IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ELLEN EZEKIELOKORIE	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. N10A-04-017-JRJ
	)	
BRANDYWINE NURSING HOME	)	
&	)	
UNEMPLOYMENT INSURANCE	)	
APPEAL BOARD,	)	
	)	
Appellees.	)	

ORDER

Date Submitted: September 12, 2011
Date Decided: December 2, 2011

Upon Appeal from the Unemployment Insurance Appeal Board: **AFFIRMED**

Ellen Ezekielokorie, *Pro se*, 2226 W. Cortez Street, #2, Chicago, IL 60622.

Loren Holland, Esq., Marshall, Dennehey, Warner, Coleman, & Goggin, 1220 N. Market Street, 5th Floor, P.O. Box 8888, Wilmington DE, 19899-8888, Attorney for Brandywine Nursing Home.

Katisha D. Fortune, Esq., Deputy Attorney General, Carvel State Office Building, 829 N. French Street, 6th Floor, Wilmington DE, 19801, Attorney for Unemployment Insurance Appeal Board.

Jurden, J.

INTRODUCTION

Appellant Ellen Ezekielokorie ("Claimant"), files this appeal from the Unemployment Insurance Appeal Board's (the "Board") decision denying her petition for unemployment benefits. For the reasons that follow, the Court finds that the Board's decision is supported by substantial evidence and is free from legal error. Accordingly, the Board's decision is **AFFIRMED**.

FACTS AND PROCEDURAL HISTORY

Claimant resigned from her position as a Certified Nursing Assistant at Brandywine Nursing Home on December 17, 2009.[1] Shortly thereafter she filed a claim for unemployment benefits.[2] On January 13, 2010, the Claims Deputy determined Claimant was disqualified from receiving benefits pursuant to 19 *Del. C.* § 3314(1) for leaving "work voluntarily without good cause."[3] Claimant untimely appealed that decision on February 23, 2010.[4] The Appeals Referee held a hearing to address the untimeliness of the appeal.[5] He determined that: (1)"Claimant was mailed a determination disqualifying her from benefits"; (2) "[that] determination was mailed to her address of record"; and (3) "there was no evidence of departmental error."[6] After the hearing, the Appeals Referee found that

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[1] Record ("R.") at 7.
[2] *Id.* at 1.
[3] *Id.* at 17; 19 *Del. C.* § 3314(1) states: "An individual shall be disqualified for benefits… [f]or the week in which he left work voluntarily without good cause…."
[4] R. at 10.
[5] *Id.*
[6] *Id.* at 16.

Claimant's appeal was not timely and that the tribunal did not have jurisdiction to entertain the merits of her appeal.[7] On March 31, 2010, the Board affirmed the decision of the Appeals Referee.[8] The Claimant then filed the instant appeal on April 22, 2010.[9]

STANDARD OF REVIEW

On appeal, the Court determines whether the Board's decision is supported by substantial evidence and is free from legal error.[10] Substantial evidence is such relevant evidence that a reasonable mind would accept as adequate to support a conclusion.[11] The Court does not act as the trier of fact, nor does it have authority to weigh the evidence, decide issues of credibility, or make factual conclusions.[12] In reviewing the record for substantial evidence, the Court must consider the record in the light most favorable to the party prevailing below.[13] The Court's review of conclusions of law is *de novo*.[14] Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.[15]

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[7] *Id.*
[8] *Id.* at 20.
[9] *Id.* at 24.
[10] *General Motors v. McNemar*, 202 A.2d 803, 805 (Del. Super. 1964); *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. Super. 1960).
[11] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. Super. 1994).
[12] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. Super. 1965).
[13] *Benson v. Phoenix Steele*, 1992 WL 354033, at *2 (Del. Super.).
[14] *Harris v. Logisticare Solutions*, 2010 WL 2707421, at *2 (Del. Super.).
[15] *Dellachiesa v. General Motors Corp.*, 140 A.2d 137, 138 (Del. Super. 1958).

PARTIES CONTENTIONS

Claimant, a *pro se* appellant, addresses the underlying merits of her appeal, but not the issue of timeliness.[16] Both Appellees argue that Claimant's appeal is late, and therefore, is jurisdictionally barred pursuant to 19 *Del. C.* § 3318(b).[17] Appellees further assert that there are no mitigating circumstances to justify waiving a timely appeal as required by law.[18]

DISCUSSION

Pursuant to 19 *Del. C.* § 3318(b), when a claimant fails to file an appeal of the Claims Deputy's determination within ten days, that determination becomes final.[19] "The time for filing an appeal is an express statutory condition of jurisdiction that is both mandatory and dispositive."[20] The Court cannot invoke or exercise appellate jurisdiction "unless an appeal is perfected within the time period fixed by law."[21] Unless the Claims Deputy makes a mistake when mailing his determination, the ten day period to file an appeal begins to run on the date of the mailing.[22] Further, Delaware law presumes that a determination that is sent by

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[16] *See* Appellant's Opening Brief at 1.
[17] *See* Answering Brief of UIAB ("UIAB Br.") at 3; *see* Brandywine Nursing Home's Answering Brief ("Brandy. Br.") at 6.
[18] UIAB Br. at 4; Brandy. Br. at 6.
[19] 19 *Del. C.* § 3318(b) provides: "Unless a claimant ... files an appeal within 10 calendar days after such Claims Deputy's determination was mailed to the last known address o the claimant and the last employer, the Claim's Deputy's determination shall be final ..."
[20] *Duncan v. Delaware Dep't of Labor,* 2002 WL 31160324, at *2 (Del. Super.).
[21] *Id*. (quoting *Draper King Cole v. Malave*, 743 A.2d 672, 673 (Del. 1999)).
[22] *Lively v. Dover Wipes Co.*, 2003 WL 21213415, at *1 (Del. Super.).

mail with the proper address and postage has been received by the intended party.[23] The Board does not normally accept jurisdiction over untimely appeals, however, on occasion, untimely appeals are considered *sua sponte*.[24] This typically occurs where "there has been some administrative error on the part of the Department of Labor which deprived the claimant of the opportunity to file a timely appeal, or in those cases where the interests of justice would not be served by inaction."[25] The Court notes, however, that a claim that one did not receive the Claims Deputy's decision without a showing of error by the Department of Labor has not been a "sufficient reason for the UIAB to assert jurisdiction of an untimely appeal" in the past.[26]

Here, the Claims Deputy mailed the determination to Claimant's address of record[27] on January 13, 2010.[28] Claimant had until January 23, 2010 to file an appeal of the Claims Deputy's determination.[29] Claimant did not appeal the Claims Deputy's determination until February 23, 2010.[30] Although Claimant does not allege any error on the part of the Department of Labor, she contends that her appeal was late because she never received the Claims Deputy's determination. Claimant, however, confirmed that the address used by the Claims Deputy to send

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[23] *Id*. (citing *Malatesta v. Thiokol Corp.*, 1994 WL 146026, at *2 (Del. Super.)).
[24] *See Funk v. UIAB*, 591 A.2d 222 (Del. 1991).
[25] *Funk,* 591 A.2d at 225.
[26] *Lively*, 21213415, at *1 (citing *Funk,* 591 A.2d at 225).
[27] Claimant's address of record at the time was 260 Christiana Road, Apartment N-7, New Castle, Delaware 19720.
[28] R. at 15.
[29] *Id*.
[30] *Id*.

the determination on January 13, 2010 was accurate, and Claimant did not change her address of record until early March of 2010.[31] Moreover, the United States Postal Service did not return any mail to Claimant from the Department of Labor as "undeliverable."[32]

The facts presented demonstrate that Claimant's appeal falls outside of the ten day statutory period and is therefore untimely. Nothing in the record indicates that the Board acted outside the scope of its discretion. As such, the Board's decision is supported by substantial evidence and is free from legal error.[33]

CONCLUSION

For the foregoing reasons, the decision of the Unemployment Insurance Appeal Board is **AFFIRMED**.

IT IS SO ORDEDED.

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Jan R. Jurden, Judge

cc: Prothonotary

[31] *Id*.
[32] *Id*. at 20.
[33] *McNemar*, 202 A.2d at 805; *Freeman*, 164 A.2d at 688.