for Hearing and Specification of Issues” form addressed the scope of issues to be raised at hearing, rather than the jurisdictional requirements for requesting a hearing); *Kimberly L. Murphy*, 41 Van Natta 847 (1989), *aff’d without opinion*, 106 Or App 180 (1991) (request for Board review timely filed; Board not authorized to limit its jurisdiction to less than that provided by statute; therefore, request for Board review need only state that a party requests review); *see also June E. Bronson*, 51 Van Natta 928, 928 n 1 (1999) (because ORS 656.295(1) merely requires the filing of a request for Board review, a violation of administrative rule (OAR 438-011-0005(3)) does not invalidate a timely filed appeal).

In those cases, we reasoned that neither ORS 656.283 nor ORS 656.295 (which concern requests for hearing and Board review, respectively) mandate a specific form or format for making such requests. Here, our decision regarding the “portal” filing is not premised on a lack of information in the request. Instead, the issue is the submission and receipt of the request itself; *i.e.*, its “filing.”