

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ROBERT DEYSHER,)	
)	
Appellant,)	
)	
v.)	C.A. No. N11A-03-015 WCC
)	
UNEMPLOYMENT INSURANCE)	
APPEAL BOARD,)	
)	
Appellee.)	

Submitted: September 28, 2011

Decided: December 29, 2011

Appeal from Unemployment Insurance Appeal Board - **REMANDED**

ORDER

Robert Deysher, 7 Cummings Court, Wilmington, DE 19804. *Pro se* Appellant.

Katisha D. Fortune, Esquire, Department of Justice, 820 N. French Street,
Wilmington, DE 19801. Attorney for Unemployment Insurance Appeal Board.

CARPENTER, J.

BACKGROUND

Appellant Robert Deysher (“Deysher”) was terminated from his job with Bath Saver, Inc. for allegedly enabling the falsification of a credit application. Shortly thereafter, in December of 2010, Deysher applied for unemployment benefits. In the weeks that followed, he tried by phone and by going to the Department of Labor to ascertain the status of his application but was unable to receive any additional information. Without him knowing it, however, a claims deputy reviewed and denied Deysher’s application soon after it was filed and apparently mailed this decision to Deysher on December 15, 2010. The decision indicated that Deysher had ten days to file an appeal pursuant to 19 *Del. C.* 3318(b).¹ Deysher claims he neither received nor knew of the decision until January 4, 2011, when he again visited the Department of Labor to check on his application. Deysher filed an appeal immediately upon learning that the claims deputy denied his application.

Because Deysher filed his appeal more than ten days from the decision’s mailing date, the decision became final.² Even so, an appeals referee held an evidentiary hearing on the issue of the appeal’s timeliness. After hearing

¹ 19 *Del. C.* § 3318(b) provides that “[u]nless a claimant . . . files an appeal within 10 calendar days after such Claims Deputy’s determination was mailed to the last known addresses of the claimant . . . the Claims Deputy’s determination shall be final and benefits shall be paid or denied in accordance therewith.”

² *See id.* (finalizing the claim deputy’s decision if the claimant does not appeal within ten days).

testimony from Deysher and a witness for the Department of Labor, the appeals referee found that Deysher's appeal was untimely. Deysher appealed that finding to the Unemployment Insurance Appeal Board. The Board declined further review of the case, reasoning that there was no evidence of Department error that would justify the Board's *sua sponte* review. It is this decision that Deysher now appeals before the Superior Court of Delaware.

STANDARD OF REVIEW

When reviewing an appeal from the Unemployment Insurance Appeal Board, the Court must find that the Board's conclusions are without legal error.³ The Court must also determine whether the record before the Board contained substantial evidence that a reasonable mind could accept as adequate support for the Board's conclusions.⁴ Substantial evidence is evidence from which the Board could fairly and reasonably reach its conclusion.⁵

When reviewing a Board decision based on the untimeliness of a claimant's appeal, the Court must determine, first, whether there are facts to support the finding that the appeal was untimely; and, second, whether the Board abused its

³ *Unemployment Ins. Appeal Bd. of Dept. of Labor v. Duncan*, 337 A.2d 308, 309 (Del. 1975).

⁴ *Id.*

⁵ *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

discretion by not exercising its power to review the record for injustice despite the untimely appeal.⁶

DISCUSSION

Generally, the Court will affirm the Board's decision regarding the failure of a party to appeal a decision within the statutory time frame unless there appears to be an error or mistake made by the staff of that administrative agency.⁷ The simple assertion by an appellant that he never received the decision has been consistently ruled as insufficient to overcome the presumption that the decision was received by the appellant when the evidence supports that it was mailed to the proper address and not returned by the postal service.⁸ That continues to be the law, and the findings in this decision in no way change this fundamental principal.

But, for the reasons set forth below, it is not clear that the Court should apply this principal to the facts of this case. First, this appears to be a claimant who was very interested in his claim and followed up his submission with phone

⁶ See *Purdie-Morris v. Unemployment Ins. Appeals Bd.* 2006 WL 1679390, at *1 (Del. Super. Apr. 10, 2006) (explaining the twofold review process of Board decisions based on the untimeliness of a claimant's appeal).

⁷ See *Anderson v. Comfort Suites*, 2004 WL 304359 (Del. Super. Feb. 12, 2004) (finding that the Board based its determination that a decision was properly mailed and that the subsequent appeal was untimely on substantial evidence when the decision was mailed to the claimant's correct address, was not returned, and when there was no other evidence of error).

⁸ See *Diaz v. Fitzgerald Auto*, 2006 WL 1229691, *2 (Del. Super. 2006) (“[A] claimant's assertion that he did not receive the mailing is an insufficient reason for the Board to consider an untimely appeal.”).

calls and subsequent visits to the unemployment office. It is clear to the Court that if Deysher had received an adverse decision, he would have reacted to it.

Second, and more importantly, the Court has reviewed the record submitted by the Board to the Court and believes there are significant issues in regards to how this claim was handled by the agency that were not addressed by the appeals referee or the Board. It appears that Deysher was unable to electronically access and review his claim while it was being processed; that a reorganization in the agency's office during the time his claim was pending caused staff to provide inconsistent information regarding the status of his claim; and that the claims deputy contacted Deysher on December 7th and advised him that she would contact him in a few weeks with a decision. All these facts raise questions whether this claim was appropriately handled by the agency. Simply put, this case does not mirror the typical untimely appeal case, in which the claimant fails to take timely action on his appeal and the agency has clearly and undisputedly followed its own procedures for processing appeals.

Under these circumstances, the Court is unable to find that the Board's decision not to review Deysher's case is supported by substantial evidence. While the administrative agency is given a presumption of properly mailing a decision, when challenged in the manner here, some minimal evidentiary showing to rebut

the alleged agency misconduct is required. No such evidence, let alone substantial evidence, was presented to the Board.

As a result, the Court will remand this matter pursuant to 29 *Del. C.* § 10142(b) so that a more complete record can be created by the Unemployment Insurance Appeal Board regarding the circumstances relating to the processing of this claim. This means the agency is required to create a record beyond the mere introduction of the claim deputy's decision. During the remand, jurisdiction is again given to the Board to either continue to deny Mr. Deysher's claim as untimely or to rule that the appeal will be allowed to proceed forward and be decided on its merits. Under the limited facts known by the Court, since it is possible that the same result may occur regardless of which choice is made, the Court would encourage the Board to seriously consider the latter course of action.

Finally, cases contesting the proper mailing and receipt of agency decisions by claimants are not new to the Board or the Court. This case presents the Court with an opportunity to suggest that the agency, its counsel, and the Board consider developing a more accurate method of documenting the mailing of their decisions. This could be as simple as requiring an affidavit of mailing in a claimant's file by the staff member who processed the mail; e-mailing a notification of the decision to the claimant; or sending the decision in a manner that would reflect actual

delivery. Too many valuable resources are being wasted on an issue that can be solved by the agency with minimal additional effort.

CONCLUSION

The matter is hereby remanded to the Unemployment Insurance Appeal Board for further proceedings consistent with this Order.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.

Judge William C. Carpenter, Jr.