

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Vicki L. Gorniak,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 148 C.D. 2010
	:	
Unemployment Compensation	:	Submitted: August 6, 2010
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: October 15, 2010

This unemployment compensation matter involves two alleged untimely appeals: the first from the service center to a referee, and the second from the referee to the Unemployment Compensation Board of Review (Board). Although the Board ruled that both appeals were untimely, our disposition focuses primarily on the second appeal, from the referee to the Board.

In particular, Vicki L. Gorniak (Claimant) petitions for review from an order of the Board that dismissed as untimely her appeal from a referee's decision. The Board determined Claimant filed her appeal approximately a month after the expiration of the appeal period. The Board further determined Claimant did not present sufficient evidence to justify a "now for then" or *nunc pro tunc* appeal. Thus, the Board concluded it lacked jurisdiction to hear the appeal. Upon review, we affirm.

The underlying facts may be summarized as follows. Claimant worked as a pharmacy technician for Thrift Drug, Inc. (Employer). After her separation from employment with Employer, Claimant filed an application for unemployment benefits, which a UC service center representative denied under Section 402(b) of the Unemployment Compensation Law (Law) (relating to voluntary quit).¹ Claimant appealed.

As to the first appeal, Claimant filed her appeal to the referee one day after the due date for filing. A referee held a hearing on the timeliness of Claimant's appeal. At the hearing, Claimant offered the testimony and affidavit of a messenger for Claimant's law firm, who claimed he personally delivered the appeal to the service center on the last day of the appeal period. Thereafter, the referee dismissed Claimant's appeal as untimely.

Regarding the second appeal, Claimant faxed her appeal to the Board approximately a month after the expiration of the appeal period. The Board notified Claimant of the untimeliness of the fax. Claimant requested a hearing, which the Board granted.

At hearing, Claimant's counsel asserted he timely mailed the appeal to the Board by regular mail as evidenced by a stamp from his private postal machine. Claimant's counsel alleged his office faxed the appeal documents after learning the documents were not received through his prior mailing.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(b).

Ultimately, the Board issued an order affirming the referee's decision. Upon Claimant's request for reconsideration, however, the Board vacated its order and reopened the case. After hearing, the Board dismissed Claimant's petitions for appeal as untimely pursuant to Sections 501(e) and 502 of the Law. 43 P.S. §§821(e), 822 (an appeal must be filed within 15 days after the notice of determination or decision of the referee, respectively, is mailed or delivered). Claimant subsequently filed a request for reconsideration, which the Board denied. Claimant now petitions for review.

On subsequent appeal to this Court,² Claimant raises two arguments regarding her first appeal. However, we must first address the timeliness of Claimant's second appeal (from the referee's decision to the Board) because the referee's decision is deemed final unless a claimant files a timely appeal. 43 P.S. §822; DiIenno v. Unemployment Comp. Bd. of Review, 429 A.2d 1288 (Pa. Cmwlth. 1981) (failing to timely appeal renders a referee's decision nonreviewable and claimant's arguments on the merits can not be considered).

As to her second appeal, Claimant argues she mailed the appeal documents to the Board before the expiration of the appeal period and prior to the fax.

² Our review is "limited to determining whether necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated." Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review, 949 A.2d 338, 341 n.2 (Pa. Cmwlth. 2008).

The Board responds that Claimant's appeal from the referee's decision to the Board was untimely, and, therefore, required dismissal.³

The Board is the ultimate fact-finder in unemployment compensation cases. Peak v. Unemployment Comp. Bd. of Review, 509 Pa. 267, 501 A.2d 1383 (1985). Thus, questions of credibility, evidentiary weight and the inferences drawn from the evidence are within the Board's exclusive province. Taylor v. Unemployment Comp. Bd. of Review, 484 A.2d 844 (Pa. Cmwlth. 1984). When the record contains substantial evidence to support the Board's findings, the findings are conclusive on appeal. Hessou v. Unemployment Comp. Bd of Review, 942 A.2d 194 (Pa. Cmwlth. 2008).

The time period to appeal is mandatory and strictly applied. Renda v. Unemployment Comp. Bd. of Review, 837 A.2d 685 (Pa. Cmwlth. 2003) (en banc). Moreover, if an appeal from a referee's determination is not filed within 15 days of its mailing, the determination becomes final and the Board no longer has jurisdiction to hear the appeal. Hessou; 43 P.S. §822. An appeal filed one day after the 15-day appeal period is untimely. Id.

³ The Board also submits that Claimant failed to preserve any issue regarding the timeliness of her second appeal (from the referee's decision to the Board) by omitting it from her statement of questions involved. Pa. R.A.P. 2116(a); Leone v. Unemployment Comp. Bd. of Review, 885 A.2d 76 (Pa. Cmwlth. 2005). However, we may exercise our discretion to consider this issue because Claimant consistently raised it below and both parties address it in their briefs. Izzi v. Workmen's Comp. Appeal Bd. (Century Graphics), 654 A.2d 176 (Pa. Cmwlth. 1995). Therefore, we decline to hold this issue waived.

An untimely appeal may be considered where there is a breakdown in the administrative process. Carson Helicopters, Inc. v. Unemployment Comp. Bd. of Review, 960 A.2d 524, 527 (Pa. Cmwlth. 2008). A breakdown occurs where “an administrative board or body is negligent, acts improperly or unintentionally misleads a party.” Id.; Union Elec. Corp. v. Bd. of Prop. Assessment, Appeals & Review of Allegheny Cnty., 560 Pa. 481, 487, 746 A.2d 581, 584 (2000). Moreover,

nunc pro tunc or “now for then” relief may be granted when: a referee’s decision is mailed to an incorrect address; adequate assistance is not provided to a claimant with cognitive impairment; or, an official misleads a litigant as to the proper procedure for filing an appeal. See UPMC Health Sys. v. Unemployment Comp. Bd. of Review, 852 A.2d 467 (Pa. Cmwlth. 2004); Lewis v. Unemployment Comp. Bd. of Review, 814 A.2d 829 (Pa. Cmwlth. 2003); Monroe Cnty. Bd. of Assessment Appeals v. Miller, 570 A.2d 1386 (Pa. Cmwlth. 1990).

Hessou, 942 A.2d at 198.

An appeal before the Board is governed by the Department of Labor & Industry’s (Department’s) regulations. George v. Unemployment Comp. Bd. of Review, 767 A.2d 1124 (Pa. Cmwlth. 2001). The Department’s regulations provide guidance for determining filing dates. 34 Pa. Code §101.82(b). If mailed, the filing date is “[t]he date of the official United States Postal Service postmark on the envelope containing the appeal, a United States Postal Form 3817 (Certificate of Mailing), or a United States Postal Service certified mail receipt” or “the date of a postage meter mark on the envelope containing the appeal”. 34 Pa. Code §101.82(b)(1)(i)-(ii). If the filing date cannot be determined by any of the

aforementioned methods, the filing date is the date of receipt. 34 Pa. Code §101.82(b)(1)(iii).

Here, the Board found that a copy of the referee's decision was mailed to Claimant at her last known postal address on the date of issuance, and the mail was not returned by the postal authorities as undeliverable. C.R. at Item #29, Bd. Op., 1/5/10, Findings of Fact (F.F.) Nos. 5, 7. The referee's decision included a notice advising the parties of the 15-day appeal period, and specifically stated April 6, 2009, was the appeal deadline. F.F. Nos. 6, 8. Claimant acknowledged this deadline. C.R. at Item #17, p. 3 (Transcript). However, Claimant filed her appeal several weeks after the deadline. C.R. at Item #29, F.F. No. 9.

While Claimant's counsel maintains he mailed the appeal to the Board within the appeal time period, see C.R. at Item #17, p. 2, the mailing was never received. Id. at p. 3. Claimant's knowledge that the mailed appeal documents were never received prompted the fax. Id.

Claimant sent the fax on May 1, 2009. C.R. at Item #17, p. 3. Claimant's appeal is imprinted with the faxed date of May 1, 2009 and is stamped as received May 4, 2009. Id.; Item #12. Clearly, the fax was received approximately one month after the final day of the appeal period, April 6, 2009.

In an attempt to explain the delay, Claimant submitted three exhibits at hearing: the fax communication report containing two cover letters (May 1, 2009 and March 31, 2009), the petition for appeal to the Board, and a March 31, 2009,

cover letter with attachments. C.R. at Item #17, p. 5. However, Claimant did not present any evidence regarding the prior mailing of the appeal that satisfies the requirements for mailing set forth in 34 Pa. Code §101.82, above. In short, Claimant failed to present a postmark, Postal Service Form 3817, a certified mail receipt, or a postage meter mark on the envelope of the appeal.

Under these circumstances, the filing date for Claimant's second appeal is the date of receipt, May 1, 2009. 34 Pa. Code §101.82(b)(1). Therefore, the record supports the Board's determination that Claimant's second appeal was untimely.⁴

Further, Claimant does not argue circumstances justifying *nunc pro tunc* or "now for then" relief. The Board's findings reflect the lack of such circumstances. Specifically, the Board found the unemployment compensation authorities did not misinform or mislead Claimant concerning her rights to appeal, and Claimant's late filing was "not caused by fraud or its equivalent by the administrative authorities, a breakdown in the appellate system, or by non-negligent conduct." C.R. at Item #29, F.F. Nos. 10, 11. The record supports these findings of the Board, and Claimant does not challenge them.

⁴ We acknowledge that the Board's Finding of Fact No. 9 incorrectly sets forth the filing date of Claimant's appeal to the Board as May 31, 2009. Based on the imprinted date from the sender's fax machine, the record reflects a May 1, 2009 filing date for the fax. C.R. Item #17; see also 34 Pa Code §101.82(b)(3)(i) (determining filing date for a fax). The service center stamped the fax with a date of May 4, 2009. Nevertheless, because there is no doubt that Claimant sent the fax well after the April 6, 2009 appeal deadline, the typographical error does not warrant reversal. See Grossman v. Unemployment Comp. Bd. of Review, 387 A.2d 1335 (Pa. Cmwlth. 1978) (concluding that an apparent typographical inaccuracy by the Board in a date set forth in a finding of fact is not reversible error).

Recognizing statutory appeal periods are mandatory and not finding any relevant limited exceptions, the Board properly dismissed Claimant's appeal from the referee's decision to the Board. Hessou. Upon review, we discern no basis to disturb the Board's order.⁵

⁵ The untimeliness of the second appeal forecloses review of the timeliness of the first appeal (to the referee). However, even if we agreed to focus on the issue of the timeliness of Claimant's first appeal, we would reject Claimant's two arguments on that point.

Claimant first argues the Board capriciously disregarded uncontroverted evidence of personal delivery of the appeal from the initial service center determination to the referee on the last day of the appeal period. A capricious disregard occurs when a tribunal willfully or deliberately ignores evidence that any reasonable person would have considered important. Porco v. Unemployment Comp. Bd. of Review, 828 A.2d 426 (Pa. Cmwlth. 2003). A review for capricious disregard should not intrude on the Board's fact-finding role or its decision-making authority. Johnson v. Unemployment Comp. Bd. of Review, 869 A.2d 1095 (Pa. Cmwlth. 2005).

Here, Claimant presented the testimony and affidavit of William Townsend, a messenger, in support of her assertion that she filed her appeal from the initial service center determination by way of personal delivery on the last day of the appeal period. However, the Board implicitly rejected this testimony and found Claimant did not file her appeal until one day after the deadline. F.F. No. 16. Specifically, the Board found Claimant received the initial determination and notice informing her that February 10, 2009, was the last day to file an appeal. F.F. Nos. 13-15. The Board further found "[t]he claimant did not file an appeal on or before February 10, 2009, but waited until February 11, 2009 before filing her appeal." F.F. No. 16. The Board's finding is directly supported by Claimant's appeal petition, which is stamped one day after the expiration of the appeal period. C.R. at Item #4; see U.G.I. Util., Inc. v. Unemployment Comp. Bd. of Review, 776 A.2d 344 (Pa. Cmwlth. 2001) (timeliness of a filing should be evident from the face of the document or from internal records of the court). Because Claimant's appeal, on its face, reflects a February 11, 2009, filing date, no capricious disregard is apparent.

Claimant also contends a breakdown of operations occurred at the service center when it stamped Claimant's appeal with a date one day after the due date. Again, we disagree.

Where an appeal is untimely on its face, the appellant bears the burden of proving the fraudulent, negligent or wrongful acts of administrative officials require his appeal be deemed timely. Appeal of Farrell, 450 A.2d 266 (Pa. Cmwlth. 1982). The appellant also bears the burden of overcoming the presumption of the regularity of the acts of public officials. Id.

Here, the Board found Claimant's late appeal was not attributable to "fraud or its equivalent by the administrative authorities, a breakdown in the appellate system, or by non-negligent conduct." F.F. No. 18. Because Claimant did not present evidence to satisfy any of the circumstances justifying "now for then" or *nunc pro tunc* relief, we cannot disturb the Board's finding.

Based on the foregoing, we affirm.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Vicki L. Gorniak,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 148 C.D. 2010
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 15th day of October, 2010, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge