

The claimant was aware of an overpayment issue on his claim for several years before he decided to appeal it, so there is no justification for his late appeal.

**Board of Review
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Issue ID: 0031 0104 83

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's request for a hearing. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The DUA issued a Notice of Redetermination and Overpayment to the claimant on August 5, 2011. The claimant appealed the determination to the DUA hearings department on May 7, 2019. On May 31, 2019, the agency determined that pursuant to G.L. c. 151A, § 39(b), the claimant did not have justification for his late appeal. The claimant appealed the determination to the DUA hearings department on October 2, 2019. 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 in a decision rendered on December 13, 2019. We accepted the claimant's application for review.

The claimant's request for a hearing was denied after the review examiner determined that he did not have justification for his late appeal on May 7, 2019, as meant under 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 obtain additional evidence pertaining to the agency's attempts to recover money from the claimant to apply to his overpayment. The claimant participated in 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 decision, which concluded that the claimant's request for a hearing would not be granted because he did not have justification for his late appeal, is supported by substantial and credible evidence and is free from error of law, where the claimant's testimony during the remand hearing indicates that he was aware of the underlying overpayment issue as early as 2012.

Findings of Fact

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

1. The claimant had a 2010 claim for unemployment insurance benefits. The effective date of this claim is 4/18/10. The end date of this claim is 4/16/11.
2. The claimant had a 2011-01 claim for unemployment insurance benefits. The effective date of this claim is 4/17/11. The end date of this claim is 4/14/12.
3. The claimant had a 2012-01 claim for unemployment insurance benefits. The effective date of this claim is 4/22/12. The end date of this claim is 4/20/13.
4. The DUA created a Notice of Redetermination, Overpayment, and Compensable Week Disqualification (Notice X). Notice X is dated 8/05/11. Notice X indicates that the claimant is not entitled to benefits for the period 6/05/10 through 4/16/11. Notice X indicates that the claimant is overpaid \$19,327.00.
5. The DUA created a Notice of Redetermination, Overpayment, and Compensable Week Disqualification (Notice Z). Notice Z is dated 8/05/11. Notice Z indicates that the claimant is not entitled to benefits for the week ending 3/19/11. Notice Z indicates that the claimant is overpaid \$420.00.
6. Notice Z reads, in part, "You may request a hearing on this redetermination, overpayment, and compensable week disqualification. This redetermination will become final unless (1) you request a hearing within ten calendar days after the date of mailing or delivery in hand, or (2) you request a hearing within eleven to thirty calendar days after the date of mailing or delivery in hand and it is established that such delay was for good cause."
7. The claimant reported a mailing address to the DUA (Address 1). Address 1 is in [Town A], MA. The claimant never reported another mailing address to the DUA after he reported Address 1.
8. The DUA mailed Notice Z to Address 1 on 8/05/11. Address 1 is the address that the DUA had on file for the claimant when it mailed Notice Z to the claimant.
9. The claimant received Notice Z within thirty days from its mail date.
10. The DUA recovered money from the claimant via a third party intercept as follows: \$245.00 in 2013, \$201.00 in 2016, \$1,574.12 in 2018, and \$829.92 in 2019. When these intercepts happened, the claimant understood that there was an overpayment issue on a prior claim. The claimant did not contact the DUA to find out why his taxes were being intercepted.
11. The claimant certified for benefits for some weeks on his 2011-01 claim. The DUA withheld the claimant's benefits payments for these weeks and applied them to the claimant's overpayment balance. When this happened, the claimant understood that there was an overpayment issue on his claim.

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13. The claimant appealed Notice Z in May 2019. The claimant's appeal is postmarked 5/07/19.

Credibility Assessment:

In [the] hearing, the claimant testified that he did not receive Notice X or Notice Z, and that he did not know about the overpayment until the tax intercept that happened in 2019. Given the totality of the testimony and evidence presented, the claimant's testimony in its entirety is not credible and it is concluded that the claimant received Notice Z and knew about the overpayment in the appeal window. In the hearing, the claimant testified that he performed certifications on the 2011-01 and 2012-01 claims; he did not receive any benefits via those certifications; and that the benefits for those weeks were supposed to be subtracted from his overpayment balance. This testimony diminished the claimant's overall credibility because it is a clear indicator that the claimant indeed knew about the overpayment years before the 2019 tax intercept, as he alleged. Furthermore, the record compels a conclusion that the claimant indeed knew about the overpayment before the 2019 tax intercept because his taxes were intercepted in 2013, 2016, 2018, and 2019. It is unlikely that the claimant was unaware of these intercepts.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We set aside the portion of Consolidated Finding # 12, which refers to the claimant's 2011-01 claim. In light of Consolidated Finding # 11, which also refers to the benefits the claimant requested on his 2011-01 claim, and the credibility determination mentioning the benefit requests on both the 2011 and 2012 claims, we believe the reference to the 2011-01 claim in Consolidated Finding # 12 is a typo, and the review examiner meant to refer to the 2012-01 claim. We also set aside the portion of Consolidated Finding # 5, which names the August 5, 2011, notice at issue here as a Notice of Redetermination, Overpayment, and Compensable Week Disqualification. The documentation in the record establishes that the determination at issue here is a Notice of Redetermination and Overpayment, as the overpayment was due to an error without fraudulent intent. In adopting the remaining findings, we deem 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.

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. . . .

Also relevant in this case is 430 CMR 4.15, which provides, in pertinent part, as follows:

- (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.

We remanded this case to the review examiner to afford the claimant an opportunity to review the DUA records on which the review examiner based his credibility determination after the initial hearing was held on October 21, 2019. Prior to the remand hearing, the DUA sent the claimant documentation pertaining to the claimant's benefit requests on his 2011 and 2012 claims, and the agency's tax intercepts of the claimant's tax refunds in 2013, 2016, 2018, and 2019. The review examiner reviewed these documents with claimant during the remand hearing, and the claimant was given an opportunity to provide testimony regarding the content of the documents. After hearing the claimant's testimony and reviewing the documentation in the record, the review examiner determined that, despite his assertions to the contrary, the claimant timely received the Notice of Redetermination and Overpayment that the agency sent him on August 5, 2011. The review examiner's credibility assessment is within the scope of his role as a fact finder, and, because we find it is reasonable in relation to the evidence presented, we will not disturb it on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996).

When a party's appeal to the hearings department is received more than 30 days after a determination is issued, the party may establish justification for the late appeal under four specific circumstances. One circumstance involves receiving the determination beyond the 30-day extended filing period, and another circumstance is when the determination is not received, and the party promptly files an appeal after he or she becomes aware of the determination. *See* 430 CMR 4.15(2) and 4.15(3). Here, the claimant's only contention as to why he didn't timely appeal the Notice of Redetermination and Overpayment is that he wasn't aware of it until his tax refund was intercepted in 2019. In light of the review examiner's determination that the claimant timely received the Notice of Redetermination and Overpayment at the time that it was issued in

2011, the claimant has not established that he had justification for his late appeal, because he wasn't aware of it at the time it was issued. We further note that, even assuming, *arguendo*, that the claimant did not receive the Notice of Redetermination and Overpayment at the time it was issued on August 5, 2011, the claimant's own testimony at the remand hearing establishes that the claimant was aware of the overpayment as early as 2012, when he began requesting benefits on his 2011 claim after a break in signing. Since the claimant did not try to dispute the overpayment via an appeal at the time that he states that he became aware of it eight years ago, he has not established justification for his late appeal in 2019.

We note that the record before us establishes that the agency issued a determination on May 31, 2019, stating that the claimant did not have justification for his late appeal on May 7, 2019, and the claimant did not appeal that determination until October 2, 2019. The claimant was not questioned as to why he was late appealing the May 31st determination, and there are no consolidated findings regarding this issue. However, even if we assume, *arguendo*, that the claimant had justification for this second late appeal, the result of this decision would not change, as the claimant did not have justification for his failure to timely appeal the original determination issued on August 5, 2011.

The review examiner's decision is affirmed. The claimant's request for a hearing on the Notice of Redetermination and Overpayment issued to him August 5, 2011, is denied.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 29, 2020



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
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until June 1, 2020¹. If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day following the thirtieth day.

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

¹ See Supreme Judicial Court's Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 4-27-20.

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.

SVL/rh