

Claimant established justification for her late appeal within the meaning of 430 CMR 4.15(2), where she could not access the underlying disqualifying determination on her iPhone, she tried to obtain help from DUA, and promptly appealed once she could read it. The Board further held that the claimant had good cause for her late appeal under 430 CMR 4.14(10) and (12), because the delay was due to incapacitating mental health issues.

**Board of Review
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Issue ID: 0033 7690 36

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), which concluded that the claimant did not have justification for failing to timely request a hearing on a determination issued on October 14, 2019. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

On October 14, 2019, the DUA sent the claimant a Notice of Disqualification which stated that she was not eligible for benefits beginning October 6, 2019, for failing to attend a required Reemployment Services and Eligibility Assessment (RESEA). The claimant appealed that determination on January 30, 2020. The DUA then sent the claimant another Notice of Disqualification on February 29, 2020, informing her that she did not have justification for failing to timely appeal the October 14, 2019, determination. On March 18, 2020, the claimant appealed the February 29, 2020, determination and attended the hearing. In a decision rendered on April 10, 2020, the review examiner affirmed the agency determination, concluding that the claimant did not have justification for failing to timely request a hearing, pursuant to G.L. c. 151A, § 39(b), and 430 CMR 4.15. Thus, she was not entitled to a hearing on the October 14, 2019, determination. The review examiner further concluded that because the claimant did not have justification for failing to timely file the October 14, 2019, determination, she need not consider the timeliness of the claimant's appeal of the February 29, 2020, determination.

The Board accepted the claimant's application for review. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, and her counsel's memorandum of law.

The issues before the Board are: (1) the review examiner's conclusion that the claimant did not have justification pursuant to 430 CMR 4.15, for the late appeal of the October 14, 2019, determination, is supported by substantial and credible evidence and is free from error of law; and (2) whether the claimant had good cause pursuant to 430 CMR 4.14, for failing to timely appeal the February 29, 2020, determination.

Findings of Fact

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

1. On 10/14/19, a Notice of Disqualification was electronically sent to the claimant as the claimant had requested when she filed her claim.
2. The claimant received this notice. She attempted to open the notice on her phone because she did not have a computer at the time. The claimant was unable to open it; she attempted to contact the Department by telephone to no avail. She did not attempt to go into an unemployment office or career center for help.
3. A friend subsequently told the claimant she needed to keep trying. Eventually the claimant did get in and filed a late appeal. The appeal was postmarked 1/30/20.
4. On 2/29/19, a Determination on Timeliness of Appeal was electronically sent to the claimant. This determination found no justification to consider the appeal timely.
5. The claimant received this determination but was frantic with her own personal depression; she did not send out the appeal.
6. The claimant subsequently appealed the determination of 2/29/20. The claimant's request for a hearing was postmarked 3/18/20.

Ruling of the Board

In accordance with our statutory obligation, we review the record and decision made by the review examiner to determine: (1) whether the 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 findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is not entitled to a hearing on the merits of the October 14, 2019, determination issued by the DUA.

The claimant did not timely file appeals of two DUA determinations. We therefore look to the applicable statute and regulations to determine whether the claimant had justification or good cause for this failure.

Pursuant to G.L. c. 151A, 39(b), the claimant had ten days to appeal the October 14, 2019, notice of disqualification. Since the claimant did not file the appeal until three months after the issuance of the underlying determination, the standard is whether there is justification for considering the appeal to be timely, rather than whether there is good cause for the late appeal. *Compare* 430 CMR 4.14 (allowing hearing on late appeal if appeal is filed within thirty days of issuance of

determination and good cause is shown) *with* 430 CMR 4.15 (allowing hearing on late appeal if appeal filed after thirty days and justification shown). 430 CMR 4.15 provides:

The 30 day limitation on filing a request for a hearing shall not apply where the party establishes that:

- (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.

Per the language of this regulation, the claimant has the burden to show that one of these four circumstances is true. We need not consider (1) and (4), because the findings of fact do not support a conclusion that those circumstances are at all applicable. Because 430 CMR 4.15(3) contemplates that the determination is not received ever, we also do not believe that this provision applies to the facts here. Given the record before us, the question presented to the Board is whether, under circumstance (2), the claimant received the notice of disqualification "beyond the 30 day extended filing period and [she] promptly file[d] a request for hearing." As set forth below, we believe circumstance (2) applies to the instant matter.

The review examiner found that at the time the claimant filed her claim, she selected electronic correspondence as the means by which the DUA should communicate with her. The review examiner also found the October 14, 2019, notice of disqualification was electronically sent to the claimant and was put into her UI Online inbox by the DUA. However, the review examiner further found that the claimant, who did not possess a computer at the time, could not open the notice on her iPhone. As a result, the claimant could not access and read the notice, and thereby understand her legal rights and obligations relative to an appeal.

Normally, we would conclude, as the review examiner did, that the depositing of the notice into the UI Online inbox constitutes receipt of the notice. When a claimant has free access to her account, there is no reason why she cannot access it, read a determination, and then take appropriate action in response. Even as in the case here, where a claimant may have trouble reading a document (it may not open properly, or it is in a different language), the claimant would still be aware of the existence of a document and it would be incumbent upon the claimant to seek out assistance from the DUA regarding its content. The findings and record before us show that the claimant made diligence efforts to obtain such assistance. The review examiner found that the claimant attempted to contact the DUA by telephone to no avail. At the hearing, the claimant testified that she made multiple calls to the agency to learn the contents of the notice but was

unable to get through.¹ The record also indicates that, during this time period, the claimant continued to make persistent efforts to electronically access the determination. Ultimately with the assistance of a friend, the claimant was able to open and read the determination and file her appeal. There is nothing in the record or findings which suggests the claimant did not promptly file her appeal upon gaining access to the same.

The claimant's situation and actions persuade us that the review examiner's decision is not in accord with the spirit of 430 CMR 4.15, the prior decisions of this Board or with the mandate under G.L. c. 151A, § 74, to liberally interpret the unemployment law. In prior decisions under G.L. c. 151A, 39(b), and the relevant regulations, this Board has consistently held claimants to a standard of reasonability. *See, e.g.*, Board of Review Decision 0029 2124 94 (June 20, 2019); Board of Review Decision 0025 6888 02 (September 6, 2018). We believe the claimant has met this standard. This technological issue which prevented the claimant from accessing the determination notice was beyond her control. Thereafter, she took reasonable but unsuccessful steps to try to find out what the October 14, 2019, determination said, and to promptly appeal the determination once she read it. Under these circumstances, we believe the claimant has established justification for her late appeal within the meaning of 430 CMR 4.15(2).

We next consider the claimant's late appeal of the February 29, 2020, DUA determination. The claimant appealed this determination nine days late. Since the appeal was filed within thirty days of the determination date, we apply the good cause standard set forth at 430 CMR 4.14. This regulation provides a lengthy list of circumstances which could constitute good cause for failing to timely an appeal. Among these circumstances is "[a]n inability because illiteracy or a psychological disability to understand that a request for a hearing must be filed within the ten day filing period." 430 CMR 4.14(10). The regulation also includes a catch-all provision, providing that good cause may be found where the claimant provides evidence of "[a]ny other circumstances beyond a party's control which prevented the filing of any timely appeal. 430 CMR 4.14(12). We believe both of these provisions are applicable to the claimant's circumstances.

The review examiner found that the claimant did not send out an appeal for the February 29, 2020, determination because the claimant was frantic with personal depression. This finding is supported by the letter which was submitted to the Board on appeal, from the claimant's psychiatrist. In this letter, the psychiatrist states that the claimant suffers from mental health issues, the symptoms of which include disorganization and difficulties with concentration, attention, motivation and perseverance. The psychiatrist also states her opinion that the claimant's failure to timely file her appeal is directly related to the claimant's psychiatric disabilities. The claimant's mental health issues are a circumstance beyond her control, which appears to have hindered her ability to understand the need to timely file an appeal. On the record before us, we conclude the claimant has shown evidence of good cause within the meaning of 430 CMR 4.14 (10) and (12), for failing to timely file the February 29, 2020, notice of determination.

We, therefore, conclude as a matter of law that because the claimant's circumstances and actions satisfy the conditions of 430 CMR 4.15(2), the review examiner's decision finding no justification for the late appeal of the October 14, 2019, determination, is not free from error of law. We further

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

conclude that the claimant had good cause under 430 CMR 4.14 (10) and (12), for failing to timely file an appeal of the February 20, 2020, notice of determination.

The review examiner's decision is reversed. A hearing on the October 14, 2019, determination should be scheduled as soon as possible.

BOSTON, MASSACHUSETTS
Fitzgerald, Esq.
DATE OF DECISION - May 29, 2020



Paul T.
Chairman



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

**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 July 1, 2020². 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

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.

PTF/rh

² See Supreme Judicial Court's Second Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 5-26-20.