

Where the claimant met the criteria for his late appeal of a determination disqualifying him under G.L. c. 151A, § 69(c), he was entitled to a hearing on the merits on that disqualification despite filing a late appeal of the DUA's intervening disqualification under G.L. c. 151A, § 39(b). The review examiner had no authority to rule on the timeliness of the appeal of the § 39(b) determination.

**Board of Review
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Issue ID: 0078 8942 60

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 an overpayment waiver request. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

On December 3, 2022, the DUA issued to the claimant a Notice of Disqualification (December 3rd Notice) denying his request for a waiver under G.L. c. 151A, § 69(c). The claimant appealed this determination on December 23, 2022. On January 12, 2023, the DUA issued a Notice of Disqualification (January 12th Notice), stating that the claimant did not have justification for submitting his appeal after the statutory deadline. The claimant appealed the January 12th Notice on January 30, 2023. Following a hearing, the review examiner denied the claimant a hearing on the merits of the December 3rd Notice in a decision rendered on April 25, 2023. We accepted the claimant's application for review.

A hearing on the merits of the December 3rd Notice was denied after the review examiner determined that the claimant had not met the criteria to file his late appeal of that Notice or the January 12th Notice pursuant to G.L. c. 151A, § 39(b), and 430 CMR 4.14-4.15. 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 obtain additional evidence pertaining to the December 3rd Notice. Following the remand hearing, the review examiner issued his consolidated findings of fact. 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 December 3rd Notice, because he did not meet the criteria to file his late appeal of that Notice or the January 12th Notice, 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. The claimant filed a claim for unemployment benefits effective August 28, 2022.
2. The claimant chose to receive correspondence from the DUA by electronic delivery.
3. The claimant was not sent any correspondence from the DUA in the month of September, 2022.
4. On October 11, 2022, the claimant spoke to a DUA agent about his claim. Staff notes state that "CX checking on status of Waiver. Advised still pending a determination. NO Time frame given. Advised to continue to monitor inbox for notification."
5. On November 29, 2022, the claimant spoke to a DUA agent about his claim. Staff notes state that "claimant called in requesting an update on Waiver; however, claimant has a DQ'd IDV issue and an IDV issue in redetermination Status. Per [Supervisor], the Claimant appealed DQ'd IDV - claimant profile sent to Hearings. Once the IDV has been deemed eligible, the claimant will call in to get the waiver issue assigned."
6. On December 3, 2022, the claimant was issued a Notice of Disqualification (the Notice) under Massachusetts General Law Chapter 151A, § 69(c) to the claimant, stating that he had not established that his income or resources were insufficient to enable him to meet the ordinary living expenses and repay the debt. Additionally, he had not established that he gave up any rights when he collected unemployment benefits or used the money for purposes other than those for which he would have spent non-benefit funds. Recovery of the overpayment would not be against equity and good conscience nor defeat the purposes of benefits otherwise authorized.
7. The Notice had an issue date of September 15, 2022.
8. The Notice was issued to the claimant on December 3, 2022, after his identity had been verified on December 2, 2022.
9. The claimant received the Notice when it was placed correctly in his UI Online Inbox on December 3, 2022.
10. The claimant did not appeal the Notice within the ten-day deadline because his grandfather passed away on December 6, 2022, due to COVID-19.
11. The claimant attended his grandfather's funeral on December 14, 2022.

12. On December 23, 2022, the claimant called and spoke to a DUA agent about his claim. They reviewed the letters in his UI Online Inbox and advised him to appeal.
13. The claimant mailed his appeal on December 23, 2022.
14. The DUA received the claimant's appeal for the Notice on December 28, 2022, via US Mail.
15. On January 12, 2022, the DUA issued the claimant a second Notice of Disqualification, indicating that he did not have good cause for his late filing of the appeal of the Notice.
16. DUA records show that the claimant viewed his UI Online Inbox on January 12, 2023, and twice on January 18, 2023.
17. The claimant did not file the appeal for the second Notice of Disqualification because he forgot about it and lost track of time.
18. The claimant returned to his UI Online Inbox to reread the second Notice of Disqualification on an unknown date. After rereading the disqualification, he learned that he could appeal the disqualification.
19. The DUA received the claimant's appeal for the Notice on January 30, 2023, via US Mail.

Credibility Assessment:

In light of the UI staff notes and what is in the claimant's UI Online Inbox, the claimant provided credible testimony that he did not learn about the Notice until December 3, 2023, after his identity had been verified on 12/2/22. He also credibly testified that he did not submit his appeal right away because his grandfather passed away due to COVID-19.

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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject the portion of Consolidated Finding # 10 that states that the claimant's grandfather passed away on December 6, 2022, as the claimant did not give an exact date and stated that his grandfather passed away after December 6th, but a week prior to the funeral held on

December 14th.¹ We also reject the portion of Consolidated Finding # 12, which states that the claimant spoke to a DUA Agent on December 23, 2022, as the information contained in the DUA's record-keeping system, UI Online, shows that the claimant spoke to a DUA Agent on December 6, 2022. Finally, we note that the second Notice of Disqualification mentioned in Consolidated Finding # 15 has an issue date of January 12, 2023, and not January 12, 2022. *See* Exhibit 2. In adopting the remaining findings, we deem 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, 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 December 3rd Notice.

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 or authorized representative 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:

(2) Death of a household member or an immediate family member (including a spouse, child, parent, brother, sister, grandparent, stepchild or parent of a spouse) ...

In the instant case, although the agency issued the December 3rd Notice to the claimant on December 3, 2022, there was a date of September 15, 2022, on the Notice. As a result of this system error, during the initial hearing, the review examiner mistakenly questioned the claimant as if the December 3rd Notice had been issued on September 15th, and ultimately concluded that the claimant did not have any justification for his late appeal. We remanded the case to clarify this misunderstanding and afford the claimant an opportunity to provide evidence as to why he appealed the December 3rd Notice late on December 23, 2022.

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner, including the claimant's testimony and Exhibit 2. *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).

After remand, the review examiner found that the claimant's appeal of the December 3rd Notice was late because his grandfather passed away during the week of December 4, 2022, through December 10, 2022. Consolidated Finding # 10. The claimant attended his grandfather's funeral on December 14, 2022. Consolidated Finding # 11. Based on these findings showing that the claimant lost an immediate family member days after receiving the December 3rd Notice, the claimant has shown that he had good cause for filing his appeal 20 days after the December 3rd Notice date.

The review examiner also found that the claimant appealed the January 12th Notice late on January 30, 2023, because he forgot about the appeal. Consolidated Findings ## 15, 17, and 19. The review examiner further concluded that the claimant did not have good cause for filing his appeal 18 days after the January 12th Notice date. The review examiner took into consideration the late appeal of the January 12th Notice when determining that the claimant was not entitled to a hearing on the merits of the December 3rd Notice. This was an error, as the issue of the January 12th Notice was not before him.

The DUA never issued a determination that the January 12th Notice was appealed late. Since there was no separate determination, there was nothing to appeal. Without an underlying determination and hearing request, the review examiner had no authority to hold a hearing as to the timeliness of that appeal pursuant to G.L. c. 151A, § 39(b). He certainly could not use it as a basis to deny the claimant a hearing on the original December 3rd Notice. *See* Board of Review Decision 0080 6688 30 (Oct. 18, 2023).

We, therefore, conclude as a matter of law that the claimant is entitled to a hearing on the merits of the December 3rd Notice, because he had good cause to file a late appeal of that determination pursuant to the provisions of G.L. c. 151A, § 39(b), and 430 CMR 4.14(2).

The review examiner's decision is reversed. The claimant is entitled to a hearing on the merits of the December 3rd Notice, Issue ID # 0078 1624 51.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 29, 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.

SVL/rh