

The only credible evidence presented was that the claimant missed the appeal deadline because he waited for paperwork from his prior employer. Inasmuch as no one told him he needed this paperwork to appeal, and he failed to thoroughly read the disqualifying determination to see the 10-day deadline, held he did not demonstrate circumstances beyond his control that prevented him from meeting the statutory deadline. Pursuant to G.L. c. 151A, § 39(b) and 430 CMR 4.14, he is not entitled to a hearing on the merits on the determination that denied benefits.

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Issue ID: 0082 3505 18

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. A hearing on the merits was denied on the grounds that the claimant did not show that he met any of the criteria under 430 CMR 4.14 to file an appeal beyond the statutory deadline set forth under G.L. c. 151A, § 39(b).

The claimant had filed a claim for unemployment benefits, effective January 28, 2024, which was denied in a determination issued by the agency on February 21, 2024, (§ 25(e) determination). The claimant appealed this § 25(e) determination to the DUA Hearings Department on March 7, 2024, 15 days later. On April 11, 2024, the DUA issued a determination denying a hearing on the merits, stating that the claimant did not have good cause for failing to file the appeal within 10 days (late appeal determination).

Following a hearing on the merits of the late appeal determination, the review examiner affirmed the agency's determination in a decision rendered on May 23, 2024. The claimant sought review by the Board, which dismissed his appeal because it was filed beyond the statutory deadline set forth under G.L. c. 151A, § 40, and the claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On October 31, 2024, the District Court ordered the Board to review the claimant's Board of Review appeal on the merits. Although we continue to believe that the Board does not have jurisdiction to review the claimant's appeal, we have complied with the District Court's Order.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant failed to present credible evidence that he filed a late appeal either because of a medical condition, an inability to reach DUA, or due to being discouraged by his employer, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, and the District Court's Order, we affirm the review examiner's decision.

Findings of Fact

The review examiner's findings of fact and credibility assessment, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant filed a claim for unemployment benefits with the Department of Unemployment Assistance (DUA) effective January 28, 2024.
2. The claimant elected to receive electronic correspondence from the DUA and provided his correct email address.
3. On February 21, 2024, the DUA issued the claimant a Notice of Disqualification (the First Notice) in issue # 0082 0774 53-01.
4. The First Notice was issued electronically to the claimant's inbox.
5. On February 26, 2024, the claimant accessed his inbox.
6. The claimant opened and read the First Notice.
7. The claimant did not thoroughly read the First Notice.
8. The claimant did not file an appeal of the First Notice immediately because he was waiting for paperwork from his previous employer.
9. No one told the claimant that he needed paperwork from his previous employer to file an appeal.
10. No one from the DUA discouraged the claimant from filing an appeal.
11. No one from the previous employer discouraged the claimant from filing an appeal.
12. The claimant did not attempt to contact the DUA by phone.
13. The claimant did not attempt to file his appeal earlier.
14. On March 7, 2024, more than 10 days after the First Notice, the claimant filed an electronic appeal of the First Notice.

[Credibility Assessment:¹]

During the hearing, the claimant gave inconsistent and conflicting testimony regarding all aspects of the issue. The claimant initially admitted that he received and opened the First Notice approximately when it was sent. The claimant testified that he did not read the full notice. The claimant later contended that he did not receive the First Notice. The claimant testified that he went in person to the “[Location A] branch” after receiving the First Notice, which the claimant contended was before February 21, 2024. The claimant then amended his testimony to that he went to the [Location A] branch on March 7, 2024. The claimant testified in the initial hearing that he contacted the DUA by phone about the First Notice on February 25, 2024, at 11:30 a.m. The claimant stated that he was basing this testimony on a “call log” on his cell phone that he was looking at while testifying. The claimant was asked to provide the call log as an exhibit. The hearing was continued for the claimant to present the exhibit. In the continued hearing, the claimant did not present the call log. The claimant initially testified that no call log existed because he made all contacts to the DUA by computer. The claimant then testified that he was looking at his call log on his cell phone and that he contacted the DUA on January 26. Based on the claimant’s testimony, it can only be concluded that the claimant was falsely testifying about contacting the DUA by phone. It therefore cannot be concluded that the claimant made any attempt to contact the DUA by phone. Because of the claimant’s inconsistent and non-credible testimony, it cannot be concluded that the claimant was unable to speak to a representative due to high call volume.

The claimant further contended that he did not file his appeal earlier because his employer told him not to file an appeal. This testimony was also inconsistent and non-credible as the claimant stated the employer told him not to file an appeal of the First Notice prior to the issuance of the First Notice.

The claimant further contended that he was unable to file an appeal due to a medical condition. The claimant presented documentation showing that he was cleared to return to work prior to the issuance of the First Notice. The claimant did not present any credible evidence showing that his medical condition prevented him from filing his appeal in a timely manner. Furthermore, it cannot reasonably be concluded that the claimant was prevented from filing his appeal due to a medical condition and then testified as above.

During the initial hearing, the claimant’s wife was not initially declared as a participant to the hearing. The wife could be heard “coaching” the claimant’s testimony. The wife was sworn in as a witness in the continued hearing. However, the wife’s testimony was also inconsistent and not credible.

Ruling of the Board

¹ We have copied and pasted here the portion of the review examiner’s decision that included his credibility assessment.

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. For the reasons set forth below, we also agree that the review examiner reached the correct legal conclusion to deny a hearing on the merits.

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 has promulgated regulations, which list examples of reasons that constitute good cause under G.L. c. 151A, § 39(b). Specifically, 430 CMR 4.14, provides 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:

- (1) A delay by the United States Postal Service in delivering the Commissioner's determination;
- (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);
- (3) A documented serious illness or hospitalization of a party household member an immediate family member during the entire ten day filing period or a portion of the appeal period if the party's ability to timely appeal is thereby affected;
- (4) An emergency family crisis which requires a party's immediate attention during the entire ten day filing period or a portion of the appeal period if the party's ability to timely appeal is thereby affected;
- (5) An inability to effectively communicate or comprehend English and the party is unable to find a suitable translator to explain the notice of determination within the ten day filing period;

- (6) The Commissioner's determination is not received and the party promptly files a request for a hearing after he or she knows or should have known that a determination was issued;
- (7) A continuing absence from the Commonwealth, while seeking employment, during all or most of the ten day filing period;
- (8) Intimidation, coercion or harassment by an employer resulting in a party failing to timely request a hearing;
- (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.
- (10) An inability because of illiteracy or a psychological disability to understand that a request for a hearing must be filed within the ten day filing period;
- (11) The individual's need to address the physical, psychological and legal effects of domestic violence as defined in M.G.L. c. 151A, § 1(g^{1/2});
- (12) Any other circumstances beyond a party's control which prevented the filing of a timely appeal.

During the hearing and on appeal to the Board, the claimant has asserted various reasons for filing his appeal 15 days after receiving his disqualifying § 25(e) determination. *See* Finding of Fact # 14. One reason is that, due to his medical condition of sleep apnea and a delay in acquiring his CPAP machine, this somehow caused a cognitive impairment which prevented him from submitting his appeal in a timely manner. He raised this reason during the hearing, but the review examiner rejected it.

In his credibility assessment, the review examiner concluded that the claimant did not present credible evidence to show that this medical reason caused the delay. Such assessments are within the scope of the fact finder's role, 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). "The test is whether the finding is supported by "substantial evidence."" *Lycurgus v. Dir. of Division of Employment Security*, 391 Mass. 623, 627 (1984) (citations omitted). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" *Id.* at 627–628, *quoting New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 466 (1981) (further citations omitted). Given the entire record, we believe his assessment is reasonable in relation to the evidence presented.

As the review examiner alluded to, there is a letter, dated January 12, 2024, from the claimant's medical doctor, which merely states the claimant needed to remain out of work from January 17 –

22, 2024. A second medical record, dated February 1, 2024, shows diagnoses of daytime tiredness and decreased quality of sleep, and recommends head gear while sleeping. *See* Exhibits 11 and 12.² Nothing in this evidence indicates a cognitive impairment that would prevent the claimant from timely filing his appeal.

During the hearing, he testified that his former employer discouraged him from filing the appeal on time. He testified about a conversation with an individual who reached out after his two weeks of severance, which was on or about February 4, 2024. However, the conversation he described having with this person seemed to be about trying to persuade him to return to work in a different role. Nothing in his testimony suggested that they discussed an unemployment appeal. Moreover, as the review examiner notes in his credibility assessment, this February 4th conversation could not have been about the § 25(e) determination, because it pre-dated the February 21st determination date.

The claimant also insisted that the DUA was to blame, because he was unable to reach anyone on the phone due to call volume, and the DUA failed to provide him with an advocate for the hearing. Although the DUA is required to provide various translation services for individuals whose primary language is not English, there is neither a rule of law nor DUA policy to provide parties with advocates. *See* G.L. c. 151A § 62A(d). As the hearing notice explains, parties are free to arrange for their own representation. *See* Exhibits 8 and 9.³

As for being unable to call the DUA, the review examiner's credibility assessment touches on the fact that the claimant provided contradictory testimony about the dates he tried to call the DUA, whether he knew the dates that he called, and whether a call log showing his calls to the DUA existed.⁴ Even if he was unable to reach the DUA by phone, the claimant knew how to visit a DUA office in person, as he testified that he visited a [Location A] branch at one point for assistance with re-applying for benefits. Given this record, the claimant has not demonstrated that any inability to reach the DUA by telephone constituted a circumstance beyond his control that prevented the filing of a timely appeal.

Lastly, the claimant maintained that the reason for the delay in filing was because he was waiting for a letter from his previous employer, which did not arrive until March 7, 2024. *See* Finding of Fact # 8. However, no one told him that he needed this paperwork in order to appeal the § 25(e) determination. Finding of Fact # 9. Had the claimant thoroughly read the § 25(e) determination, Exhibit 6, he would have seen that he had to request a hearing within ten calendar days. *See*

² While not explicitly incorporated into the review examiner's findings, these exhibits, as well as the exhibits and the claimant's testimony referenced below, are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

³ Exhibits 8 and 9 are the hearing notices for the original and continued hearing.

⁴ In his decision, the review examiner states that the claimant never submitted a call log. There is a document uploaded into UI Online (E9), which appears to be a list of calls "By Phone," including dates and times. As this document was not mentioned in the hearing, it may have been created and uploaded after the hearing concluded. In any event, this appears to be a typewritten list, not the Excel spreadsheet that the claimant testified to having at the first hearing. Further, it does not include the dates of February 21, 23, and 24, or calls made "every day," which the claimant testified to calling the DUA. For these reasons, we decline to attribute any weight to this document or remand further for the review examiner to consider it.

Finding of Fact # 7. Unfortunately, his failure to thoroughly read DUA's notice is not a circumstance beyond his control, and we are without authority to grant the claimant the relief he is requesting.

We, therefore, conclude as a matter of law that the claimant has failed to present substantial and credible evidence that he had good cause for filing his appeal beyond the statutory 10-day deadline within the meaning of G.L. c. 151A, § 39(b), and 430 CMR 4.14.

The review examiner's decision is affirmed. The claimant is not entitled to a hearing on the merits of the § 25(e) determination in Issue ID # 0082 0774 53.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 4, 2025



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