

The claimant failed to establish that she met the criteria to file a late appeal of a G.L. c. 151A, § 25(e)(1), two years after it was issued. She was not entitled to a hearing on the merits of that disqualification.

**Board of Review
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Issue ID: 0078 4117 69

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 the merits in connection with a determination to deny benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

On November 21, 2020, the DUA issued to the claimant a Notice of Disqualification (November 21st Notice) disqualifying her from receiving benefits under G.L. c. 151A, § 25(e)(1). The claimant appealed the determination electronically on October 13, 2022. On March 7, 2023, the DUA issued a Notice of Disqualification (March 7th Notice), stating that the claimant did not have justification for submitting her appeal after the statutory deadline. The claimant appealed the March 7th Notice on April 6, 2023. Following a hearing on the merits, the review examiner affirmed the agency's November 21, 2020, determination in a decision rendered on September 7, 2023. We accepted the claimant's application for review.

A hearing on the merits of the November 21st Notice was denied after the review examiner determined that the claimant failed to establish that she met the criteria to allow her late appeal of the March 7th Notice pursuant to G.L. c. 151A, § 39(b), and 430 CMR 4.15. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to take additional evidence regarding the reasons the claimant did not timely file her appeal of the November 21st Notice. The claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. Our decision is based upon our review of the entire record.

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 November 21st Notice because she failed to meet the criteria for appealing the March 7th Notice beyond 30 days of the date it was issued, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. On 11/21/20, a Notice of Disqualification was electronically sent to the claimant according to how the claimant had requested to receive all correspondence when she filed her claim.
2. The notice was delivered to the claimant's UI online inbox account as Document # 287100120.
3. After the DUA issued the claimant a Notice of Disqualification in Issue ID # 0057420602 on November 21, 2020, the claimant did not appeal it before October 13, 2022, because she did not see it.
4. The claimant subsequently received a letter in March of 2022 concerning an overpayment on her account. The claimant attempted to apply for a waiver of the overpayment. After going through the waiver process and being denied, the claimant decided to file her appeal of the initial 11/21/20 disqualification.
5. The claimant filed an appeal which was received by the Department on 10/13/22.
6. On 3/7/23, a Determination on Timeliness of Appeal was electronically sent to the claimant's UI online inbox account. This determination found no justification to consider the appeal timely.
7. The claimant received the 3/7/23 determination.
8. The claimant appealed the determination of 3/7/23. The claimant's request for a hearing was received on 4/6/23.

Credibility Assessment:

Although the claimant contended that she did not see the Notice of Disqualification dated 11/21/20 and this is why she did not appeal it before 10/13/22, her contention is not deemed credible since the notice was delivered to her UI online inbox as Document # 287100120 and she had been in and out of her inbox on several occasions between these dates.

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. However, while we affirm the review examiner's conclusion that the claimant is not entitled to a hearing on the merits of the November 21st Notice, our legal reasoning for this outcome differs, as discussed more fully below.

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. . . .

Where a claimant files her appeal more than 30 days after the date a determination was issued, the applicable DUA regulation is 430 CMR 4.15, which provides, in relevant part, as follows:

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.

In the case before us, the review examiner initially denied the claimant's request for a hearing on the merits of the November 21st Notice on the grounds that the claimant had filed her appeal of the March 7th Notice more than 30 days after it was issued and had not met the criteria for waiving the 30-day limitation on filing an appeal. This was an error, since this issue was not before the review examiner. The DUA never issued a determination that the March 7th Notice was appealed late. Therefore, the review examiner had no authority to hold a hearing as to timeliness of that appeal pursuant under G.L. c. 151A, § 39(b), and she could not properly use it as a basis to deny the claimant a hearing on the instant November 21st determination. *See* Board of Review Decision 0080 6688 30 (October 18, 2023).

Where the review examiner's initial decision failed to include findings and analysis regarding the reasons the claimant failed to timely appeal the November 21st Notice, we remanded the case back to the review examiner to take additional testimony and evidence regarding this matter.

After remand, the review examiner found that the claimant did not appeal the November 21st Notice before October 13, 2022, "because she did not see it." *See* Consolidated Finding # 3.

However, the review examiner also issued a detailed credibility assessment rejecting the claimant's testimony, indicating this contention was not credible, because it had been delivered to her UI Online inbox, and the claimant had checked her inbox on several occasions between November 21, 2020, and October 13, 2022. *See* Remand Exhibit # 5¹. Such assessments are within the scope of the review examiner's role as fact-finder, 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). We believe her assessment is reasonable.

Here, there is no evidence showing that the claimant took any action to appeal her disqualification during the almost two-year period between her receipt of the Notice on November 21, 2020, and her filing of her appeal on October 13, 2022. As her contention that she "did not see" the November 21st Notice has been discredited, the claimant has not met one of the four criteria to file a late appeal under 430 CMR 4.15.

We, therefore, conclude as a matter of law that the claimant is not entitled to a hearing on the merits of the November 21st Notice because she failed to meet the criteria for her late appeal of that determination pursuant to the provisions of G.L. c. 151A, § 39(b), and 430 CMR 4.15.

The review examiner's decision is affirmed. The claimant is not entitled to a hearing on the merits of the Notice of Disqualification in Issue ID # 0057 4206 02, dated November 21, 2020.



Charlene A. Stawicki, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 28, 2024



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

¹ Remand Exhibit 5 is a printout of the claimant's activity log, showing the dates the claimant and DUA staff checked her UI Online inbox between November 20, 2020, and April 7, 2023. While not explicitly incorporated into the review examiner's findings, it 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).

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.

JPCA/rh