

Held claimant had good cause to file a late appeal of a pre-date denial more than 30 days after the determination pursuant to 430 CMR 430 4.15(1). She had mistakenly filed a timely appeal of the wrong issue. A DUA agent reached out to her, but instead of advising her to promptly appeal the correct determination, he told her that a hearing was not necessary, it would take a while, but that the weeks would be made available. The DUA agent effectively advised her that an appeal was not necessary.

**Board of Review
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Issue ID: 0071 1885 71

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 her request to pre-date her claim. 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 July 19, 2020, which was approved. Subsequently, the claimant submitted a request to have the DUA pre-date her claim to March 15, 2020. The DUA denied this request for an earlier effective date in a determination issued on September 3, 2020 (pre-date determination). The claimant appealed the pre-date determination on July 8, 2021, 309 days after it was issued. On June 16, 2022, the DUA issued a separate determination pursuant to G.L. c. 151A, § 39(b), denying her request for a hearing on the pre-date determination on the ground that she did not have good cause for filing a late appeal (late appeal determination). The claimant timely appealed the late appeal determination. Following a hearing on the G.L. c. 151A, § 39(b), issue, the review examiner affirmed the agency's denial of a hearing on the pre-date determination in a decision rendered on July 28, 2022. We accepted the claimant's application for review.

The review examiner concluded that the claimant did not have good cause for failing to timely file an appeal of the pre-date determination pursuant to G.L. c. 151A, § 39(b), and 430 CMR 4.15. Thus, she was not entitled to a hearing on the merits. 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, as well as agency records in its electronic record-keeping system, UI Online.

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 pre-date determination because her appeal was filed late without good cause as meant under G.L. c. 151A, § 39(b), is supported by substantial and credible evidence and is free from error of law, where the claimant filed an appeal on the wrong issue within the statutory deadline and spoke to a DUA agent, who indicated that she did not have to appeal the pre-date determination.

Findings of Fact

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

1. The claimant filed a claim for unemployment insurance benefits effective 7/19/2020.
2. Upon filing the claim, the claimant chose to receive correspondence electronically.
3. On 9/03/2020, the Department of Unemployment Assistance ("DUA") electronically issued the claimant a Notice of Disqualification ("notice") to the claimant's UI Online inbox.
4. The claimant received the notice in her UI Online inbox on 9/03/2020.
5. The notice informed the claimant that a period may not be served nor benefits paid on the claim for any weeks prior to 7/19/20 pursuant to Section 23(b) of the Law.
6. The notice included instructions on how to file an appeal and the time parameters within which to file an appeal.
7. An appeal of the notice was due by 9/14/2020.
8. On 9/04/2020, the claimant filed an appeal online to the 7/23/2020 notice of monetary determination.
9. On 9/11/2020 the claimant was contacted by a DUA agent, and she was advised that she filed her appeal to the incorrect issue, and the claimant agreed to withdraw her appeal.
10. On 7/08/2021, the claimant submitted an appeal online.
11. 7/08/2021 was the 309th calendar day following 9/03/2020.
12. On 6/16/2022, the DUA mailed the claimant a Notice of Disqualification pursuant to Section 39 of the Law ("second notice") to her UI Online Inbox.
13. The second notice included instructions on how to file an appeal and the time parameters within which to file an appeal.
14. An appeal of the second notice was due by 6/26/2022.
15. On 6/26/2022 the claimant filed an appeal electronically.

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 pre-date 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. . . .

There is no question that a hearing request filed 309 days after the determination date is well beyond the statutory 10-day filing period under G.L. c. 151A, § 39(b). *See* Findings of Fact # 10 and 11. The DUA has promulgated regulations to consider circumstances that may constitute good cause for missing the appeal deadline under G.L. c. 151A, § 39(b), where an appeal is filed more than 30 days after the determination. 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.

When we look closely at the record in this case, it is evident that the claimant actually tried to appeal the pre-date determination on September 4, 2020, a day after it was issued. In the conclusions and reasoning section of the hearing decision, the review examiner refers to the claimant's testimony that she immediately filed an appeal after seeing it in her UI Online inbox. An appeal was filed on September 4, 2020, but it was filed on a different issue, a monetary determination. Finding of Fact # 8. The findings further provide that a DUA agent noticed the

mistake, reached out to the claimant, advised her of the error, and the incorrect appeal was appropriately withdrawn. *See* Finding of Fact # 9.

For some reason, the review examiner failed to capture, either in her findings or analysis, the claimant’s additional testimony, wherein she explained that she told the DUA agent her entire situation and intent to collect benefits retroactively.¹ An entry on September 11, 2020, in UI Online from this same DUA agent corroborates this. He wrote, “Claimant looking to appeal determination on predate issue.”

Ordinarily, the DUA agent would then advise the claimant to immediately appeal the correct issue. This did not happen here. During the hearing, the claimant explained that, instead, this agent told her it was not necessary to have a hearing, that it would take a little time, but that her weeks of benefits would be made available for her to apply. She further testified that, when that did not happen, she attempted to contact this agent again on many occasions, but she could not get through and finally appealed the pre-date determination in 2022.

In this case, we believe the DUA agent’s September 11, 2020, statements to the claimant misled the claimant to believe that she did not need to file a hearing request on the pre-date denial. Pursuant to 430 CMR 4.15(1), this constitutes good cause to file her hearing request more than 30 days after it was issued.

We, therefore, conclude as a matter of law that the claimant has demonstrated good cause for filing an appeal beyond the statutory deadline under G.L. c. 151A, § 39(b).

The review examiner’s decision is reversed. The claimant is entitled to have a hearing on the merits of the pre-date determination, Issue ID # 0049 5947 33.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 11, 2023



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

¹ Although not included in the findings, this portion of the claimant’s testimony as well as additional statements referenced below, are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

**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.

AB/rh