

Where the claimant met the criteria for his late appeal of a determination disqualifying him under G.L. c. 151A, § 29(a), 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 § 39(b) determination.

**Board of Review
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Issue ID: 0079 0606 58

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 reverse.

On December 22, 2022, the DUA issued to the claimant a Notice of Disqualification (December 22nd Notice) disqualifying him from benefits under G.L. c. 151A, § 29(a). The claimant appealed this determination electronically on January 16, 2023. On April 25, 2023, the DUA issued a Notice of Disqualification (April 25th Notice), stating that the claimant did not have justification for submitting his appeal after the statutory deadline. The claimant appealed the April 25th Notice on November 13, 2023. Following a hearing on the merits, the review examiner denied the claimant a hearing on the merits of the December 22nd Notice in a decision rendered on March 7, 2024. We accepted the claimant's application for review.

A hearing on the merits of the December 22nd Notice was denied after the review examiner determined that, while the claimant met the criteria to file his late appeal of this Notice, he had not met the criteria to file his late appeal of the April 25th Notice pursuant to G.L. c. 151A, § 39(b), and 430 CMR 4.15. 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 was not entitled to a hearing on the merits of the December 22nd Notice even though he had good cause to file it late, because he did not meet the criteria to appeal the April 25th 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 findings of fact are set forth below in their entirety:

1. The claimant filed a claim for unemployment benefits with the Department of Unemployment (DUA) with an effective date of 12/4/2022.
2. The claimant elected to receive correspondence from the DUA electronically.
3. On 12/22/2022, the claimant was issued a Notice of Disqualification, Issue ID No. 0078 7217 25-01, citing Massachusetts General Law Chapter (M.G.L. c.) 151A, Section 29(a) and 1(r), finding the claimant ineligible for benefits beginning 11/27/2022 and indefinitely thereafter.
4. The claimant appealed the Notice of Disqualification citing M.G.L. c. 151A Section 29(a) and 1(r) on 1/16/2023. The claimant appealed 26 days after receipt of the Notice of Disqualification.
5. The claimant had received other Notices of Disqualification and was confused.
6. The claimant viewed his UI online inbox on 12/22/2022, 1/2/2023, 1/5/2023, 1/7/2023, 1/9/2023 and 1/16/2023.
7. The claimant called the DUA on numerous occasions and was confused because he had received many Notices of Disqualification. The claimant received Notices of Disqualification on 12/22/2022, 1/3/2023 and 1/7/2023.
8. On 4/25/2023, the DUA issued a Notice of Disqualification denying the claimant's request for a late appeal.
9. The claimant received two Notices of Disqualification on 4/25/2023.
10. On 11/13/2023, the claimant appealed the denial of late appeal electronically. The claimant's appeal was 203 days after receipt of the Notice of Disqualification.
11. The claimant viewed his inbox on 4/25/2023.
12. The claimant had answered questions regarding fact finding for the underlying issue and did not think he needed to do anything further.
13. The claimant did not think he had to appeal the Notice of Disqualification denying the request for a late appeal because he had already filed an 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 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 December 22nd 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: . . .

(9) A Division employee directly discourages a party from timely requesting a hearing and such discouragement results in a party believing that a hearing is futile or that no further steps are necessary to file a request for a hearing. . . .

In the instant case, the review examiner found that the claimant was confused by receiving multiple Notices. *See* Finding of Fact # 5. This confusion was compounded by multiple conversations with customer service and the Notices he received on December 22, 2022, January 3, 2023, and January 7, 2023. *See* Finding of Fact # 7. Customer service answers in response to the claimant's questions regarding DUA fact-finding on the underlying issue convinced him to think that he need not do anything further. *See* Finding of Fact # 12. During the hearing, the claimant testified that a customer service agent told him that "everything is all set," which "led me to believe" that no further action was needed.¹ On this basis, the review examiner deemed him to have good cause for filing his appeal 26 days after the December 22nd Notice date. Inasmuch as the customer service agent's statement that everything is all set could reasonably discourage the claimant from timely appealing that determination, we agree.

Nonetheless, the review examiner denied the claimant's request for a hearing on the grounds that the claimant had filed his appeal of the April 25th Notice more than 30 days after it was issued and

¹ The claimant's uncontested testimony in this regard is part of the unchallenged evidence introduced at the hearing and placed into 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).

had not met the criteria for waiving the 30-day limitation on filing an appeal. *See* Finding of Fact # 10. This was erroneous, because this issue was not before the review examiner.

The DUA never issued a determination that the April 25th 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). She certainly could not use it as a basis to deny the claimant a hearing on the original December 22nd Notice. *See* Board of Review Decision 0080 6688 30 (October 18, 2023).

We, therefore, conclude as a matter of law that the claimant is entitled to a hearing on the merits of the December 22nd 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(9).

The review examiner's decision is reversed. The claimant is entitled to a hearing on the merits of the December 22nd Notice, Issue ID # 0079 0606 58-04.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 14, 2024



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.

BGM/rh