

Claimant could not access her PUA account because she lost all of her electronic devices in a house fire. Once able to regain access, she appealed a disqualifying employment substantiation determination promptly. Held she demonstrated good cause for her failure to file a timely appeal within the meaning of G.L. c. 151A, § 39(b).

**Board of Review
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Issue ID: N6- HHJP- LVJK

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 July 22, 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 requirements for continued PUA benefits commencing December 27, 2020 (employment substantiation determination). The claimant appealed the employment substantiation determination on October 23, 2021. The DUA then sent the claimant a Notice of Non-Monetary Issue Determination, Late Appeal, on October 26, 2021, informing her that she 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 February 10, 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, she 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 lost the electronic devices she used to access her email and her PUA account in a house fire and appealed promptly after she regained access to these accounts.

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 the initial PUA claim.
3. On July 22, 2021, the DUA issued the claimant a Notice of Non-Monetary Issue Determination for Employment Substantiation (“the Notice”) Appeal ID number N6-H54P-543H. 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. The claimant received the Notice on July 22, 2021, when it was properly placed in the PUA account.
5. The claimant filed an appeal of the Notice on October 23, 2021, ninety-four (94) days after the Notice was issued. The appeal was late.
6. The claimant testified that she did not file a timely appeal because she had sustained a house fire on July 10, 2021, and she did not have access to her electronic devices or her PUA account. As a result, she did not file a timely appeal.
7. The claimant testified that she stopped certifying for PUA benefits because she started working.
8. The claimant’s last week requesting and certifying for PUA benefits was the week ending May 1, 2021.

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. The portion of Finding of Fact # 5, which provides that the claimant filed her appeal 94 days late is not accurate, as October 23, 2021, is actually 93 days after the employment substantiation determination was issued. In adopting the remaining findings, we deem 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. . . .

In this case, the claimant filed her appeal 93 days after the DUA issued its determination. *See* Finding of Fact # 5. 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 suggest 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 employment substantiation determination “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).

In this case, the claimant elected to receive communications from the DUA electronically. *See* Finding of Fact # 2. However, the claimant was not able to access her electronic communications via email or by looking in her PUA account, as she had lost her electronic devices in a house fire. *See* Finding of Fact # 6. The claimant promptly filed an appeal once she regained access to her PUA account and could access the notice.¹ Although the claimant did not explain on the record how she regained access to her account, she was clear that she appealed promptly after she was able to view the employment substantiation determination.

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).

Normally, we would conclude, as the review examiner did, that the depositing of the notice into the claimant's online PUA account constitutes receipt of the notice. When a claimant has free access to her account, there is no reason that she cannot read notices and respond to them timely. However, in prior decisions under GL. c. 151A, § 39(b), and 430 CMR 4.15(2), the Board has held that claimants, who were initially unable to access notices in their online accounts and appealed promptly once they could, had good cause for filing late appeals. *See, e.g.*, Board of Review Decision 0070 0543 71 (Sept, 27, 2022); and Board of Review Decision N6-FV89-LDFD (Dec. 29, 2022). Similarly, the record here shows that the claimant did not have access to her account due to circumstances beyond her control, and she promptly filed the appeal once she regained access. Under these circumstances, we believe that the claimant has established good cause for her late appeal within the meaning of 430 CMR 4.15(2).

We, therefore, conclude as a matter of law that 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 the employment substantiation determination in Issue ID # N6-H54P-543H.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 11, 2023



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.

REB/rh

