

The claimant did not receive the disqualifying IDV determination because it was issued in connection with a claim that he did not file and was mailed to Indiana when he resided in Massachusetts. The review examiner properly concluded that claimant had established justification for filing his IDV determination late within the meaning of G.L. c. 151A, § 39(b), and 430 CMR 4.15. Held the review examiner could not then deny the claimant a hearing on the merits because he had appealed a subsequent determination issued under G.L. c. 151A, § 39(b), after the filing deadline, as the claimant was not afforded adequate notice and an opportunity to be heard on this separate question.

**Board of Review
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Issue ID: 0063 9375 76

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 unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant filed a claim for unemployment benefits with the DUA, effective September 27, 2020. On December 19, 2020, the DUA issued a determination denying benefits pursuant to G.L. c. 151A, § 25(a), based on the claimant's failure to present proper identification (IDV determination). On September 13, 2021, the DUA issued a determination denying a hearing on the appealed IDV determination on the ground that the claimant had filed the hearing request after the statutory deadline without showing justification for filing a late appeal (Late Appeal). The claimant then requested a hearing on the Late Appeal determination, but this was also filed after the statutory deadline. Following a hearing, attended by the claimant, the review examiner affirmed the agency's Late Appeal determination in a decision rendered on July 2, 2022.

The review examiner concluded that, pursuant to G.L. c. 151A, § 39(b), and 430 CMR 4.14.–4.15, the claimant was not entitled to a hearing on the merits of the IDV determination, because, although he established justification for submitting a late appeal of the IDV determination, he did not establish justification to file a hearing request on the Late Appeal determination after the statutory deadline.

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, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision to deny the claimant a hearing on the merits of his IDV determination is supported by substantial and credible evidence and is free from error of law, even though he had demonstrated justification for failing to timely appeal that determination.

Findings of Fact

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

1. A claim for unemployment was filed with the Department of Unemployment (DUA) under the claimant's name on October 7, 2020, which was determined to be effective September 27, 2020, with a weekly benefit amount of \$823. The claim was filed with an Indiana address.
2. The claimant elected to receive correspondence from the DUA by United States Mail.
3. On December 19, 2020, the DUA issued the claimant a Massachusetts General Laws Chapter 151A, Section 25(a) Notice of Disqualification that read, in part, "You have failed without good cause to present proper identification, and therefore do not meet the filing and registration benefits". The Notice also read, in relevant part, "This determination will become final unless: (1) You request a hearing within ten calendar days after the date of the mailing; or (2) You request a hearing within eleven to thirty calendar days after the date of mailing and it is established that such delay was for good cause. In limited circumstances, you may request a hearing after thirty calendar days".
4. The claimant did not file the unemployment claim with an effective claim date of December 19, 2020.
5. The claimant did not receive the Section 25(a) Notice of Disqualification as the address listed on the claim was Indiana, when the claimant resided in Massachusetts.
6. The claimant became aware of the Section 25(a) Notice of Disqualification on February 10, 2021, when he attempted to file a claim for unemployment benefits, but was unable to access the account. The claimant immediately called and spoke to a DUA representative, who assisted him with accessing his account and changing the information in the account, as well as instructing the claimant an appeal needed to be filed, which was filed the same day.
7. On September 13, 2021, the DUA issued the claimant a Notice of Disqualification denying the claimant's request for a hearing regarding his February 10, 2021, appeal.
8. The claimant filed an appeal pertaining to the September 13, 2021, Notice by United States Mail with a postmarked date of October 27, 2021. The claimant did not file his appeal within 10 days of the September 13, 2021, Notice being issued because he was confused by the process and chose not to take immediate action upon receipt of the Notice.

Ruling of the Board

In accordance with our statutory obligation, we review the record and the 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 IDV determination.

The unemployment statute sets forth a time limit for requesting a hearing. 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 a 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. . . .

Pursuant to 430 CMR 4.15, the thirty-day filing deadline shall not apply if the claimant can establish a justification within the meaning of the regulation. The DUA regulation at 430 CMR 4.15 provides, in pertinent part:

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

(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...

Here, the review examiner found that the claimant did not file the unemployment claim that generated the IDV determination. *See* Findings of Fact ## 3 and 4. He further found that the claimant did not receive the IDV disqualification because it was mailed to an Indiana address when the claimant was living in Massachusetts. *See* Finding of Fact # 5. The findings also reflect that on February 10, 2021, the claimant attempted to file an unemployment claim for benefits but was unable to do so. *See* Finding of Fact # 6. Unable to gain access to the DUA's electronic UI system, the claimant contacted a DUA representative who assisted him in obtaining access to his account and advised him to file an appeal to the IDV determination. *See* Finding of Fact # 6. Since the claimant did not file the underlying claim and the IDV determination was not sent to his address, we agree with the review examiner's conclusion that the claimant has demonstrated that his request for a hearing on the IDV determination was submitted seven weeks after the determination for reasons beyond the claimant's control. He met the criteria for filing a late appeal under 430 CMR 4.15.

Although the review examiner concluded that the claimant was justified in filing his IDV determination late, the review examiner ruled that the claimant was not entitled to a hearing on the merits due to filing his Late Appeal determination over 30 days after it was issued. We believe that it was improper for the review examiner to rule on the question of whether or not the claimant had justification for appealing the September 13, 2021, Late Appeal determination after the statutory deadline.

The DUA did not issue a separate determination under G.L. c. 151A, § 39(b), to notify the claimant that he had also appealed the September 13, 2021, Late Appeal determination after the statutory deadline. The only DUA determination concerning lateness that had been issued to the claimant was the first Late Appeal Determination, which addressed the claimant's failure to timely appeal the IDV determination. *See* Finding of Fact # 7; *see also* Exhibit 11.¹ Moreover, nothing in the Notice of Hearing suggested that the claimant would also have to address his failure to timely appeal the Late Appeal Determination.

We are not suggesting that a review examiner may never add a new legal issue during the hearing. But, in order to do so, the parties must be given adequate notice. The Due Process Clause of the Fourteenth Amendment prohibits the States from depriving any person of property without providing notice and an opportunity to be heard. *Dusenbery v. United States*, 534 U.S. 161, 167 (2002). Specifically, it requires “notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . .” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (further citations omitted).

Ordinarily, this due process concern is addressed with a combination of an explanation of the factual basis for denying or awarding benefits set forth in the determination and the hearing notice, which apprise the parties of the hearing date, time, and the section of law to be addressed at the hearing. In instances where review examiners realize that the facts warrant considering a new issue, they usually explicitly state so during the hearing and afford the parties an opportunity to either continue the hearing for another date, so that they may prepare for the new issue, or waive the formal notice and proceed with a hearing on both issues.

In our case, this did not happen. During the hearing, the review examiner questioned the claimant about the reasons for his late filing the Late Appeal Determination without affording him an opportunity to continue the hearing or to waive notice, and then rendered a decision based upon the claimant's responses to those questions.

We, therefore, conclude as a matter of law that the claimant is entitled to a hearing on the merits of the IDV determination, because he established justification for filing a hearing request after the statutory deadline as permitted under G.L. c. 151A, § 39(b), and 430 CMR 4.15. We further conclude that it was an error of law to deny the claimant a hearing on the merits due to his late

¹ Exhibit 11 is the Notice of Disqualification, which refers only to the late hearing request of the IDV determination. While not explicitly incorporated into the review examiner's findings, the content of this exhibit is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

filing of the Late Appeal determination, because the agency did not provide the claimant with adequate notice and an opportunity to be heard on this separate question.

The review examiner's decision is reversed. The claimant is entitled to a hearing on the merits of the IDV determination.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 13, 2023



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. 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 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.

DY/rh