

Because the claimant did not receive DUA's email notifying her of a determination due to technical problems with her email, and once resolved she filed her appeal promptly, Board held she had justification for her late appeal pursuant to G.L. c. 151A, § 39(b).

**Board of Review
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Issue ID: N6-FMKM-4FFL

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, dated August 5, 2020. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

On August 5, 2020, the DUA issued to the claimant a Notice of Non-Monetary Determination – Identity Verification (August 5, 2020 Notice) stating that the claimant was not eligible for Pandemic Unemployment Assistance (PUA) benefits because he had failed to provide sufficient documentary evidence to verify his identity. The claimant appealed the determination on October 2, 2020, 58 days after the Notice was issued. On November 30, 2020, DUA issued a Notice of Non-Monetary Issue Determination – Late Appeal stating that the claimant did not have good cause for submitting his appeal after the statutory deadline. The claimant requested a hearing on this late appeal determination. Following a hearing on the merits concerning the late appeal, the review examiner affirmed the agency's initial determination in a decision rendered on July 23, 2021. We accepted the claimant's application for review.

A hearing on the merits of the August 5, 2020 Notice was denied after the review examiner determined that the claimant did not have good cause or justification for failing to file a timely appeal of that determination. 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 information about the circumstances surrounding the claimant's late appeal. The claimant attended the remand hearing. Thereafter, 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 did not have good cause or justification for failing to file a timely appeal because he did not provide a clear reason as to why his appeal was filed more than 30 days after the determination date, 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 Pandemic Unemployment Assistance (PUA) which was determined to be effective May 03, 2020.
2. The claimant elected to receive electronic correspondence from the Department of Unemployment Assistance (DUA) on their initial PUA claim.
3. On August 04, 2020, the DUA issued the claimant a Notice of Non-Monetary Issue Determination Identity Verification (the Notice). The Notice read, in relevant part, "If you disagree with this determination you have the right to file an appeal. Your appeal must be received within 30 calendar days from the issue date of this determination."
4. On August 04, 2020, the claimant received the Notice when it was properly placed in their PUA account inbox. DUA records show that an email concerning the placement of the Notice was sent to the email on file.
5. The claimant has only one email address associated with their PUA claim.
6. The claimant did not receive the email concerning the Notice being placed in their PUA inbox, despite the correct email being held on file and used. The claimant's email address has not changed during their claim. The claimant is "vigilant" in their email habits including checking alternative junk or promotional inboxes. The claimant has not yet seen, found, or received the email concerning the Notice's placement.
7. In September, the claimant spoke with family and friends with similar issues on their PUA claim to understand the reason for their denial. The claimant "scoured" their email inboxes to find an email to remedy the issue with their claim.
8. On October 01 and October 02 of 2020, the claimant called the DUA helpline to resolve the legal issue in the Notice. The helpline advised the claimant on October 02, 2020 to clear their internet cache to allow for their viewing of the Notice. The advice successfully resolved the technical difficulties.
9. On October 02, 2020, more than 30 days after the Notice was issued, the claimant appealed the Notice.
10. The reason the claimant did not appeal the Notice within 30 days is because they were unaware of the Notice and could not open the electronic version after becoming aware of the Notice's placement.
11. The claimant was not discouraged by a DUA representative from filing their appeal.

12. The claimant was not threatened, harassed, or intimidated by an employer concerning filing their appeal.

Credibility Assessment:

The claimant credibility testified that they did not receive the email to alert them to the Notice in their PUA portal inbox. The claimant confirmed the email on file for their claim, and credibly testified that they have only had one email on their PUA claim. DUA records show that the email was sent to the email on file. However, the claimant testified that they did not receive the email for the Notice. The claimant credibly testified that they are “vigilant” regarding their email habits, such as checking alternative junk or promotional inboxes. The claimant credibly testified that they have not yet seen, found, or received the email concerning the Notice’s placement. With this testimony, the claimant did not receive the email concerning the Notice’s placement in their PUA inbox. In both hearings, the claimant testified that they took steps to understand their claim by asking friends and family about their own PUA claims. In the remand hearing, the claimant further testified that they first understood there may be an issue with their claim and talked to family in September. The claimant testified in the remand hearing that they “scoured” their email inboxes to find an email to remedy the issue with their claim. On October 01 and October 02 of 2020, the claimant called the DUA helpline to resolve the legal issue in the Notice. The helpline advised the claimant on October 02, 2020 to clear their internet cache to allow for their viewing of the Notice. The advice successfully resolved the technical difficulties. From the claimant’s testimony, they have sparse recollection of any other steps taken to resolve the issue. The claimant maintained a “general confusion” caused by the pandemic in August 2020 and stated that “the sequence of events is a bit of a blur in [their] mind.” The claimant has sparse recollection of the period between the Notice and the calls made to the DUA in general and alleged being in “panic” during the period between the Notice and the phone calls to the DUA. The claimant has no documentation or notes to serve as evidence of their steps or reason for not contacting the DUA prior to October 2020. Under different circumstances, a claimant’s consistent testimony that they do not recall the details of the period at issue may corroborate the confusion they had at the time. However, the claimant’s “general confusion” and “panic” lasted for nearly two months (from August 04, 2020 to October 01, 2020), and this period appears too long for a reasonable claimant to leave “general confusion” and “panic” unresolved before calling the DUA. Therefore, it is not credible that the reason for not contacting the DUA sooner was the result of “general confusion” and “panic.”

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. 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, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant did not articulate good cause or justification for failing to file a timely appeal.

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 relevant DUA regulation, 430 CMR 4.15, 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: (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 a 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....

The review examiner found that the claimant did not receive an email from the DUA to his personal email account informing him that the important documents relevant to his PUA claim had been placed in his PUA online inbox. Consolidated Finding # 6. The right to receive notice and an opportunity to be heard is a fundamental right. The Due Process Clause of the Fourteenth Amendment prohibits the States from depriving any person of property without "notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (further citations omitted). As the claimant did not receive a communication from the DUA informing him that a determination had been issued, we believe that he did not receive the requisite notice necessary to timely appeal. *See* Board of Review Decision 0055 8011 26 (Mar. 29, 2021).

Moreover, upon finally resolving the technical difficulties with his email and seeing the DUA's communication, the claimant promptly submitted his appeal. *See* Consolidated Findings ## 8 and 9. Thus, he had justification for his late appeal pursuant to 430 CMR 4.15(3).

We, therefore, conclude as a matter of law that the claimant established justification for filing his appeal beyond the statutory appeal period pursuant to G.L. c. 151A, § 39(b), and 430 CMR 4.15.

The review examiner's decision is reversed. The claimant is entitled to a hearing on the merits of Issue ID # N6-FH7N-HDTH.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 29, 2021



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.

LSW/rh