

**Because the claimant timely received the applicable Notice of Disqualification from the DUA, both via U.S. Mail and via electronic correspondence, there is no justification for considering his appeal to be timely under 430 CMR 4.15.**

**Board of Review  
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**Issue ID: 0030 0078 95**

## **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 a hearing on, and to dismiss the claimant's appeal of, a determination issued by the DUA on January 9, 2019. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant filed a claim for benefits, and the claim was determined to be effective March 26, 2017. On January 9, 2019, the DUA sent the claimant a Notice of Disqualification, which informed him that he had not accurately reported his earnings during the benefit year of his unemployment claim and, thus, was overpaid benefits. The claimant appealed the January 9, 2019, notice on March 14, 2019. Because the appeal was not timely, the DUA dismissed his appeal. The claimant then appealed the dismissal to the DUA hearings department. Following a hearing on the merits attended by the claimant, the review examiner affirmed the agency's initial determination and dismissed the appeal of the January 9, 2019, determination.

The appeal was dismissed after the review examiner determined that the claimant had not shown justification for the late appeal 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 accepted the claimant's application for review and remanded the case to the examiner to take additional evidence regarding the claimant's preferred method of correspondence with the DUA, as well as the reasons why the claimant did not timely appeal the January 9, 2019, determination. The claimant attended 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 to dismiss the claimant's appeal is supported by substantial and credible evidence and is free from error of law, where the review examiner's consolidated findings of fact show that the claimant received the DUA's January 9, 2019, determination through the U.S. Mail in a timely manner, but the claimant did not appeal it for several months.

## Findings of Fact

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

1. The claimant filed an unemployment claim effective March 26, 2017. The claimant elected to receive correspondence via U.S. Mail.
2. The claimant had no history of difficulty receiving mail at his address. He regularly received correspondence from the Department of Unemployment Assistance (DUA) via U.S. Mail.
3. The claimant supplied DUA with his email address when he filed his claim.
4. The claimant regularly received an email from DUA alerting him to check his UI Online Inbox for correspondence.
5. The claimant suffers from bipolar disorder and has been treated by medical professionals regularly for the last several years with therapy and medication.
6. The claimant and his wife have had difficulties with her adult son who suffers from depression and other mental health issues. Beginning in December 2018, and over the next several months, the claimant's stepson came to live with him, his wife and his younger son. During that time, the stepson was in and out of their home and his mental health issues caused increased stress and tension for the claimant and his family. As a result, the claimant was not focused on himself and did not always take his bipolar medication regularly.
7. On January 9, 2019, the Department of Unemployment Assistance (DUA) issued the claimant a Notice of Disqualification (the January Notice). The January Notice found the claimant had failed to accurately report his gross earnings for weeks in which he claimed benefits. It further stated he was overpaid in the total amount of \$15,459.00.
8. On January 9, 2019, the DUA emailed the claimant: "You have time sensitive correspondence waiting in your UI Online Inbox that may require a response. Failure to respond to time sensitive requests for information may result in a loss or denial of your unemployment benefits. To view the correspondence, log into your UI Online account at: [www.mass.gov/DUA/UIOnline](http://www.mass.gov/DUA/UIOnline). To access correspondence, select 'Claimant Inbox' from the Claimant Home screen. Then, select 'Search' to find and view the correspondence. Note: Correspondence on the UI Online system is stored as a PDF file. To view online correspondence, you will need Adobe Reader. For a free download of the latest Adobe Reader version, visit <http://get.adobe.com/reader>."

9. The claimant received the email notification from DUA, but did not check his UI Online inbox as instructed. The claimant was stressed due to his personal issues at home and was not taking his bipolar medication regularly.
10. The claimant first saw the January Notice on or about January 12, 2019.
11. On or about January 12, the claimant received the January Notice in the mail and quickly read it. The claimant did not read it in its entirety. He saw his former employer's name on the January Notice and thought it was a mistake because he was not collecting at the time and no longer worked for that employer. He had not collected unemployment benefits since October 2017.
12. The claimant did not appeal the January Notice because he did not read it carefully enough to understand its importance.
13. On February 11, 2019, the DUA emailed the claimant: "You have time sensitive correspondence waiting in your UI Online Inbox that may require a response. Failure to respond to time sensitive requests for information may result in a loss or denial of your unemployment benefits. To view the correspondence, log into your UI Online account at: [www.mass.gov/DUA/UIOnline](http://www.mass.gov/DUA/UIOnline). To access correspondence, select 'Claimant Inbox' from the Claimant Home screen. Then, select 'Search' to find and view the correspondence. Note: Correspondence on the UI Online system is stored as a PDF file. To view online correspondence, you will need Adobe Reader. For a free download of the latest Adobe Reader version, visit <http://get.adobe.com/reader>."
14. On February 11, 2019, the claimant created a new password and logged-into his UI Online account after receiving the email notification from DUA. The claimant quickly viewed his inbox at 9:32am and saw a monthly statement showing he owed money to DUA. The claimant was unsure of why he would be receiving a statement that he owed money.
15. In February, the claimant was focused on his family situation as he and his wife were overwhelmed with dealing with the effects of his step-son's mental health issues. As a result, the claimant did not take the time to carefully read the January Notice or contact DUA for assistance in understanding the monthly statement.
16. The claimant did not access his UI Online inbox at any time between December of 2017 and February 11, 2019.
17. On March 13, the DUA emailed the claimant that he had time sensitive correspondence in his UI Online Inbox.

18. On March 13, 2019, the claimant viewed his UI Online Inbox and read a monthly statement of account that stated he owed over \$17,000. This was the first time he viewed his UI Online Inbox since February 11.
19. On March 13, the claimant called DUA and spoke with a representative. The DUA representative explained the appeal process to the claimant and explained to him how to file an appeal online.
20. On March 14, 2019, the claimant appealed the January notice of disqualification, the 64<sup>th</sup> day after issuance.

#### Credibility Assessment:

The claimant's testimony was generally consistent and credible at both hearings. The claimant provided more detailed answers at the remanded hearing in response to specific questions requested by the Remand order. The additional testimony clarified that the claimant had requested to receive correspondence by U.S. Mail.

Although the claimant initially testified to viewing the January Notice of Disqualification on February 11, since the claimant received the disqualification in January, this memory is attributed to his reading of the disqualification in January.

The claimant testified to having no difficulty receiving mail at his residence. He testified he could not remember receiving the mailed January Notice, but must have. DUA presumes the U.S. Postal Service delivers mail within 3 days unless there are facts to conclude otherwise. Lacking substantial and credible evidence the U.S. Postal Service failed to timely deliver the January 9 Notice, it is concluded it was delivered on or about January 12, 2019.

I considered whether the claimant's bipolar disorder contributed to his late appeal. The claimant was unable to testify with any certainty that it did and presented no other evidence regarding his medical condition. As such, it cannot be concluded the claimant's bipolar disorder contributed to his late appeal of the January 9 Notice.

#### 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 original 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we conclude that the review examiner's decision is free from error of law. Therefore, the claimant's late appeal should be dismissed.

There is no dispute that the claimant appealed the January 9, 2019, Notice of Disqualification late. He appealed the determination on March 14, 2019, which is far beyond the ten-day appeal period provided for in G.L. c. 151A, § 39(b). The appeal date is 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 or 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. The claimant made no contention at either hearing that someone discouraged him from filing an appeal. Therefore, we address only provisions (2) and (3) from the regulation.

Both provisions relate to whether, and when, the claimant received the January 9, 2019, determination. In her decision, the review examiner focused on the claimant's electronic receipt of the determination. However, there was some indication from his testimony and from the DUA's records that the claimant had not initially requested electronic correspondence from the DUA. If the claimant did not receive the determination in his preferred method of correspondence, then his burden to show justification may be met. Thus, the Board remanded for additional evidence about how the claimant requested correspondence, and whether he received correspondence in his preferred manner.

During the remand hearing, the record was clarified that the claimant initially requested correspondence via U.S. Mail. Consolidated Finding of Fact # 1. It was also made clear that the claimant received the January 9, 2019, determination via U.S. Mail. Consolidated Finding of Fact # 9. Because the determination was issued by the DUA on January 9, 2019, the claimant presumably received it a few days later, on or about January 12, 2019. Consolidated Finding of Fact # 10. Thus, he had ample opportunity to timely appeal the determination. Because the claimant timely received the determination, he has not met the circumstance provided for in 430 CMR 4.15(3), and, because he received it prior to the thirty-day extended filing period, he also does not meet the circumstance provided for in 430 CMR 4.15(2). The claimant has not shown justification for the late appeal.<sup>1</sup>

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<sup>1</sup> We note that some of the review examiner's consolidated findings of fact could be read to imply that the claimant's personal circumstances and medical conditions contributed to his failure to timely appeal the January 9, 2019, determination. *See* Consolidated Findings of Fact ## 5, 6, and 15. Such reasons, while potentially relevant

We, therefore, conclude as a matter of law that the review examiner's decision to dismiss the appeal of the January 9, 2019, Notice of Disqualification is supported by substantial and credible evidence and free from error of law, because the claimant, who received the January 9, 2019, determination in a timely manner, has not shown justification for the late appeal.

The review examiner's decision is affirmed. The claimant's request for a hearing on the January 9, 2019 determination is denied, and the appeal is dismissed.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - July 25, 2019**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Michael J. Albano 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

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under the good cause standard contained within 430 CMR 4.14, are not relevant to our justification analysis under 430 CMR 4.15.