

Although the claimant filed her hearing request beyond the statutory appeal period, she is entitled to a hearing on the merits of that determination because she understood a DUA representative’s comments that she was “all set” to mean that no further steps were necessary to file a request for a hearing. Board held she had justification to file a late appeal pursuant to 430 CMR 4.15(1).

**Board of Review
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Issue ID: N6-HH9L-TJMF

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 20, 2020. On May 3, 2021, the DUA issued a Notice of Non-Monetary Issue Determination denying benefits based on Employment Substantiation (ES). She timely appealed and had a hearing scheduled for October 6, 2021. On August 2, 2021, the DUA issued a Notice of Non-Monetary Issue Determination denying benefits based on COVID-19 Eligibility (COVID-19 Eligibility), which she appealed on October 6, 2021. On October 7, 2021, the DUA issued a determination denying her appeal of the COVID-19 Eligibility issue due to filing the appeal 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 December 31, 2021.

The review examiner concluded that the claimant did not have justification for failing to timely file an appeal of the COVID-19 Eligibility 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 COVID-19 Eligibility 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 COVID-19 Eligibility determination, is supported by substantial and credible evidence and is free from error of law, where comments by a DUA representative to the claimant that she was “all set” discouraged her from taking further action.

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 15, 2020.
2. The claimant elected to receive correspondence from the Department of Unemployment Assistance (DUA) electronically.
3. On August 2, 2021, the DUA issued the claimant a Notice of Non-Monetary Issue Determination, COVID-19 Eligibility (the Notice) in issue N6-HD7D-T2M5. 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 2, 2021, the claimant received the Notice when it was properly placed in her PUA account inbox.
5. The claimant had received a determination on a separate Employment Substantiation issue (issue ID N6-H54V-2NVF) in May 2021 and had appealed it. A hearing on that issue was scheduled for October 6, 2021. Upon seeing the Notice (COVID-19 Eligibility), the claimant called DUA to inquire whether she needed to take any action regarding the Notice. She was told that she was "all set" on the Employment Substantiation issue. She mentioned the COVID-19 Eligibility issue and interpreted the DUA representative's statement to mean that she needed to take no action on the Notice.
6. On October 6, 2021, the claimant had her hearing on the Employment Substantiation issue and was told that the Notice was a separate issue that required a separate appeal. On that day, 65 days after the Notice, the claimant filed an appeal regarding the Notice 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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject portions of Findings of Fact # 5 as misleading and not supported by the record, as discussed below. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, we disagree with the review examiner's legal conclusion that the claimant is not entitled to a hearing on the merits of the August 2, 2021, COVID-19 Eligibility determination.

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 65 days after the DUA issued its determination. Finding of Fact # 6. 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.

(Emphasis added.)

The review examiner concluded that the claimant failed to establish that a DUA representative discouraged her from appealing. We disagree.

The claimant contacted the DUA upon seeing the August 2, 2021, COVID-19 Eligibility Notice and inquired as to whether she needed to take any action. Finding of Fact # 5. At the hearing, the claimant testified that the DUA representative had made it seem that she was "all set," and no further action was required on her part, as her original appeal covered both situations. In response to the review examiner's questioning, she further testified that, although it was possible that the DUA representative thought she was only talking about the Employment Substantiation issue, she had mentioned the new Notice regarding the COVID-19 Eligibility issue at that time. The claimant

also stated that she has filed appeals immediately upon learning of a determination in the past and would have done so for the COVID-19 Eligibility issue if she had known it was necessary.¹

In his decision, the review examiner explains why he concluded that a DUA representative did not discourage the claimant from filing a timely appeal. He writes, “[the claimant] was unable to recall the details of the exchange and allowed for the possibility that the DUA representative meant that no further action was required on the Employment Substantiation issue.” Thus, in reaching his conclusion, the hearing officer relies on speculation of what the DUA representative might have thought.

In rendering his decision, he also mischaracterizes the claimant’s testimony. Specifically, Finding of Fact # 5 states that the claimant was “told that she was ‘all set’ on the Employment Substantiation issue. She mentioned the COVID-19 Eligibility issue and interpreted the DUA representative’s statement to mean that she needed to take no action on the Notice.” This is misleading. The claimant did not testify that the representative said she was all set on the Employment Substantiation issue. The claimant testified that she mentioned the COVID-19 Eligibility Notice to the DUA representative and was told that she was “all set.” From this exchange, we believe that she could reasonably assume that the DUA representative’s “all set” response was intended to cover both issues.

Additionally, we note that, when the claimant learned for the first time at the October 6th hearing on the Employment Substantiation issue that the COVID-19 Eligibility determination was a separate issue that required a separate appeal, she filed her appeal on that same day. This demonstrates the type of due diligence expected under 430 CMR 4.15.

Under these circumstances, we believe that the reason for the delay in filing the claimant’s appeal was caused by the DUA representative’s comments that she was “all set,” which led the claimant to believe that no further steps were necessary to file a request for a hearing on the COVID-19 Eligibility determination.

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 4.15(1).

The review examiner’s decision is reversed. The claimant is entitled to a hearing on the merits of the August 2, 2021, COVID-19 Eligibility determination.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 24, 2022



Paul T. Fitzgerald, Esq.
Chairman



¹We 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).

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