

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas P. McDermott,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1858 C.D. 2009
	:	
Unemployment Compensation Board	:	Submitted: February 12, 2010
of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: April 30, 2010

Thomas McDermott (Claimant), pro se, petitions this Court for review of an order of the Unemployment Compensation Board of Review (Board) affirming the Unemployment Compensation Referee's (Referee) dismissal of his appeal from the Scranton Unemployment Compensation Service Center's (Service Center) determination. The Referee dismissed Claimant's appeal as untimely pursuant to Section 501(e) of the Unemployment Compensation Law (Law).¹ Before this

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

Court, Claimant argues that his appeal should not have been dismissed as untimely. For the reasons that follow, we affirm the Board's order.

Claimant applied for unemployment compensation benefits in December of 2008. In January of 2009, Claimant requested backdating of his application for benefits, waiting week, and claim weeks, asserting that he had attempted to apply for benefits earlier but that he was unable to do so because the Service Center was overwhelmed and the phone lines were always busy. Specifically, Claimant requested: backdating of his application for benefits to October 10, 2008; backdating of his waiting week to the week ending October 12, 2008; and backdating of his compensable weeks to the weeks ending October 18, 2008 through December 6, 2008.

On March 26, 2009, the Service Center issued a Notice of Determination denying² Claimant's request for backdating pursuant to Section 401(b)-(c) of the Law³ and 34 Pa. Code § 65.33.⁴ On April 21, 2009, Claimant appealed the Service Center's determination; however, Claimant filed his appeal after the deadline.

² As the Board points out in its brief, "[t]he Department did allow Claimant to backdate his waiting and claim weeks from January 16, 2009 to December 13, 2008, based on Claimant's allegation that he could not get through busy telephone lines." (Board's Br. at 2 (citing Claim Record, May 5, 2009, Notice of Determination, Findings of Fact (FOF) ¶¶ 4-5).) The Board also acknowledged that "[d]enying a request to backdate an application or claim week does not diminish the amount or duration of benefits due a claimant." (Board's Br. at 2.)

³ 43 P.S. § 801(b)-(c). Section 401 provides, in pertinent part, as follows:

Compensation shall be payable to any employee who is or becomes unemployed,
and who--

. . . .

(Continued...)

On May 28, 2009, the Referee conducted a hearing regarding the timeliness of Claimant's appeal, but Claimant did not appear. Following the hearing, the Referee issued a decision in which she made the following findings of fact:

1. On March 26, 2009, a determination was issued disqualifying the claimant for unemployment compensation benefits.

(b) Has registered for work at, and thereafter continued to report to an employment office in accordance with such regulations as the secretary may prescribe, except that the secretary may by regulation waive or alter either or both of the requirements of this clause as to individuals attached to regular jobs and as to such other types of cases or situations with respect to which he finds that compliance with such requirements would be oppressive or would be inconsistent with the purposes of the act: Provided, however, That no such regulation shall conflict with section four hundred and one (c) of this act;

(c) Has made a valid application for benefits with respect to the benefit year for which compensation is claimed and has made a claim for compensation in the proper manner and on the form prescribed by the department.

43 P.S. § 801(b)-(c).

⁴ Section 65.33 provides, in pertinent part:

(a) A claim for a week of total, partial or part-total unemployment may be deemed to be constructively filed as of the first day of a calendar week previous to the week which includes the day on which it is actually filed when, in the opinion of the Bureau, the claimant was prevented, through no fault of his own, from filing his claims during the week immediately subsequent to the week for which the claim is filed because of one or more of the following reasons:

(1) The inability of the local public employment office to handle currently all claims, or the postponement of claims-taking by the local office for administrative reasons shall permit not more than 6 weeks of predating.

34 Pa. Code § 65.33(a)(1).

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 the 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 10, 2009.
5. The claimant did not file an appeal on or before April 10, 2009, but waited until April 21, 2009.
6. The claimant was not misinformed nor in any way misled regarding the right of appeal or the need to appeal.

(Referee's Decision/Order, Findings of Fact ¶¶ 1-6.) Based on these findings, the Referee dismissed Claimant's appeal as untimely pursuant to Section 501(e). Thereafter, Claimant appealed to the Board, which issued an order adopting the Referee's findings of fact and conclusions of law. Claimant now petitions this Court for review of the Board's order.⁵

Before this Court, Claimant argues that the Board erred in affirming the Referee's dismissal of his appeal as untimely under Section 501(e) of the Law. We disagree.

Section 501(e) provides:

⁵ This Court's "scope of review is limited to a determination of whether constitutional rights were violated, an error of law was committed or whether necessary findings of fact are supported by substantial competent evidence." Key v. Unemployment Compensation Board of Review, 687 A.2d 409, 411 n.2 (Pa. Cmwlth. 1996).

(e) Unless the claimant or last employer or base-year employer of the claimant *files an appeal* with the board, from *the determination contained in any notice* required to be furnished by the department under section five hundred and one (a), (c) and (d), *within fifteen calendar days after such notice was delivered to him personally, or was mailed to his last known post office address*, and applies for a hearing, *such determination of the department, with respect to the particular facts set forth in such notice, shall be final and compensation shall be paid or denied in accordance therewith.*

43 P.S. § 821(e) (emphasis added). Thus, under Section 501(e), a party has fifteen days to file an appeal from a determination of the Service Center. United States Postal Service v. Unemployment Compensation Board of Review, 620 A.2d 572, 606 (Pa. Cmwlth. 1993). “The appeal provisions of the Law are mandatory: failure to file an appeal within fifteen days, without an adequate excuse for the late filing, mandates dismissal of the appeal.” Id. Due to the mandatory nature of the appeal provisions, “the burden to establish the right to have an untimely appeal considered [nunc pro tunc] is a heavy one.” Hessou v. Unemployment Compensation Board of Review, 942 A.2d 194, 198 (Pa. Cmwlth. 2008). An appellant may satisfy its burden of proving an adequate excuse by showing either: (1) that “the administrative authority engaged in fraudulent behavior or manifestly wrongful or negligent conduct”; or (2) that “non-negligent conduct beyond [the appellant’s] control caused the delay.” Id.

Here, the Service Center’s Notice of Determination informed Claimant that the last day to file an appeal therefrom was April 10, 2009. However, Claimant

did not file his appeal until April 21, 2009.⁶ Thus, Claimant's appeal was untimely by eleven days.

Claimant argues that he did not meet the appeal deadline in this case because he did not have a computer and he was hesitant about filing a handwritten appeal. (Claimant's Br. at 9.) However, as the Board correctly argues, Claimant failed to appear at the May 28, 2009 hearing held before the Referee to testify and provide evidence, on the record, as to the reasons for his late appeal. Claimant asserts that he failed to appear at the May 28, 2009 hearing because he only received notice of the hearing when he picked up his mail at the post office later in the afternoon on the day of the hearing. (Claimant's Br. at 8.) Nonetheless, as the Board points out, Claimant did not raise this issue in his appeal to the Board, and he did not request that the hearing be reopened so that he could present evidence, on the record, regarding the reasons for his failure to appear.⁷ "[I]t is well settled that issues not

⁶ In his brief to this Court, Claimant alleges that he filed his appeal on April 14, 2009. (Claimant's Br. at 8.) However, as the Board correctly points out, the envelope in which Claimant mailed his appeal, which is part of the record, contains a postmark date of April 21, 2009. (Envelope of Petition for Appeal, April 21, 2009.) Thus, there is substantial evidence in the record to support the Board's finding that Claimant filed his appeal on April 21, 2009. Furthermore, even if Claimant had filed his appeal on April 14, 2009, that is still beyond the April 10, 2009 deadline.

⁷ Claimant asserts that when he picked up his mail on the date of the hearing, he immediately contacted the Referee's office and advised them of what happened. (Claimant's Br. at 8-9.) Claimant further contends that the Referee's office improperly denied him his right to a continuance. (Claimant's Br. at 10.) There is evidence in the record to support Claimant's assertion that he called the Referee's office in the afternoon on the day of the hearing. (Report of Telephone Call on Hearings, May 28, 2009.) However, by the time the Claimant contacted the Referee's office, the Referee had already held the hearing. Because the hearing had already been conducted, it would not have been appropriate for the Referee to grant a *continuance* to postpone the hearing from proceeding at that point. Instead, the only remaining relief available to

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specified in an appeal before the Board are waived for purposes of review by this Court.” Tri-State Scientific v. Unemployment Compensation Board of Review, 589 A.2d 305, 307 (Pa. Cmwlth. 1991). Thus, by failing to raise the issue of his nonappearance in his appeal to the Board, Claimant waived his right to raise the issue before this Court on appeal.⁸ Because Claimant failed to appear at the May 28, 2009 hearing, there is no competent evidence contained in the record regarding the reasons for Claimant’s untimely appeal. Therefore, we agree with the Board that Claimant failed to meet his burden of proof.

Moreover, even if Claimant had appeared at the May 28, 2009 hearing and testified as to his asserted reasons for filing an untimely appeal, the reasoning he relies on would not have satisfied his burden of establishing fraud or negligent conduct by the unemployment authorities or non-negligent conduct beyond his control. First, while Claimant asserts that he did not have a computer, he does not

Claimant was to request that the hearing be *reopened*. A referee may only reopen a hearing if a *written request*, setting forth the reasons for not appearing, is made prior to the issuance of a decision. 34 Pa. Code § 101.24(a)-(b). If a *written request* is made after the referee filed a decision, but is received or postmarked within 15 days after the Referee’s decision was mailed, then the request is to be treated as “a request for further appeal to the Board and a reopening of the hearing.” 34 Pa. Code § 101.24(a), (c). Here, Claimant never made a written request to reopen the hearing.

⁸ We note that the explanation provided by Claimant in his brief regarding the circumstances surrounding his receipt of the notice of hearing is rather vague and does not establish that Claimant has good cause for his nonappearance at the hearing. In order to prove good cause for his failure to appear at the hearing, Claimant would have needed to establish, on the record, that he had been checking his mail on a regular basis and that the notice of hearing had not arrived any earlier. In other words, Claimant’s failure to check his mail at the post office prior to the date of hearing, without more, would not provide Claimant with the requisite good cause for his nonappearance.

establish why he could not use someone else's computer or a computer available for public use if he wanted to file a typewritten appeal or file his appeal electronically. Second, while Claimant asserts that he was hesitant about filing a handwritten appeal, there is no requirement that appeals be typed or filed electronically; therefore, a handwritten appeal that is sent via U.S. mail, common carrier, fax transmission, or that is personally delivered to a workforce investment officer or the Board during normal working hours is sufficient. See 34 Pa. Code § 101.81(e) (providing that a written objection will be considered, even if it does not appear on the standard appeal form); 34 Pa. Code § 101.82(b) (providing that a party may file a written appeal via U.S. mail, common carrier, fax transmission, electronic transmission other than fax, or personal delivery to a workforce investment office or the Board). Therefore, Claimant did not have a valid reason for the untimely filing of his appeal.⁹

Because Claimant failed to satisfy his burden of proof, Claimant was not entitled to have his appeal considered by the Board *nunc pro tunc*. Therefore, we conclude that the Board did not err in affirming the Referee's dismissal of Claimant's appeal.¹⁰

⁹ We note that even after Claimant contacted someone at the Service Center on April 14, 2009, who advised him that a handwritten appeal would be acceptable and that any appeal should be filed immediately, (Claimant's Br. at 8), Claimant waited another 7 days to file his appeal.

¹⁰ Given our disposition, we do not reach the issue of whether Claimant's request for backdating was properly denied.

Accordingly, the Board's order is affirmed.

RENÉE COHN JUBELIRER, Judge

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ORDER

NOW, April 30, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge