

Claimant did not have good cause for late appeal, where she had called DUA, was told of her disqualification and right to file an appeal, but she did not timely do so. Similarly, the claimant did not have justification for filing an appeal of her denial of a late appeal.

**Board of Review
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Issue ID: 0026 8127 36

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny the claimant a hearing on a Notice of Disqualification issued by the DUA on August 10, 2018. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant filed a claim for unemployment benefits with the DUA, and her claim was determined to be effective July 8, 2018. The DUA issued her two Notices of Disqualification, on August 10, 2018,¹ and September 13, 2018.² The claimant did not submit timely appeals in response to either notice. However, a hearing was scheduled to address the reasons for her late appeals. Following the hearing, attended by the claimant, the review examiner affirmed the agency's initial determination to deny the claimant a hearing on the merits of the August 10 Notice.

A hearing on the merits was denied after the review examiner determined that the claimant did not have justification for her late appeal of the Notice issued on September 13, 2018, and, thus, was not entitled to a hearing on her underlying separation, pursuant to G.L. c. 151A, § 39(b), and 430 CMR 4.15. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to take additional evidence from the claimant and clarify some of her initial findings of fact. The claimant participated in the remand hearing. Thereafter, the review examiner issued her 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 decision, which concluded that the claimant is not entitled to a hearing on the merits of her disqualification, is supported by substantial and credible evidence and is free from error of law.

¹ The Notice issued on August 10, 2018, (August 10 Notice), which was adjudicated as DUA Issue ID 0026 1944 19, disqualified the claimant from benefits based on her separation from employment, pursuant to G.L. c. 151A, § 25(e)(2). *See* Hearings Exhibit # 5.

² The Notice issued on September 13, 2018, (September 13 Notice) related to a determination that the claimant did not timely appeal the August 10 Notice.

Findings of Fact

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

1. On 8/10/18, a Notice of Disqualification was electronically sent to the claimant. The claimant had initially requested that all correspondence be sent to her electronically. The claimant checked her UI online inbox frequently. She did not know how to access the correspondence that was being sent.
2. The claimant filed an appeal electronically on 9/6/18 with the assistance of her daughter.
3. On 8/23/18, at 3:31 PM the claimant spoke to a DUA Staff member and was informed of the Notice of Disqualification in question. She was also informed of her right to appeal that disqualification. (Remand Exhibit 4, page 3)
4. On 8/23/18, at 3:35 PM the same DUA Staff member updated the claimant's home phone field. (Remand Exhibit 4, page 2)
5. On 3/29/19, at 9:21 AM, another DUA Staff member updated the claimant's contact information to US Mail at the claimant's request. The Staff member updated the claimant's mailing address at this time. (Remand Exhibit 4, page 4)
6. On 9/13/18, a Determination on Timeliness of Appeal was electronically sent to the claimant. This determination found no good cause to consider the appeal timely.
7. The claimant received this determination but did not realize she should appeal it because she had already been found ineligible.
8. After getting assistance from her daughter the claimant appealed the determination of 9/13/18. The claimant's request for a hearing was postmarked 4/4/19.

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 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 that the claimant has not shown that she is entitled to a hearing.

As correctly noted in the decision, the claimant did not timely appeal either of the notices sent to her by the DUA. G.L. c. 151A, § 39(b), provides, in pertinent part, as follows:

Any interested party notified of a determination may request a hearing within ten days after delivery in hand by the commissioner's authorized representative, or mailing of said notice, unless it is determined . . . that the party had good cause for failing to request a hearing within such time. In no event shall good cause be considered if the party fails to request a hearing within thirty days after such delivery or mailing of said notice. . . .

Under G.L. c. 151A, § 39(b), the claimant has the burden of proof to establish that she had "good cause" for requesting a hearing between 11 and 30 days after the underlying determination was issued pursuant to 430 CMR 4.14, which provides, in pertinent part, as follows:

The Commissioner may extend the ten day filing period where a party establishes to the satisfaction of the Commissioner or authorized representative that circumstances beyond his or her control prevented the filing of a request for a hearing within the prescribed ten day filing period.

The regulation sets forth 12 different reasons which the DUA considers "good cause" for filing an appeal between 11 and 30 days after a determination is issued.

If a hearing is requested beyond thirty days from the determination, the claimant bears the burden of proof to establish "justification" for her untimely appeal, a much stricter standard governed by 430 CMR 4.15, which provides four specific situations when the 30-day limitation will not apply:

- (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 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 or a witness for the party, which resulted in the party's failure to file for a timely hearing.

With regard to the claimant's appeal of the September 13 Notice, she mailed her appeal on April 4, 2019. The appeal was more than six months late, so the claimant would have to establish "justification" for her untimely appeal in order to receive a hearing on the merits of her separation. The review examiner found the claimant received the Notice but had not realized she should appeal it, because she had already been found ineligible. This does not fall within one of the four exceptions constituting justification, as set forth in 430 CMR 4.15. We, therefore, affirm the review examiner's conclusion that the claimant did not have justification for filing her late appeal of the September 13 Notice.

As to Issue ID 0026 1944 19, which was the determination disqualifying the claimant from unemployment benefits based on her separation, we remanded this back to clarify the claimant's communications with the DUA in August and September, 2018. Initially, the review examiner found that the claimant had requested that DUA correspondence be sent to her by U.S. mail on August 23, 2018, and that the September 13 Notice was sent to her home address by mail. *See* Remand Exhibit # 1, (former) Findings 3–4.

After remand, the review examiner found that the claimant spoke with a DUA representative on August 23, 2018, the DUA employee updated the claimant's home telephone number, told the claimant about the August 10 Notice, and informed the claimant she had a right to appeal that Notice. The September 13 Notice was sent to the claimant electronically. Finally, the review examiner found that the claimant spoke to another DUA representative on March 29, 2019, at which time the claimant requested the DUA employee change her correspondence preference with DUA from electronic to U.S. mail.

Because the review examiner found the claimant failed to establish justification for her late appeal of the late appeal determination, her initial decision did not address the claimant's untimely appeal of the August 10 Notice. We note that where a DUA employee told the claimant of the disqualification and her right to appeal on August 23, 2018, and the claimant waited more than ten days to file her appeal on September 6, 2018, the claimant's untimely appeal does not satisfy any of the 12 criteria for "good cause" enumerated under 430 CMR 4.14.

We, therefore, conclude as a matter of law that the review examiner's decision to deny the claimant a hearing on the merits of the August 10, 2018, Notice of Disqualification is supported by substantial and credible evidence and free from error of law.

The review examiner's decision is affirmed. The claimant is not entitled to hearing on the merits of her disqualification.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 30, 2019



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, 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

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.

JPC/rh