

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Linda S. Levandoski,	:		
Petitioner	:		
	:		
v.	:	No. 1635 C.D. 2009	
	:	SUBMITTED: December 31, 2009	
Unemployment Compensation	:		
Board of Review,	:		
Respondent	:		

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: April 29, 2010

Claimant Linda S. Levandoski petitions for review of the July 24, 2009 order of the Unemployment Compensation Board of Review (Board) that affirmed the decision of the referee to dismiss her appeal as untimely under Section 501(e) of the Unemployment Compensation Law (Law).¹ We affirm.

The background of this case is as follows. Claimant worked part-time as a cake decorator for Employer Giant Eagle Supermarkets from 1994 to 2009. In March 2009, she filed a claim for unemployment compensation benefits, which the

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 821(e).

Duquesne UC Service Center denied pursuant to Section 402(e) of the Law, 43 P.S. § 802(e) (willful misconduct). In that April 8, 2009 determination, the service center advised Claimant that the last day to file a timely appeal from its determination was April 23, 2009, fifteen calendar days after the April 8th mailing date. In light of the fact that the only appeal of record was dated May 15, 2009, the referee sent out a revised notice of hearing advising the parties that he would consider only the issue of whether Claimant filed a timely and valid appeal from the initial determination.

At the hearing, where only Claimant appeared, the referee reiterated that the purpose of the proceeding was to allow Claimant to appear and offer testimony regarding the timeliness of her appeal. To that end, Claimant testified that she mailed an appeal of the service center's determination on April 14, 2009, but later discovered that no one had received it when she called to ascertain whether there was a hearing date. She further testified that the individual she spoke with on the telephone advised her to mail a new appeal, which is the only appeal of record.

In ultimately determining that Claimant failed to file a timely appeal, the referee found the following facts:

1. On April 8, 2009, a determination was issued disqualifying the claimant for unemployment compensation benefits.
2. A copy of this determination was mailed to the claimant's last known post office address on the above date.
3. The Notice of Determination was not returned by the postal authorities as being undeliverable.

4. The Notice of Determination informed the claimant that there were fifteen (15) days from the date of that determination in which to file an appeal if the claimant disagreed with the determination. The last day on which a valid appeal could be filed from that determination was April 23, 2009.
5. The claimant did not file an appeal on or before April 23, 2009 but waited until May 15, 2009.
6. The claimant was not misinformed nor in any way misled regarding the right of appeal or the need to appeal.

Findings of Fact Nos. 1-6.

In rendering his determination, the referee noted that “Section 501(e) of the Law provides that a Notice of Determination shall become final and compensation shall be paid or denied in accordance therewith unless an appeal is filed within the fifteen-day period after proper notification of said determination has been given to all affected parties.” Referee’s June 11, 2009 Decision at 2. He further noted that the provisions of Section 502(e) are mandatory and a referee has no jurisdiction to consider an appeal filed after expiration of the statutory appeal period. Accordingly, the referee dismissed Claimant’s appeal. The Board affirmed, adopting and incorporating the Referee’s findings and conclusions.² In addition, the Board specifically stated that it found “insufficient credible evidence in support of the claimant’s assertion that she filed an earlier appeal by mail.” Board’s July 24, 2009 Decision at 1. Claimant’s timely appeal to this Court followed.

² The Board may adopt a referee’s fact-findings that are supported by the record. *See Bowers v. Unemployment Comp. Bd. of Review*, 402 A.2d 308 (Pa. Cmwlth. 1979).

Claimant argues that, absent an express credibility determination by the referee, the Board exceeded its authority in determining that there was insufficient credible evidence to support her claim that she submitted an earlier appeal by mail. She asserts that, because the referee did not rule on the sufficiency or credibility of the evidence, the Board acted contrary to the regulation providing that, except in limited circumstances, the Board shall consider only those issues expressly ruled upon by the referee in the decision at issue. *See* 34 Pa. Code § 101.107 (a) and (b). She maintains that this regulation ensures that the agency representative who had the opportunity to see and to hear the witness actually makes the credibility determinations.

As for the referee's failure to rule on her testimony that she filed a timely appeal on April 14, 2009, Claimant contends that the Board should have corrected the referee's erroneous understanding that he lacked authority to consider whether to grant an appeal *nunc pro tunc*. Claimant recites the well-settled case law that a referee may properly allow an appeal *nunc pro tunc* where a claimant proves either a breakdown of the administrative process or a delay in filing caused by non-negligent conduct beyond his or her control. *ATM Corp. of Am. v. Unemployment Comp. Bd. of Review*, 892 A.2d 859 (Pa. Cmwlth. 2006). Claimant, therefore, maintains that the referee erred in not addressing her testimony that she submitted an earlier appeal.

In response, the Board acknowledges that the referee did not make a specific credibility determination regarding Claimant's testimony that she filed an earlier appeal. It asserts, however, that its fact-finding on that point was sufficient in that it is empowered to make such determinations as the ultimate finder of fact. *Greif v. Unemployment Comp. Bd. of Review*, 450 A.2d 229 (Pa. Cmwlth. 1982).

Further, it maintains that by rendering such a credibility determination, the Board averted the situation in *Stana v. Unemployment Comp. Bd. of Review*, 791 A.2d 1269 (Pa. Cmwlth. 2002), where this Court was compelled to remand a similar late appeal case in light of the failure of either the referee *or* the Board to make credibility determinations or other findings with regard to the claimant's excuse for an untimely appeal. *See also Hasely v. Unemployment Comp. Bd. of Review*, 553 A.2d 482 (Pa. Cmwlth. 1989); *Kirkwood v. Unemployment Comp. Bd. of Review*, 525 A.2d 841 (Pa. Cmwlth. 1987) (board required to make specific credibility determinations where party with burden of proof was the only party to present evidence and did not prevail.) We agree.

As the Board noted, it is within its purview as the ultimate finder of fact to resolve all conflicts in evidence and to determine witness credibility and evidentiary weight. *Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review*, 949 A.2d 338 (Pa. Cmwlth. 2008). In that capacity, it has the power to make credibility determinations despite the fact that it is not there to observe the demeanor of witnesses. In addition, the Board has the right to disbelieve a claimant's testimony, even if that testimony is unrebutted. *Treon v. Unemployment Comp. Bd. of Review*, 499 Pa. 455, 453 A.2d 960 (1982).

In the present case, the Board rejected Claimant's testimony that she filed a timely appeal. Indeed, at the hearing, Claimant submitted no proof of mailing an earlier appeal, *i.e.* a United States Postal Service (USPS) form 3817 (certificate of mailing), or even a copy of what she allegedly mailed. Further, the record is similarly devoid of definitive proof that Claimant mailed an earlier

appeal.³ In any event, in the absence of any persuasive written proof that Claimant filed a timely appeal, this case hinged on Claimant's credibility. The Board decided to disbelieve her testimony and that determination is binding on this Court. *See Guthrie v. Unemployment Comp. Bd. of Review*, 738 A.2d 518 (Pa. Cmwlth. 1999) (credibility and evidentiary weight are determined by the Board and its findings of fact are conclusive on appeal when the record, in its entirety, contains substantial evidence to support those findings.) Accordingly, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

³ The record contains the envelope from her late appeal, with a USPS mark of May 15, 2009 and a Duquesne UCSC stamp of May 18, 2009. While it is true that the record also contains a handwritten note mailed with the late appeal indicating that "I had sent in one paper to file for an appeal . . . please call when you recieve [sic] this . . . said did not recieve [sic] last time," Certified Record, Item. No. 5, there is no indication on that paper as to when Claimant may have mailed such a "paper." Of course, even if the note contained a date, that would not necessarily be definitive proof for the Board that Claimant had mailed an earlier appeal.

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Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 29th day of April, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge

