

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Daniel S. Griffin,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1486 C.D. 2009
	:	
Unemployment Compensation	:	Submitted: February 26, 2010
Board of Review,	:	
	:	
Respondent	:	

OPINION NOT REPORTED

**MEMORANDUM OPINION
PER CURIAM**

FILED: May 26, 2010

Daniel S. Griffin (Claimant), pro se, petitions for review of the order of the Unemployment Compensation Board of Review (Board), which dismissed his appeal from the determination of the Unemployment Compensation Referee (Referee) as untimely pursuant to Section 502 of the Unemployment Compensation Law (Law).¹

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 822. Section 502 provides, in pertinent part, that:

The parties and their attorneys or other representatives of record and the department shall be duly notified of the time and place of a referee's hearing and of the referee's decision, and the reasons therefor, which shall be deemed the final decision of the board, unless an appeal is filed therefrom, within fifteen days after the date of such decision

Claimant argues that the Board erred in dismissing his appeal as untimely. For the reasons that follow, we affirm.

Claimant applied for unemployment compensation benefits after becoming separated from his employment as a police officer for the Municipality of Kingston (Employer).² The Unemployment Compensation Service Center (Service Center) issued a determination finding Claimant not ineligible for benefits under Section 402(e) of the Law, 43 P.S. § 802(e). Employer appealed from the Service Center's determination, and the Referee conducted an evidentiary hearing on March 5, 2009. On March 6, 2009, the Referee issued a decision and order reversing the Service Center's determination and denying Claimant benefits under Section 402(e) on the basis that he was discharged for willful misconduct in connection with his work.³ Claimant filed an appeal from the Referee's decision and order on April 1, 2009, to which Employer objected as being untimely because it was filed after the March 23, 2009, appeal deadline.

On April 24, 2009, the Board issued an order remanding the matter back to the Referee to hold a hearing and to receive evidence regarding the reasons for Claimant's untimely appeal. The Referee, acting as the hearing officer for the Board, conducted a remand hearing on May 13, 2009, at which Claimant and two witnesses

² Employer has intervened in the instant matter and filed a brief in opposition to Claimant's Petition for Review. In light of Employer's brief, the Board has elected not to file a brief.

³ The Referee concluded that Claimant engaged in willful misconduct where he submitted an altered invoice seeking reimbursement from Employer for a shotgun that he had purchased, was found guilty of criminal attempt to commit theft by deception and forgery in the Court of Common Pleas of Luzerne County, and did not have good cause for his actions. (Referee Decision at 2-3.)

for Employer appeared. Following the remand hearing, the Board issued a decision and order in which it made the following pertinent findings of fact:

4. Following a hearing on the merits, the Referee issued a decision which denied the claimant benefits.
5. A copy of the Referee's decision was mailed to the claimant at his last known post office address on the same date.
6. The decision was accompanied by notice advising that the interested parties had fifteen (15) days in which to file a valid appeal.
7. The claimant received the decision.
8. The claimant's appeal from the Referee's decision, in order to be timely, had to have been filed on or before March 23, 2009.
9. The claimant's appeal was filed on April 1, 2009.
10. The claimant was not misinformed or misled by the unemployment compensation authorities concerning his right or the necessity to appeal.
11. The claimant's filing of the late appeal was not caused by fraud or its equivalent by the administrative authorities, a breakdown in the appellate system, or by non-negligent conduct.
12. The claimant asserted that his appeal was late because the appeal instructions were unclear.
13. The appeal instructions are clear.

(Board Decision, Findings of Fact ¶¶ 4-13.) Based on these findings, the Board dismissed Claimant's appeal as untimely pursuant to Section 502 of the Law. Claimant now petitions this Court for review of the Board's order.⁴

⁴ This Court's "review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact were supported by
(Continued...)

Before this Court, Claimant argues that the Board should not have dismissed his appeal as untimely.⁵ Claimant contends that his late appeal was justified because: (1) he received the Referee’s decision and order on March 25, 2009, two days *after* the March 23, 2009, appeal deadline; and (2) his receipt of another determination from the unemployment authorities setting forth an appeal deadline of April 1, 2009, led him to believe that the later deadline was the one with which he needed to comply, which he did. We disagree.

According to Section 502 of the Law, where a party seeks to file an appeal with the Board, the appeal must be filed “within fifteen days after the date of [the referee’s] decision.” 43 P.S. § 822. The fifteen-day time limit established by Section 502 “is mandatory; if an appeal is not timely filed within the specified time period, the determination becomes final, and the Board does not have the requisite jurisdiction to consider the matter.” Shea v. Unemployment Compensation Board of Review, 898 A.2d 31, 33 (Pa. Cmwlth. 2006). However, the Board may grant *nunc pro tunc* relief and consider a late appeal if the appellant proves either that: (1) “the administrative authority engaged in fraudulent behavior or manifestly wrongful or negligent conduct”; or (2) that “non-negligent conduct beyond his control caused the delay.” Hessou v. Unemployment Compensation Board of Review, 942 A.2d 194, 198 (Pa. Cmwlth. 2008). Given the mandatory nature of the statutorily-imposed

substantial evidence.” Hessou v. Unemployment Compensation Board of Review, 942 A.2d 194, 197 n.3 (Pa. Cmwlth. 2008).

⁵ Claimant, in his brief, correctly acknowledges that the instant appeal is limited to the timeliness issue and that the merits of his appeal from the Referee’s decision and order denying him benefits under Section 402(e) are not presently before this Court for consideration. (Claimant’s Br. at 2.)

appeal deadline, “[t]he burden to establish the right to have an untimely appeal considered [*nunc pro tunc*] is a heavy one.” Id.

Here, the Referee’s decision and order indicated at two different places that the final date to file an appeal therefrom was March 23, 2009. (Referee Decision at 1, 3.) However, Claimant did not file his appeal until April 1, 2009. Therefore, Claimant’s appeal was untimely by nine days.

Although Claimant contends that his appeal was untimely because he did not receive the Referee’s decision and order until March 25, 2009, Claimant failed to preserve this argument for appellate review. As Employer correctly points out, Claimant made no assertion in his appeal to the Board, or during the remand hearing, that he did not receive the Referee’s decision and order until after the March 23, 2009 appeal deadline. Claimant is not permitted to raise new arguments for the first time on appeal. Schneider v. Unemployment Compensation Board of Review, 523 A.2d 1202, 1204 (Pa. Cmwlth. 1987). Moreover, Claimant’s argument is not supported by the record. During the remand hearing, the Referee specifically asked Claimant if he had received the Referee’s decision and order around March 6th, 7th, or 8th, and Claimant responded: “Yes, I did.” (Board Remand Hr’g Tr. at 5, May 13, 2009). Thus, Claimant admitted on the record that he had received the Referee’s decision and order before the March 23, 2009 appeal deadline.

The only argument that Claimant raised before the Board and preserved for our review is that his appeal was untimely because of the confusion caused by his receipt of another determination from the unemployment compensation authorities, which contained a different appeal deadline than the one set forth in the Referee’s decision and order. However, we agree with Employer and the Board that this does not justify

an untimely appeal. The other determination to which Claimant refers is a Notice of Determination of Overpayment of Benefit (Overpayment Determination), which: was issued by the Service Center on March 17, 2009; establishes a non-fault overpayment pursuant to Section 804(b) of the Law, 43 P.S. § 874(b); states that an appeal must be made by April 1, 2009; and references enclosed appeal instructions.⁶ (Overpayment Determination, March 17, 2009, Ex. BRC-1.) As Employer correctly asserts, the Referee's decision and order and the Service Center's Overpayment Determination were two separate determinations with two separate appeal dates. The Referee's decision and order dealt with the issue of Claimant's continuing eligibility for benefits, while the Service Center's Overpayment Determination involved the separate issue of whether Claimant was entitled to retain the benefits that had already been paid to him. Furthermore, an appeal from the Referee's decision and order would have been considered by the Board, while an appeal from the Service Center's Overpayment Determination would have first been considered by the Referee. See Sections 501 through 504 of the Law, 43 P.S. §§ 821-824 (discussing appeal procedures applicable to compensation determinations); Section 804(b)(2) of the Law, 43 P.S. § 874(b)(2) (explaining that overpayment determinations are subject to the same appeal procedures applicable to compensation determinations). Thus, the April 1, 2009, appeal deadline set forth in the Overpayment Determination had no bearing on the March 23, 2009, appeal deadline set forth in the Referee's decision and order.

⁶ Although Claimant submitted the Overpayment Determination into evidence during the remand hearing, he neither submitted the appeal instructions that were referenced nor testified that those instructions were not included with the materials that he received.

The Referee's decision and order clearly indicated that the last day to appeal the same was March 23, 2009, and the unemployment authorities did not, in any way, mislead Claimant regarding the applicable appeal deadline. If Claimant was at all confused regarding which appeal deadline he needed to follow in order to perfect an appeal of the Referee's decision and order, he could have contacted the unemployment compensation authorities and requested clarification or sought assistance from others. However, Claimant makes no assertion that he requested clarification or sought assistance. Thus, Claimant failed to take reasonable steps to perfect his appeal in a timely manner, and his alleged confusion does not justify his late appeal. See Dull v. Unemployment Compensation Board of Review, 955 A.2d 1077, 1080-81 (Pa. Cmwlth. 2008) (concluding that a late appeal was unjustified where the claimant failed to make reasonable efforts to preserve her appeal rights by seeking assistance in reading documents she received from the unemployment compensation authorities).

Because Claimant failed to prove that his late appeal was due to fraud or manifestly wrongful or negligent conduct on the part of the unemployment compensation authorities, or non-negligent conduct beyond his control, Claimant was not entitled to nunc pro tunc relief. Therefore, we conclude that the Board did not err in dismissing Claimant's appeal as untimely under Section 502 of the Law.⁷

⁷ To the extent that Claimant asserts that the Referee's decision and order should be overturned because of an alleged prejudice or conflict of interest that existed due to past events involving both the Referee and Claimant, such assertion goes toward the merits of the Referee's decision and order and is, therefore, one that Claimant would have needed to raise in a timely appeal to the Board in order to preserve it for this Court's review. Additionally, to the extent that Claimant asserts that the Board erred in remanding the matter back to the same Referee who ruled against him on the merits, we disagree. The Referee, on remand, simply conducted a hearing and accepted evidence on the reasons for Claimant's late appeal, and the record supports that the
(Continued...)

Accordingly, the Board's order is affirmed.

Referee conducted the hearing in an impartial manner, giving Claimant every opportunity to present any testimony and evidence that he believed to be relevant to the timeliness issue. (Board Remand Hr'g Tr. at 1-7.) Following the remand hearing, it was the Board, rather than the Referee, that made the decision to dismiss Claimant's appeal as untimely. Therefore, the Referee's alleged prejudice or conflict of interest had no impact on the Board's dismissal of Claimant's appeal.

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	:	
Respondent	:	

PER CURIAM

ORDER

NOW, May 26, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.