

Although the claimant was aware of correspondence from the DUA in her UI Online inbox, she was unable to open it using her mobile device, and she was unable to get through to anyone at DUA for assistance. Once able to speak with a DUA representative and access a laptop computer, she was able to view her adverse determination and promptly filed her appeal. Held the claimant demonstrated justification for submitting a late appeal pursuant to G.L. c. 151A, § 39(b) and 430 CMR 4.15(2).

**Board of Review
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Issue ID: 0078 3944 51

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 September 1, 2022. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant filed a claim for benefits with the DUA, effective January 23, 2022. On September 1, 2022, the DUA issued a Notice of Disqualification regarding the claimant's separation from employment, which the claimant appealed on October 10, 2022. On January 7, 2023, the DUA issued a determination denying her appeal of the Notice of Disqualification due to filing the appeal late without justification (Late Appeal). She timely appealed the Late Appeal determination. Following a hearing on the Late Appeal determination, the review examiner affirmed the agency's initial determination in a decision rendered on February 11, 2023. The Board accepted the claimant's application for review.

The review examiner concluded that the claimant did not have justification for failing to timely file an appeal of the Notice of Disqualification pursuant to G.L. c. 151A, § 39(b), and 430 CMR 4.14–4.15. Thus, she was not entitled to a hearing on the merits of this Notice of Disqualification determination. 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, which concluded that the claimant did not have justification to file her appeal more than 30 days after the date of the Notice of Disqualification, is supported by substantial and credible evidence and is free from error of law, where the claimant was unable to open the determination using her mobile device and was unable to reach anyone at the DUA for assistance.

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 benefits with the Department of Unemployment Assistance (DUA) with an effective date of 1/23/22.
2. At the time of filing, the claimant chose to receive correspondence from DUA electronically.
3. On 9/1/22, DUA issued a Notice of Disqualification (Notice) to the claimant regarding her separation from employment.
4. The claimant has been living in shelters intermittently for four years due to a domestic violence issue.
5. The claimant does not own a computer. The claimant was unable to open some documents in her Inbox on her phone. She called DUA several times to seek assistance but was unable to reach an agent due to long hold times. She was able to view the Notice in October 2022.
6. The claimant filed an appeal of the Notice on 10/10/22, 186 [sic] days after the Notice was issued.
7. On 1/7/23, the DUA issued a Notice of Disqualification (“Second Notice”) for the claimant’s late appeal.
8. The claimant appealed the Second Notice on 1/9/23.

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 original 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 disagree with the review examiner’s legal conclusion that the claimant did not show justification for her failure to file a timely appeal.

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. . . .

In this case, the claimant filed her appeal 39 days after the DUA issued its determination. Finding of Fact # 6. DUA regulations specify circumstances that constitute good cause for filing a late appeal within the meaning of G.L. c. 151A, § 39(b), and allow, under a few circumstances, a party to file an appeal beyond 30 days from the original determination. Specifically, 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.

The express language of this regulation places the burden upon the claimant to show that one of these four circumstances applies. 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 never received, we also do not believe that this provision applies to the facts here. In this case, the question is whether, under circumstance (2), the claimant received the notice of disqualification “beyond the 30-day extended filing period and [she] promptly [filed] a request for hearing.” As set forth below, we believe the claimant’s circumstances fall under 430 CMR 4.15(2).

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. Finding of Fact # 2. The DUA’s Notice of Disqualification was electronically sent to the claimant and was placed into her UI Online inbox. *See* Finding of Fact # 3. Moreover, by October, 2022, the claimant knew that the document was in her UI Online inbox, but she could not open it on her mobile device.¹ *See* Finding of Fact # 5. During the hearing, the claimant testified that she has been living in shelters intermittently for the past four years and currently remains in an unstable living situation.² *See* Finding of Fact # 4. Because the claimant does not own a computer, she called the DUA several times to seek assistance but was unable to speak with a DUA representative until October 10, 2022, which is when she was finally able to open and view the determination by using a laptop computer. Finding of Fact # 5.

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).

² This is also part of the claimant’s undisputed testimony on the record.

Normally, we would be inclined to conclude that the depositing of the determination into the claimant's 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 timely 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. In this case, the review examiner found that the claimant tried to call the DUA several times before she was able to be connected to a representative. Given the unique nature of her circumstances, this shows that the claimant made diligent efforts to obtain such assistance.

In addition, the record shows that, upon finally being able to open the determination, the claimant promptly filed her hearing request. Embedded in the review examiner's reasoning and conclusion is a finding that the claimant promptly filed an appeal upon viewing the notice in October, 2022.

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 reasonableness. *See, e.g.*, Board of Review Decision 0033 7690 36 (May 29, 2020); Board of Review Decision 0029 2124 94 (June 20, 2019); and Board of Review Decision 0025 6888 02 (September 6, 2018). We believe the claimant has met this standard. The technological issue that 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 September 1, 2022, determination said and to promptly appeal the determination once she read it. Under these circumstances, we believe that the claimant has established justification for her late appeal within the meaning of 430 CMR 4.15(2).

We, therefore, conclude as a matter of law that the claimant had good cause to file a late appeal pursuant to 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 her Notice of Disqualification in Issue ID 0077 9119 22.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 24, 2023



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, 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