

Although aware of correspondence from the DUA in her PUA inbox, the claimant was unable to access her account while out of the country. She communicated with the DUA via email, online assist, and live chat and was informed that she would have to wait until she returned to the U.S. to access her account. She promptly filed her appeal upon her return. Held the claimant demonstrated justification for submitting a late appeal pursuant to G.L. c. 151A, § 39(b) and 430 CMR 4.15(2).

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: N6-FV89-LDFD

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 Pandemic Unemployment Assistance (PUA) benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant filed a claim for PUA benefits with the DUA, effective March 8, 2020. On September 16, 2020, the DUA issued a Notice of Non-Monetary Issue Determination denying benefits based on COVID-19 Eligibility (COVID-19 Eligibility), which she appealed on January 7, 2021. On March 1, 2021, the DUA issued a Notice of Non-Monetary Issue Determination denying her appeal for filing late without justification (Late Appeal). She timely appealed this determination. Following a hearing on the Late Appeal determination, the review examiner affirmed the agency's determination in a decision rendered on July 19, 2021, concluding that she was not entitled to a hearing on the merits of the COVID-19 Eligibility determination.

The Board accepted the claimant's application for review. 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 for subsidiary findings pertaining to the claimant's attempts to file a timely appeal of the COVID-19 Eligibility determination. 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 to file her appeal more than 30 days after the date of the COVID-19 Eligibility determination, is supported by substantial and credible evidence and is free from error of law, where the claimant was unable to access her PUA account when she was out of the country and was advised by the DUA that the only way to do so was to return to the U.S.

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 March 8, 2020.
2. The claimant elected to receive electronic correspondence from the Department of Unemployment Assistance (DUA) on her PUA profile.
3. The claimant is a full-time student at a Massachusetts college. She learned that her dormitory would not be available to her during the fall semester of 2020. On August 4, 2020, she traveled to Korea to visit family, due to a COVID-related emergency.
4. On September 16, 2020, the DUA issued the claimant a Notice of Non-Monetary Issue Determination COVID-19 Eligibility (the Notice) in issue ID N6-FJV2-2KHR. 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."
5. On September 16, 2020, the claimant received the Notice when it was properly placed in her PUA account inbox.
6. The claimant suspended her U.S. mobile telephone service prior to leaving for Korea, in order to avoid international charges. The claimant's U.S. mobile telephone line did not work while she was in Korea.
7. The claimant attempted to access the PUA portal while in Korea and could not do so.
8. The claimant could not receive the text messages necessary to login to the PUA portal because her phone number to which they were sent was the U.S. mobile telephone line that she suspended when leaving the U.S.
9. While in Korea, the claimant reached out to the DUA through online assist, email, and live chatting for help accessing the PUA portal.
10. The claimant was able to communicate with the DUA while in Korea through live chatting. The DUA representative told the claimant that the only way to login to the portal was to return to the U.S. and access the text verification.
11. The claimant returned to the U.S. on January 7, 2021, lifted the suspension on her U.S. telephone service, accessed her PUA portal and viewed the Notice on January 7, 2021.
12. On January 7, 2021, 113 days after the initial determination, the claimant filed an appeal regarding the Notice on the PUA website.

Credibility Assessment:

The claimant's testimony was credible. Her responses to questions were detailed, forthright and persuasive.

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 show justification for her failure to file a timely appeal.

Because the claimant did not timely file an appeal of the COVID-19 Eligibility determination, we must look to the applicable statute and regulations to determine whether the claimant had good cause for being late. 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. . . .

In this case, the claimant filed her appeal 113 days after the DUA issued its determination. Finding of Fact # 12. DUA regulations specify circumstances that constitute good cause for filing a late appeal within the meaning of G.L. c. 151A, § 39(b), and allow, under a few circumstances, a party to file an appeal beyond 30 days from the original determination. Specifically, 430 CMR 4.15 provides:

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.

The express language of this regulation places the burden upon the claimant to show that one of these four circumstances applies. We need not consider (1) and (4), because the findings of fact do not support a conclusion that those circumstances are at all applicable. Because 430 CMR 4.15(3) contemplates that the determination is never received, we also do not believe that this provision applies to the facts here. In this case, the question is whether, under circumstance (2), the claimant received the notice of disqualification “beyond the 30 day extended filing period and [she] promptly [filed] a request for hearing.” As set forth below, we believe the claimant’s circumstances fall under 430 CMR 4.15(2).

The review examiner found that the claimant elected to receive electronic correspondence from the DUA on her PUA account. Finding of Fact # 2. The DUA’s September 16, 2020, COVID-19 Eligibility determination was electronically sent to the claimant and put into her PUA account inbox. Finding of Fact # 5. The claimant traveled to Korea on August 4, 2020, and her mobile phone did not work while she was there as she had suspended service prior to leaving. Findings of Fact ## 3 and 6. The claimant attempted to access her PUA portal while in Korea but was unable to do so, because she could not receive the text message necessary to login to her account. Findings of Fact ## 7 and 8. When unable to access her PUA account, the claimant contacted the DUA through online assist, email and live chatting for help, and a DUA representative told her that the only way to access her account was to return to the U.S. and access text verification on her phone. Findings of Fact ## 9 and 10.

Normally, we would conclude, as the review examiner did, that the depositing of the notice into her PUA account inbox constitutes receipt of the notice. When a claimant has free access to her account, there is no reason why she cannot access it, read a determination, and then take timely action in response. Even where, as here, a claimant is aware of the existence of a document but is unable to view it for some reason, it is incumbent upon her to seek out assistance from the DUA regarding its content. As the hearing officer stated in his decision, “[given] that she was unable to use her mobile telephone, it was incumbent upon her to seek alternative access.”

In this case, however, the record reflects that the claimant contacted the DUA through all means available to her and was told that she would only be able to access her inbox on her return to the U.S. Findings of Fact ## 9 and 10. This shows that the claimant made diligent efforts to obtain such assistance. Further, the findings show that, upon finally being able to access her account, the claimant promptly filed her hearing request. Findings of Fact ## 11 and 12. That the claimant filed her appeal on the same day that she learned of it demonstrates the type of due diligence expected under 430 CMR 4.15.

The claimant’s situation and actions persuade us that the review examiner’s decision is not in accord with the spirit of 430 CMR 4.15, the prior decisions of this Board, or with the mandate under G.L. c. 151A, § 74, to liberally interpret the unemployment law. In prior decisions under G.L. c. 151A, 39(b), and the relevant regulations, this Board has consistently held claimants to a standard of reasonableness. *See, e.g.*, Board of Review Decision 0033 7690 36 (May 29, 2020); Board of Review Decision 0029 2124 94 (June 20, 2019); and Board of Review Decision 0025

6888 02 (September 6, 2018). We believe the claimant has met this standard. The claimant faced a technological issue that prevented her from accessing the determination notice. She took reasonable but unsuccessful steps to access her account and promptly appealed the determination once she read it. Under these circumstances, we believe that the claimant has established justification for her late appeal within the meaning of 430 CMR 4.15(2).

We, therefore, conclude as a matter of law that the claimant had good cause to file a late appeal pursuant to G.L. c. 151A, § 39(b).

The review examiner's decision is reversed. The claimant is entitled to a hearing on the merits of her COVID-19 Eligibility determination.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 29, 2022



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.

JCT/rh