

When the claimant failed to timely appeal a determination denying his request to pre-date his claim, the DUA issued another determination denying him a hearing on the ground that his hearing request was filed late. The claimant also appealed this second determination after the statutory deadline. Because the claimant met the DUA’s regulatory criteria for filing a late hearing request on the pre-date determination, he was entitled to a hearing on the merits pursuant to 430 CMR 4.15. The review examiner had no authority under G.L. c. 151A, § 39(b), to deny the claimant that hearing simply because the second hearing request was late.

**Board of Review
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Issue ID: 0080 6688 30

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 his request to pre-date his claim. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant filed a claim for unemployment benefits with the DUA, effective November 16, 2022. Subsequently, the claimant submitted a request to have the DUA pre-date his claim to March 20, 2022. The DUA denied this request for an earlier effective date in a determination issued on March 24, 2023 (pre-date determination).¹ The claimant appealed this pre-date determination on June 20, 2023, 88 days after it was issued. On July 19, 2023, the DUA issued a separate determination pursuant to G.L. c. 151A, § 39(b), denying his request for a hearing on the pre-date determination on the ground that he did not have good cause for filing a late appeal (late appeal determination). The claimant requested a hearing on the late appeal determination on August 15, 2023, 27 days after it was issued. In a decision rendered on August 31, 2023, the review examiner denied the claimant a hearing on the merits of his pre-date determination. We accepted the claimant’s application for review.

The review examiner concluded that, although the claimant met the criteria for filing his hearing request of the pre-date determination late, he was not entitled to a hearing on the merits pursuant to 430 CMR 4.15, because he did not have good cause to file the late appeal determination beyond the statutory appeal deadline. 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 denied the claimant a hearing on the merits of the pre-date determination solely because the claimant did not show

¹ Issue ID # 0078 5671 54.

good cause for failing to timely submit a hearing request on the late appeal determination, 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 insurance benefits effective November 6, 2022.
2. The claimant elected to receive correspondence from the Department of Unemployment Assistance (DUA) electronically.
3. On March 24, 2023, the DUA issued to the claimant a Notice of Disqualification pursuant to Section 23(b) of the Law determining that there was no good cause for the claimant's failure to file for benefits earlier than he did (First Notice).
4. The First Notice included instructions on how to file an appeal and the time parameters within which to file an appeal.
5. An appeal of the First Notice was due by April 3, 2022.
6. On March 24, 2023, the claimant received the First Notice when it was properly placed in his account inbox.
7. The claimant was in an in-patient detox treatment program from March 16–24, 2023. He then transferred to an inpatient rehabilitation center adjacent to the detox center until April 25, 2023. While in the rehab center, the claimant saw the First Notice within days of its issue. He called the DUA to inquire how to appeal the First Notice. A DUA representative advised the claimant that he need do nothing regarding an appeal of the First Notice.
8. The claimant appealed the First Notice on June 20, 2023.
9. June 20, 2023 was the 88th calendar day following March 24, 2023.
10. On July 19, 2023, the DUA issued to the claimant a Notice of Disqualification pursuant to Section 39 of the Law (Second Notice).
11. The Second Notice included instructions on how to file an appeal and the time parameters within which to file an appeal.
12. An appeal of the Second Notice was due by July 29, 2022.
13. On July 19, 2023, the claimant received the Second Notice when it was properly placed in his account inbox.

14. The claimant appealed the Second Notice on August 15, 2023. He was delayed in appealing possibly because he was having ongoing problems opening items in his DUA inbox from his mobile telephone.

15. August 15, 2023 was the 27th calendar day following July 19, 2022.

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 his pre-date determination.

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. . . .

(Emphasis added.) However, the DUA has promulgated regulations at 430 CMR 4.15, which allow hearing requests to be filed beyond 30 days under limited circumstances. The regulation provides 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.

Finding of Fact # 7 provides that the claimant saw the March 24, 2023, pre-date determination within days after it was issued, spoke to a DUA representative about an appeal, but the representative advised the claimant that he need not do anything. In light of this finding, the review examiner properly concluded that this advice had discouraged the claimant from filing a timely hearing request of the pre-date determination. Pursuant to 430 CMR 4.15(1), this conclusion should have entitled the claimant to a hearing on the merits of the pre-date determination.

However, the review examiner denied the claimant the pre-date hearing, because he failed to demonstrate good cause for filing a hearing request on the late appeal determination after the statutory deadline. This was an error, because this issue was not before the review examiner.

The DUA had only issued one notice, which determined that the claimant was not entitled to a hearing on the ground that his appeal was filed late. This was its July 19, 2023, late appeal determination. When the claimant sought a hearing on this July 19, 2023, late appeal determination 27 days later, the DUA did not issue another determination informing the claimant that it, too, was untimely. Since there was no separate determination, there was nothing to appeal. The review examiner may have been curious as to why the latter hearing request was also late, but without an underlying determination and hearing request, he had no authority under G.L. c. 151A, § 39(b), to rule on it. He certainly could not use it as a basis to deny the claimant a hearing on the original, pre-date determination.

We, therefore, conclude as a matter of law that the claimant met the criteria under 430 CMR 4.15(1), to file his request for a hearing on the pre-date determination after the statutory appeal deadline.

The review examiner's decision is reversed. The claimant is entitled to have a hearing on the merits of the pre-date determination, Issue ID # 0078 5671 54.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 18, 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.

AB/rh