

Although the claimant filed his hearing request beyond the statutory appeal period, he is entitled to a hearing on the merits of that determination, because the original determination was not in his preferred language, and his inability to understand the written determination contributed to the delay.

**Board of Review
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Issue ID: N6-H7J9-F6JN

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.

On April 12, 2021, the DUA sent the claimant a Notice of Non-Monetary Issue Determination, which concluded that the claimant did not meet the eligibility requirement under § 2102 of the CARES Act of 2020, commencing December 26, 2020 (April 12, 2021 determination). The claimant appealed that determination on May 18, 2021. The DUA then sent the claimant a Notice of Non-Monetary Issue Determination on May 19, 2021, informing her that she did not have justification for filing a late appeal. The claimant timely appealed the May 19, 2021, determination and attended the hearing. In a decision rendered on July 19, 2021, the review examiner affirmed the agency's determination, concluding that the claimant did not have justification for failing to timely file an appeal of the April 12, 2021, determination pursuant to G.L. c. 151A, § 39(b), and 430 CMR 4.14–4.15. Thus, she was not entitled to a hearing on the merits of the April 12, 2021, determination.

The Board accepted the claimant's application for review. 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 did not have good cause for the late appeal of the April 12, 2021, determination is supported by substantial and credible evidence and is free from error of law, where the claimant received the determination letter in English, not her preferred language of Spanish.

Findings of Fact

The review examiner's findings of fact are set forth below in their entirety:

1. The claimant filed a claim for Pandemic Unemployment Assistance (PUA) which was determined to be effective 3/8/2020.
2. The claimant elected to receive electronic correspondence from the Department of Unemployment Assistance (DUA) on their PUA profile.
3. On 4/12/2021, the DUA issued the claimant a Notice of Non-Monetary Issue Determination COVID-19 Eligibility (“the Notice”) in issue ID N6-H5VP-4V88. The Notice reads, 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. The claimant read the Notice shortly after receiving it.
5. The claimant natively speaks Spanish and has limited English language capability, therefore after reading the Notice they were confused by its contents and did not know they had appeal rights. They did not get the Notice translated.
6. No one discouraged the claimant from filing an appeal to the Notice.
7. On 5/17/2021, 35 days after the initial determination, the claimant called DUA customer service, who informed the claimant of their right to appeal the Notice and helped them file the appeal on the PUA website.

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 DUA’s April 12, 2021, determination.

Because the claimant did not timely file an appeal of the April 12, 2021, 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. . . .

DUA regulations specify circumstances which 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 findings indicate that the claimant waited to file her appeal of the April 12, 2021, determination because it was in English, not Spanish, and the claimant did not know she had a right to appeal. *See Findings of Fact # 5.* Because this is not one of the justifications allowed under 430 CMR 4.15, the review examiner concluded that the claimant failed to establish that there was good cause to consider the appeal to have been timely filed.

However, a separate regulation, 430 CMR 4.13, includes a provision that is applicable to the claimant's specific circumstances. 430 CMR 4.13(4) provides:

- (4) Notwithstanding 430 CMR 4.13(1) through (3), where the party is an individual whose preferred language is listed under M.G.L. c.151A, § 62A and who did not receive the Commissioner's determination in his or her preferred language, the request for hearing *shall* be deemed timely if filed within 60 calendar days from the date of mailing of the determination or if filed after 60 day period and the reason for the delay in filing is caused by the Commissioner's determination having not been in his/her preferred language.

(Emphasis added.)

The review examiner failed to consider this section of the regulations in his findings and legal conclusion. Here, the claimant filed her hearing request on May 18, 2021, 36 days after the initial determination. The findings and record before us show that the claimant's preferred language is

Spanish, and the fact that the determination was in English and not Spanish attributed to the claimant's delay in filing an appeal.

On her initial PUA application, the claimant selected Spanish as her preferred language.¹ Spanish is one of the languages listed under G.L. c. 151A, § 62A(d)(iii). The hearing itself was conducted with a Spanish interpreter. At the hearing, the claimant testified that, although she received the April 12, 2021, determination she was unable to read or understand it in its entirety, because it was not written in Spanish. *See* Finding of Fact # 5. Under these circumstances, we believe that the reason for the delay in filing the claimant's appeal was caused by the DUA's determination not having been in the claimant's preferred language of Spanish.

We, therefore, conclude as a matter of law that the claimant's appeal is deemed timely pursuant to G.L. c. 151A, § 39(b), and 430 CMR 4.13(4).

The review examiner's decision is reversed. The claimant is entitled to a hearing on the merits of the April 12, 2021, determination.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 31, 2022



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member



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)**

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

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.

MJA/rh