After a district court remand, Board held claimant was still not entitled to a hearing on the merits of a determination to deny a requested pre-date of her claim. The record does not show that she could have reasonably been confused by other DUA notices. Thus, she did not demonstrate good cause for filing the appeal after the statutory deadline within the meaning of G.L. c. 151A, § 39(b).

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Issue ID: 0076 4169 46

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 her request for a hearing on the merits in connection with a determination to deny an earlier effective date of her unemployment claim. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant filed a claim for unemployment benefits with the DUA, effective February 13, 2022, which was approved. Subsequently, the claimant submitted a request to have the DUA pre-date her claim to January 23, 2022. The DUA denied this request for an earlier effective date in a Notice of Disqualification, dated February 16, 2022 (pre-date determination). The claimant appealed the pre-date determination on April 13, 2022. On April 29, 2022, the DUA issued a separate Notice of Disqualification 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, the review examiner affirmed the agency's denial of a hearing on the pre-date determination in a decision rendered on May 19, 2022. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On January 19, 2023, the District Court ordered the Board to take further action. Consistent with this order, we remanded the case to the review examiner to take additional evidence concerning the overlapping of what the Judge referred to as two concurrent claims and the reasonableness of the claimant's failure to realize that there were two separate appeals. The claimant and her attorney attended the remand hearing, which took place over the course of two sessions. Thereafter, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was not entitled to a hearing on the merits of the pre-date determination because she had not established good cause for her late appeal of that determination, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, the District Court's Order, and the consolidated findings of fact, we affirm the review examiner's decision.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant has filed 8 claims with the Department of Unemployment Assistance (DUA).

2. The claimant has requested a pre-date in a prior claim. (Remand Exhibit #10)

3. The effective date of the claim is 2/13/2022.

4. The claimant elected to receive correspondence from the DUA by the U.S. postal service.

5. The claimant's address is the same as shown on the Notice of Hearing. (Remand Exhibit #4)

6. The DUA issued a Notice of Disqualification, dated 2/16/2022, pursuant to M.G.L. c. 151A, § 23(b) [Notice of Disqualification (pre-date)] to the claimant.

7. The claimant does not recall the date she received the Notice of Disqualification (pre-date) but thinks it might have been 2/26/2022 or 2/28/2022 because the envelope was postmarked 2/24/2022. (Remand Exhibit #18)

8. The claimant does not recall the specific date she read the Notice of Disqualification (pre-date). The claimant read the Notice of Disqualification (pre-date) on the same date she received it in the mail.

9. The claimant received two pieces of correspondence from the DUA on the same date. The claimant received the Notice of Disqualification (pre-date) and the Notice of Requalification on the same date. The claimant thinks that she received both of these on 2/26/2022 or 2/28/2022.

10. The Notice of Requalification was dated 2/16/2022.

11. The claimant was confused by the Notice of Disqualification (pre-date) because she received the Notice of Requalification at the same time.

12. The claimant believed that the Notice of Requalification meant that she was eligible for benefits.

13. After receiving the Notice of Disqualification (pre-date) and the Notice of Requalification, the claimant was not receiving benefits from the DUA, and therefore called to speak to a representative on 3/3/2022. The claimant was not told to appeal anything by the representative.

14. The claimant called the DUA weekly to certify for benefits. The claimant spoke to representatives who told her to keep calling in.

15. The claimant received the Notice of Disqualification (quit), dated 4/12/2022, by U.S. mail.

16. The claimant does not know the exact date she received the Notice of Disqualification (quit).

17. The claimant called the DUA on 4/12/2022. The claimant was told by a DUA representative to appeal.

18. The claimant appealed Issue ID No. 0075 4646 24-01 (pre-date) on 4/13/2022. The claimant wrote that the reason for the appeal was: "I should be able to collect from 0075 4641 82-01 (Employer name) I was discharge (sic)."

19. On 4/29/2022, the DUA issued a Notice of Disqualification denying the claimant's request for a late appeal.

20. The Notice of Disqualification (quit) was appealed on 5/3/2022.

21. The claimant does not know why she appealed the Notice of Disqualification (quit) on 5/3/2022.

22. On 5/4/2022, the claimant appealed the denial of late appeal electronically.

Credibility Assessment:

In the hearing, the claimant testified that she did not know why she requested a pre-date of the 2022 claim. The claimant testified in the hearing that she did not know if she ever filed for a pre-date previously and further testified that she did not know what a pre-date was. This testimony lacked credibility as she had filed for a pre-date on two occasions. The claimant further testified in the hearing that she did not know why she filed her appeal of the Notice of Disqualification (pre-date) on 4/13/2022. However, this was just one day after the Notice of Disqualification (quit) was issued. The timing of the appeal draws into question the credibility of the claimant's statement. Furthermore, the claimant could not explain why she wrote on her appeal of the Notice of Disqualification (pre-date), "I should be able to collect from 0075 4641 82-01 [Employer name] I was discharge (sic)." When questioned about why she used the Issue ID number in her appeal, the claimant asserted that she did not know what the number meant. The claimant further

> testified in the hearing that she did not know what an Issue ID number was. This testimony lacked credibility as the claimant specifically used the number to identify why she was appealing. The claimant's assertion that she did not know what an Issue ID number was, is suspect. Additionally, the claimant testified in the hearing that she called the DUA weekly to certify for benefits, but also to talk to representatives. The claimant's testimony regarding her interactions with DUA representatives was vague. The claimant testified that she was told on 4/12/2022 to appeal the determination but did not specify which determination she was told to appeal.

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 consolidated 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 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.

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 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. . . .

The DUA regulation at 430 CMR 4.14 provides, in relevant part, as follows:

> The Commissioner may extend the ten day filing period where a party establishes to the satisfaction of the Commissioner . . . that circumstances beyond his or her control prevented the filing of a request for a hearing within the prescribed ten day filing period. Examples of good cause for a failure to file a timely request for a hearing include, but are not limited to, the following: . . . (12) Any other circumstances beyond a party's control which prevented the filing of a timely appeal.

In the instant case, the review examiner found that the claimant was "confused" by the pre-date determination, because she had also received a Notice of Requalification at the same time, which caused her to believe that the Notice of Requalification meant she was eligible for benefits. Consolidated Findings ## 11–12. However, despite contacting the DUA beginning on March 3, 2022, the claimant did not submit her appeal to the DUA electronically until May 4, 2022, 62 days after she began to contact DUA and speak with the agency's customer service representatives. Consolidated Findings ## 13–14 and 22.

Although there are no findings that specifically address this issue, the record, after remand, demonstrates that the two determinations that the claimant received at the same time were not the result of the overlapping of two concurrent claims. The pre-date determination referenced claim number 2022-01, Issue ID # 0075 4646 24, and stated that the claimant did not have a good cause reason for failing to contact the DUA and file her claim earlier. Exhibit 5. The Notice of Requalification, on the other hand, referenced claim number 2019-01, Issue ID # 0028 7106 22, and explained that "[t]he denial on your claim for Issue 0028 7106 22-02 has been ended. You are now eligible for benefits provided that there are no other issues on your claim that would hold you ineligible." Remand Exhibit 9.[1] Even though the two pieces of correspondence may have reached the claimant simultaneously, each determination addressed two entirely different claims that had different benefit years and distinct eligibility issues that did not overlap in any way. *See* Remand Exhibit 16.[2] Neither did the two claims exist concurrently. Rather, the Notice of Requalification merely informed the claimant that the DUA ended a pre-existing issue disqualification, which meant that the claimant could be eligible for benefits if no other issues presented on her most recent unemployment claim.

However, at the time the claimant received the pre-date determination and Notice of Requalification, the claimant had two pending separation issues on her 2022-01 claim. *See* Remand Exhibits 11 and 17.[3] The pre-date determination also informed her of this fact. The record suggests that the claimant did not appeal the pre-date determination until she had received the April 12, 2022, Notice of Disqualification (quit). The claimant maintained throughout the initial and remand hearings that she was confused by the two determinations that she had received on the same date and believed that she was eligible for benefits, and the review examiner credited this portion of the claimant's testimony. *See* Consolidated Findings ## 11–12.

Nonetheless, in her credibility assessment, the review examiner pointed to various deficiencies in the claimant's testimony during the remand hearing and specifically highlighted the disparity between the claimant's testimony regarding her knowledge of pre-dates and requests for pre-dates in previous unemployment claims, and the agency's records showing that, prior to 2022, she had requested a pre-date on two separate occasions.[4] *See* Consolidated Finding # 2. The review examiner also found the claimant's testimony about her communications with DUA customer service representatives to be vague. Such assessments are within the scope of the fact finder's

[1] While not explicitly incorporated into the review examiner's findings, the content of these two notices and those referenced below 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).

[2] Remand Exhibit 16 is a screen shot from UI Online, the DUA's online record-keeping system, which the review examiner described as a "previous claims page" during the remand hearing. In addition, we note that UI Online shows that the benefit year for claim number 2019-01 ran from December 30, 2018, through December 28, 2019, while the benefit year for claim number 2022-01 ran from February 13, 2022, through December 11, 2023.

[3] Remand Exhibit 11 is the Notice of Disqualification (quit), dated April 12, 2022, pertaining to Issue ID # 0075 4642 84, while Remand Exhibit 17 is a screen shot from UI Online's issue summary and details pages, which lists the second separation (discharge) issue and identifies it as Issue ID # 0075 4641 82. We note that UI Online shows that the DUA subsequently issued a Notice of Approval in connection with this discharge issue, which is dated March 19, 2022.

[4] Remand Exhibit 10 is the Notice of Disqualification, dated January 21, 2019, pertaining to Issue ID # 0028 7106 22, which denied the claimant's request for an earlier effective date on her 2019 unemployment claim. Remand Exhibit 17 lists another pre-date issue stemming from the claimant's 2015 unemployment claim. UI Online records show that the DUA issued a Notice of Approval on this pre-date request, dated April 2, 2016.

role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). "The test is whether the finding is supported by 'substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627-628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted). Based upon the record before us, we see no reason to disturb the review examiner's assessment of the evidence.

The record contains other inconsistencies in the claimant's testimony. During the initial hearing, the claimant testified that she read and understood the pre-date determination. At the remand hearing, however, the claimant testified repeatedly that she did not understand the meaning of the determination, that she did not know what a pre-date was, and did not know if she ever requested a pre-date from the DUA. The claimant continued to maintain this position even after stating that she reviewed the agency's proposed exhibits (which included records of her history with pre-date requests), and after the exhibits had been entered as evidence without objection from her legal counsel. During the initial hearing, the claimant read the relevant portions of the Notice of Requalification into the record, which prompted this exchange between the review examiner and claimant:

> Q: What is the one for requalification? What did it say, or-? Yes, what does it say?
>
> A: Notice of Requalification 0028 7106 22- you are now eligible, provided there are no other issues on your claim that make you ineligible.
>
> …
>
> Q. What you just read stated that you wouldn't qualify if there were other issues on the claim.
>
> A. Correct, but I was under the assumption that I was eligible.

The plain reading of this determination indicates that her eligibility was contingent on whether there were any other issues on her claim, and whether those issues would be resolved in the claimant's favor. Here, there were other issues pending, and the claimant was advised accordingly in the pre-date determination. Therefore, it was not reasonable for the claimant to believe that she was already approved for benefits at the time that she received the two determinations or for her to believe that she did not need to appeal the pre-date determination, especially given the claimant's lengthy experience navigating eight unemployment claims and their related issues between 2010 and 2022. *See* Remand Exhibit 16.

During the remand hearing, the claimant and her attorney made much of the fact that one of the DUA's envelopes in which one of the determinations arrived bore a postmark date of February 24, 2022, while the pre-date determination and Notice of Requalification are both dated February 16,

2022. *See* Remand Exhibit 18.[5] Indeed, we agree that this can be problematic from a due process standpoint. However, any notice defect brought about by a delay in mail processing is not outcome determinative here. Even if the ten-day appeal window were to have been tolled to remedy the notice defect, such that the ten-day period began to run, for instance, on March 1, 2022, and conclude on March 11, 2022, the claimant would still have filed her appeal late by 32 days (March 12, 2022, through April 13, 2022). *See* Consolidated Finding # 18; *see also* Exhibit 6.[6] While the review examiner found that the claimant contacted the DUA beginning on March 3, 2022, there is nothing in the record to show that she specifically sought assistance, inquired about her request for a pre-date, or asked about the pre-date determination itself. *See* Consolidated Findings ## 13–14.

This is not a case where the claimant mistakenly appealed one determination when she meant to appeal a different determination that was received on the same day, as in other recent cases where we decided that a claimant's confusion could constitute good cause for a late appeal.[7] *See* Board of Review Decision 0078 6226 73 (April 14, 2023) (claimant filed appeal of monetary determination by mistake, instead of appealing separation determination, which otherwise would have been timely filed). Here, she did not timely file the pre-date determination or the Notice of Disqualification (quit). *See* Consolidated Findings ## 9, 15, 18, and 20. Mere confusion about the appeal process is not good cause to file an appeal late. *See* Board of Review Decision 0074 8445 20 (May 30, 2023) (confusion about the reasons for disqualification is not a circumstance beyond the claimant's control).

We, therefore, conclude as a matter of law that the claimant is not entitled to a hearing on the merits of the pre-date determination, because she failed to establish good cause for her late appeal pursuant to the provisions of G.L. c. 151A, § 39(b), and 430 CMR 4.14(12).

The review examiner's decision is affirmed. The claimant is not entitled to a hearing on the merits of the pre-date determination in Issue ID # 0075 4646 24, dated February 16, 2022.

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[5] Remand Exhibit 18 contains photographs showing the DUA envelope in question.

[6] Exhibit 6 is the claimant's appeal of the pre-date determination, dated April 13, 2022.

[7] The consolidated findings, when taken together with the review examiner's credibility assessment, appear to suggest that the claimant may have mistakenly appealed the pre-date determination while attempting to appeal the Notice of Disqualification (quit). However, the express language in the claimant's April 13, 2022, appeal references the discharge issue for which she had received a Notice of Approval on March 19, 2022, not the quit issue. *Cf.* Footnote 3 (above); *see also* Exhibit 5.

We note that, even if the claimant had raised the quit issue in her April 13, 2022, appeal, UI Online shows that a separate hearing was held on late appeal issue relating to the underlying quit determination on February 1, 2023. The ensuing hearing decision, dated February 3, 2023, denied the claimant's appeal for a hearing on the merits on the underlying quit issue. Because there is nothing in UI Online showing that the claimant appealed this hearing decision, it has become final.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 28, 2024

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.

JMO/rh