

The claimant did not understand English well enough to select his primary language as his preferred language when applying for PUA benefits. The delay in filing the appeal was because he could not understand the determination, which was in English. Under these circumstances, the Board held that his late appeal was deemed to be timely pursuant to 430 CMR 4.13(4).

**Board of Review
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Issue ID: N6-HF5F-P6KF

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

On July 14, 2021, the DUA sent the claimant a Notice of Non-Monetary Issue Determination, Employment Substantiation, which concluded that the claimant did not meet the eligibility requirement under § 2102 of the CARES Act of 2020, commencing December 27, 2020 (employment substantiation determination). The claimant appealed that determination on August 19, 2021. The DUA then sent the claimant a Notice of Non-Monetary Issue Determination, Late Appeal, on August 30, 2021, informing him that he did not have justification for filing a late appeal (late appeal determination). The claimant timely appealed the late appeal determination and attended the hearing. In a decision rendered on January 25, 2022, the review examiner affirmed the agency's determination, concluding that the claimant did not have good cause for failing to timely file an appeal of the employment substantiation determination pursuant to G.L. c. 151A, § 39(b), and 430 CMR 4.14–4.15. Thus, he was not entitled to a hearing on the merits of the employment substantiation 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 employment substantiation determination, is supported by substantial and credible evidence and is free from error of law, where the claimant could not read the determination because his primary language is Cantonese.

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 March 8, 2020.
2. The claimant elected to receive electronic correspondence from the Department of Unemployment Assistance (DUA) on his initial PUA claim.
3. The claimant selected the English language preference on his PUA profile.
4. On July 14, 2021, the DUA issued the claimant a Notice of Non-Monetary Issue Determination (the Notice) related to his Employment Substantiation. 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. The claimant received the Notice on July 14, 2021, when it was properly placed in his PUA account.
6. The Notice was sent in English because the claimant chose English as his preferred language. The claimant could not read the Notice when he received it.
7. The claimant filed an appeal of the Notice on August 19, 2021, thirty-six (36) days after the Notice was issued. The appeal was late.
8. On August 30, 2021, the DUA issued the claimant a Notice of Non-Monetary Issue Determination Late Appeal - No Justification.
9. The claimant appealed the Determination.

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. As discussed more fully below, we disagree with the review examiner’s legal conclusion that the claimant is not entitled to a hearing on the merits of the employment substantiation 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. . . .

DUA regulations allow, under a few circumstances, a party to file an appeal beyond 10 days from the original determination. In particular, 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.

Here, the claimant filed his hearing request on August 19, 2021, 36 days after the employment substantiation determination was issued. *See* Finding of Fact # 7. During the hearing, the claimant explained that his primary language is Cantonese, and that, when he applied for PUA, he did not understand that he could choose to have materials sent to him in a language other than English. *See* Finding of Fact # 3.¹ Thus, when he received the determination in English, he was unable to read it. *See* Finding of Fact # 6. We note that the hearing was conducted with a Cantonese interpreter, and that Chinese is one of the languages listed under G.L. c. 151A, § 62A(d)(iii).

Although she did not explicitly find that the claimant was unable to read the notice due to his limited English proficiency, the review examiner considered the provisions of 430 CMR 4.13(4) in her analysis, thus implicitly recognizing that the claimant could not read the notice because of a language issue. Nonetheless, the review examiner concluded that this section of the regulation did not apply, as the claimant had selected English as he preferred language on his PUA account, disregarding the claimant's testimony that he had not selected Cantonese as his preferred language when filing his PUA claim due to his limited understanding of English. *See* Finding of Fact # 6. We think that this holding is contrary to the intent of this regulation. Under these circumstances, we believe that the reason for claimant's delay in filing the appeal was caused by the DUA's determination not having been in the claimant's primary language of Cantonese.

We, therefore, conclude as a matter of law that the claimant's late 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 Employment Substantiation determination.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 24, 2023

¹ While not explicitly incorporated into the review examiner's findings, this portion of the claimant's testimony is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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).



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.

REB/rh