

**Although the claimant was unable to initially view a determination because of problems with his Apple brand device, he had no justification for a late appeal under 430 CMR 4.15, where he was properly sent the determination by the DUA via e-mail according to his preference and he did not contact the agency soon after becoming aware that a determination existed.**

**Board of Review  
19 Staniford St., 4<sup>th</sup> Floor  
Boston, MA 02114  
Phone: 617-626-6400  
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.  
Chairman  
Judith M. Neumann, Esq.  
Member  
Charlene A. Stawicki, Esq.  
Member**

**Issue ID: 0020 7433 21**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The claimant appeals a decision by Nicholas Tsimortos, a review examiner of the Department of Unemployment Assistance (DUA), to deny the claimant a hearing on a determination dated July 13, 2016. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant had an unemployment claim, effective March 17, 2013. On July 13, 2016, the DUA issued a determination which found that the claimant was not eligible to receive benefits for the week of December 1, 2013. The claimant appealed the determination to the DUA hearings department.<sup>1</sup> On April 28, 2017, the DUA sent the claimant another determination, this time finding that there was no justification to consider the appeal timely. The claimant then appealed that timeliness determination to the hearings department. Following a hearing on the merits, attended by the claimant, the review examiner affirmed the agency's initial determination and denied the claimant's request for a hearing on the July 13, 2016, determination.

The review examiner reached his decision after concluding that the claimant did not have justification pursuant to 430 CMR 4.15, for failing to appeal the July 13, 2016, determination timely. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accepted the claimant's application for review and remanded the case for a hearing to take additional evidence regarding when the claimant saw the July 13, 2016, determination and when he first appealed it. The claimant attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that there was no justification for the claimant's late appeal of the July 13, 2016, determination is supported by

---

<sup>1</sup> As noted later in this decision, there was a question during the hearing as to when the claimant appealed the July 13, 2016, determination. The agency considered the appeal to be filed on January 11, 2017. The claimant argued that he sent something to the agency to appeal on December 15, 2016.

substantial and credible evidence and free from error of law, where he had trouble opening the determination on his Apple brand device in July of 2016, he did not contact the agency about his difficulty seeing the determination, and he finally sent in an appeal to the DUA three days after he viewed it on December 12, 2016.

### Findings of Fact

The review examiner's consolidated findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant filed a claim for unemployment benefits effective March 17, 2013.
2. At the time the claimant filed his claim, the claimant elected to receive all correspondence from the Department of Unemployment Assistance (DUA) electronically to his UI Online account.
3. On July 13, 2016, a Notice of Disqualification was issued to the claimant's UI Online account indicating that he was disqualified from receiving benefits for failure to submit a work search activity log when requested. The work search log was requested for the week ending December 7, 2013.
4. The claimant's UI Online account shows that he viewed his inbox three times on July 13, 2016, the same day the Notice of Disqualification was sent. However the claimant was not able to open and view the Notice of Disqualification because he was having trouble using his Apple brand device. The claimant did not call DUA to inquire about what the documents were. The claimant did not call DUA to inquire because of the length of time that had passed since he collected unemployment benefits and he believed that any issue would go away on its own.
5. On August 12, 2016, DUA sent the claimant a Monthly Statement of Account indicating he had been overpaid benefits of \$509.
6. On December 12, 2016, the claimant viewed his UI Online account and read the July 13th Notice of Disqualification.
7. On December 15, 2016, the claimant wrote a letter via certified mail to DUA asking to appeal the disqualification based on the fact that he did not receive the July 13, 2016 Notice of Disqualification until December 12, 2016.
8. DUA has no record to show the December 15, 2016 appeal by the claimant was received.
9. On January 11, 2017, the claimant wrote a second letter to DUA requesting an appeal because he never heard back from DUA after the December 15th appeal letter he sent.

## CREDIBILITY ASSESSMENT

At the first hearing, the claimant was unable to establish that he wrote a letter to DUA on December 15, 2016 requesting an appeal to the July 13th Notice of Disqualification. At the remand hearing for additional evidence, the claimant sent a U.S. Postal Service Certified Mail Receipt showing he sent a letter to DUA on December 15, 2016. The DUA has no record of receipt of the December 15th letter. Based on the evidence presented, this Review Examiner finds the claimant's testimony credible that he sent a letter requesting an appeal to DUA on December 15th.

### Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we agree with the review examiner that the claimant has not shown justification for the late appeal.

There is no dispute that the claimant appealed the July 13, 2016, Notice of Disqualification late. During the hearing, the claimant contended that he had appealed the notice on December 15, 2016. This would have been approximately one month prior to the DUA's receipt of an appeal dated January 11, 2017. Because the claimant did not present evidence that he had appealed the notice in December of 2016, the review examiner concluded in his decision that the date of the appeal was January 11, 2017. However, the claimant has submitted documentation to the agency showing that he had sent a certified letter on December 15, 2016. Consequently, the review examiner has now revised his findings, and the claimant's appeal is deemed to be made on December 15, 2016. *See* Remand Exhibit # 6.

In the end, however, both the January 11, 2017, and the December 15, 2016, dates are far beyond the ten-day appeal period provided for in G.L. c. 151A, § 39(b). Indeed, both dates are also beyond the thirty-day period allowed for late appeals if a claimant can show good cause for his failure to appeal timely. *See* 430 CMR 4.14. Since the claimant's appeal was submitted more than thirty days beyond the date the notice was issued, 430 CMR 4.15 is applicable. That regulation provides that "[t]he 30 day limitation on filing a request for a hearing shall not apply where the party establishes" one of the following:

- (1) A Division employee directly discouraged the party from timely requesting a hearing and such discouragement results in the party believing that a hearing is futile or that no further steps are necessary to file a request for a hearing;
- (2) The Commissioner's determination is received by the party beyond the 30 day extended filing period and the party promptly files a request for a hearing;

- (3) The Commissioner's determination is not received and the party promptly files a request for a hearing after he or she knows that a determination was issued;
- (4) An employer threatened, intimidated or harassed the party of a witness for the party, which resulted in the party's failure to file for a timely hearing.

In this case, circumstances (1) and (4) are not applicable. We must address only provisions (2) and (3) from the regulation.

As indicated in the review examiner's decision, the claimant argued, in effect, that he received the notice on December 12, 2016, when he was first able to view it. However, we think that the notice was received by the claimant soon after it was issued by the agency. The claimant received notification of the July 13, 2016, determination via his preferred method of communication, which was e-mail. *See Consolidated Findings of Fact ## 2 and 3.* The notice was sent to his inbox. The claimant clearly saw that it was in his inbox, as he viewed the inbox three times on July 13, 2016. *Consolidated Finding of Fact # 4.* Therefore, we conclude that the determination was received by the claimant within the thirty-day (or even within the initial ten-day) filing period. Given that it was received timely, provision (2) would not apply.

However, for purposes of this decision, even if we were to accept that he did not receive the notice soon after its issuance, we think that the claimant also failed to show that circumstance (3) applies to his situation. On July 13, 2016, when the claimant was checking his inbox, and when he was trying to open the determination, he was aware that something had happened on his claim. Even if he thought that it may have been a mistake, or that it would work itself out, there is no question that he was aware that some kind of notice or determination had been sent to him. When he viewed his inbox in July of 2016, the document sent to him had a general name of "NonMonDetermination" and the action required for it was "Review." *See Exhibit # 18.* Thus, even if he couldn't view it at the time, and even if that means that he did not "receive" it, he was fully aware of the determination's existence. Rather than write a letter, call the DUA, or go to a local career center office, the claimant did nothing. *Consolidated Finding of Fact # 4.* He did not act promptly after he learned that a determination existed on his claim. Therefore, he has not carried his burden to show that circumstance (3) applies.

We, therefore, conclude as a matter of law that the review examiner's initial conclusion that the claimant has not shown justification for the late appeal pursuant to 430 CMR 4.15 is supported by substantial and credible evidence and free from error of law.

The review examiner's decision is affirmed. The claimant's appeal of the July 13, 2016, determination is dismissed.

**N.B.:** The Board has reviewed the substance of the July 13, 2016, determination. From what the Board can gather from the record, the issue relates to benefits paid to the claimant for the week of December 1, 2013. The DUA created an issue for this week in August of 2014. Then, the agency issued a determination on the issue on July 13, 2016. This determination created an overpayment of \$509.00 for the week of December 1, 2013. Nothing in the record, or in the DUA's UI Online computer system suggests that the overpaid benefits were due to the claimant's fault, fraud, or misrepresentation. Consequently, it appears that the July 13, 2016, determination was issued contrary to the provisions of G.L. c. 151A, § 71. The Board brought this issue to the attention of the DUA, and the Board has been informed that the underlying issue has been redetermined and voided. If the claimant has further questions as to what this means for his claim, he may call the DUA's Problem Resolution Unit at (617) 626-5400 or the DUA's Overpayment Unit at (617) 626-6300.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - September 15, 2017**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Judith M. Neumann, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT  
COURT OR TO THE BOSTON MUNICIPAL COURT  
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:  
[www.mass.gov/courts/court-info/courthouses](http://www.mass.gov/courts/court-info/courthouses)

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

SF/rh