

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Bernadette M. Nagy,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1910 C.D. 2010
	:	Submitted: January 28, 2011
Unemployment Compensation Board	:	
of Review,	:	
	:	
Respondent	:	

**BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE BROBSON**

FILED: June 15, 2011

Petitioner Bernadette M. Nagy (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board), which affirmed a Referee’s decision dismissing Claimant’s appeal as untimely pursuant to Section 501(e) of the Unemployment Compensation Law (Law).¹ We now affirm the Board’s order.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §821(e). Section 501(e) of the Law states:

(e) Unless the claimant . . . files an appeal with the board, from the determination contained in any notice required to be furnished by the department . . . within fifteen calendar days after such notice . . . 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.

Claimant filed for unemployment compensation benefits following termination of her employment with Pennsylvania Military and Veterans Affairs (Employer) as a Personal Care Home Administrator. On May 18, 2010, the Indiana UC Service Center (Service Center) issued a Notice of Determination in which it determined that Claimant was ineligible for unemployment compensation benefits under Section 402(b) of the Law,² relating to voluntarily quitting her employment without cause of a necessitous and compelling nature. (Reproduced Record (R.R.) at 2a.) The notice stated that the last day that Claimant could appeal the determination was June 2, 2010. (*Id.*) Claimant did not file her appeal until June 20, 2010, after the statutory appeal had expired. (Certified Record (C.R.), Item No. 8.)

A Referee conducted a hearing on July 14, 2010, for the purpose of determining whether Claimant's appeal from the Notice of Determination was timely. (R.R. at 5a.) During the hearing, Claimant testified that she last worked for Employer on March 15, 2010, and that she was discharged or had to resign effective April 16, 2010. (*Id.*) She filed for unemployment compensation benefits on May 6, 2010, and left for a "much-needed" vacation in California six days later on May 12, 2010. (*Id.*) Claimant testified that she needed the vacation due to emotional stress that she had been experiencing. (*Id.*) She attached to her appeal a note from a doctor indicating that he saw Claimant on March 15, 2010, to evaluate symptoms due to increased stress resulting from a work-related incident. (*Id.*) Claimant also attached to her appeal a copy of a prescription for Lexipro, a medication prescribed for her because she was experiencing anxiety attacks. (*Id.*)

² Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(b).

Claimant testified that she did not make any arrangements to have her mail picked up during her absence because she believed that “everything was caught up” until she would be back. (*Id.*) She did not realize that she would receive anything regarding unemployment compensation benefits while she was away. (*Id.*) Claimant resides with her sister, but her sister accompanied her on the vacation and there was no one at their home. (*Id.*) Prior to leaving for vacation, Claimant attempted to call the Service Center, but the line was busy and she did not try to call again. (*Id.*) Upon her return from vacation, Claimant filed her appeal on June 20, 2010. (*Id.*) By decision dated July 15, 2010, the Referee dismissed Claimant’s appeal as untimely. (R.R. at 6a.)

Claimant appealed to the Board, and the Board affirmed the Referee’s decision. (R.R. at 7a.) In so doing, the Board issued the following findings of fact:

1. A Notice of Determination (determination) was issued to the claimant on May 18, 2010, denying benefits.
2. A copy of this determination was mailed to the claimant at her last known post office address on the same date.
3. The determination mailed to the claimant was not returned to the authorities as undeliverable by the postal authorities.
4. The notice informed the claimant that June 2, 2010, was the last day on which to file an appeal from this determination.
5. The claimant filed her appeal on June 20, 2010.
6. The claimant went on vacation in California on May 12, 2010. The claimant returned from vacation on June 15, 2010. Because the claimant

was in California, she did not receive the determination.

7. The claimant made no arrangements to have her mail picked up for her while she was in California other than leaving it at the post office.
8. The claimant was not misinformed or misled by the unemployment compensation authorities concerning her right or the necessity to appeal.
9. The 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.

(Id.)

The Board affirmed the Referee's decision and dismissed Claimant's appeal, concluding that the Referee had properly dismissed the appeal as untimely. The Board reasoned that because Section 501(e) of the Law provides that a Notice of Determination shall become final unless an appeal is filed within fifteen (15) days of its issuance, the Referee and Board have no jurisdiction to consider an appeal that was filed after the expiration of the statutory appeal period. *(Id.)* The Board explained:

The Board recognizes the claimant's testimony that she was in California from May 12, 2010 through June 14, 2010. Because the claimant filed for unemployment compensation benefits, she reasonably knew that a determination from the Department was forthcoming. There is no indication that the claimant made arrangements to have the Department send her mail to a different address, that she made arrangements to have her mail forwarded to California, or that she made arrangements for friends or family to pick up her mail while being away for an extended period of time. A claimant has the responsibility to ensure the timely

receipt of her own mail. Here, the claimant did not do so. Therefore, the facts establish that any delay in the claimant's filing was because of her own negligence in failing to make accommodations to retrieve her mail. The claimant therefore has not shown good cause for the Board to accept her appeal *nunc pro tunc*. Thus, the claimant's request that the record be remanded for additional testimony is denied.

(*Id.*)

On appeal,³ Claimant argues that the Board erred in concluding that she failed to establish circumstances justifying a *nunc pro tunc* appeal, and, therefore, improperly dismissed her appeal. In support of her argument, Claimant relies upon our Supreme Court's decisions in *Cook v. Unemployment Comp Bd. of Review*, 543 Pa. 381, 383-84, 671 A.2d 1130, 1131 (1996), and *Bass v. Pennsylvania Bureau of Corrections*, 485 Pa. 256, 401 A.2d 1133 (1979), in which the Supreme Court concluded that non-negligent circumstances existed to justify an appeal *nunc pro tunc*. Claimant contends that the circumstances in her case were non-negligent because she was suffering from stress as a result of a work-related incident for which she received a prescription for medication and that her vacation was "much-needed" in light of her circumstances.

As noted above, Section 501(e) of the Law provides that unless a claimant files an appeal with respect to a Notice of Determination within fifteen calendar days after it was mailed to his last known post office address, such determination "shall be final and compensation shall be paid or denied in accordance therewith." "This fifteen-day time limit is mandatory and subject to

³ This Court's standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. § 704.

strict application.” *Renda v. Unemployment Comp. Bd. of Review*, 837 A.2d 685, 695 (Pa. Cmwlth. 2003), *appeal denied*, 581 Pa. 685, 863 A.2d 1151 (2004). Failure to appeal timely an administrative agency’s action is a jurisdictional defect, and the time for taking an appeal cannot be extended as a matter of grace or mere indulgence. *Sofronski v. Civil Svc. Comm’n, City of Philadelphia*, 695 A.2d 921, 924 (Pa. Cmwlth. 1997). Thus, a petitioner carries a heavy burden to justify an untimely appeal. *Blast Intermediate Unit #17 v. Unemployment Comp. Bd. of Review*, 645 A.2d 447, 449 (Pa. Cmwlth. 1994).

As our Supreme Court opined in *Cook*, an appeal *nunc pro tunc* may be allowed where the delay in filing the appeal was caused by extraordinary circumstances involving fraud or some breakdown in the administrative process or non-negligent circumstances related to the petitioner, his counselor, or a third party. *Cook*, 543 Pa. at 383-84, 671 A.2d at 1131. With regard to non-negligent circumstances that may justify an appeal *nunc pro tunc*, a claimant must establish that: “(1) the appeal was filed late as a result of non-negligent circumstances, either on appellant’s part or on the part of his counsel, (2) the appeal was filed shortly after the expiration date and (3) the appellee was not prejudiced by the delay.” *Kenneth S. Hartman, Inc. v. Office of Unemployment Comp. Tax Svcs.*, 928 A.2d 448, 452 (Pa. Cmwlth. 2007).

In *Cook*, four days before his unemployment compensation appeal was due to be filed, the claimant collapsed, requiring hospitalization. The claimant spent three days in intensive care, then four days in an ordinary room. The Supreme Court noted that during that time period, the claimant was unable to leave the hospital, did not have his notice of determination with him, and his diagnosis on discharge supported a determination that he was seriously ill when he was

admitted. As a result, he filed his appeal four days late. The Supreme Court concluded that the claimant established non-negligent circumstances justifying the late filing.

Similarly, in *Bass v. Pennsylvania Bureau of Corrections*, 485 Pa. 256, 401 A.2d 1133 (1979), the Supreme Court concluded that a secretary's illness constituted a non-negligent circumstance that excused the filing of an untimely appeal. In *Bass*, an attorney instructed his secretary to type the appeal papers six days prior to the expiration of the appeal period, which she did. She then placed the appeal in a folder for filing, along with other papers that were to be filed at the courthouse. That same day, the secretary became ill before the appeal was filed. She returned to work one week later to discover that the appeal had not been filed. She then filed the appeal, although after the expiration of the appeal period.

The circumstances of the case at hand differ significantly from those in *Cook* and also *Bass*. In both of those cases, the person responsible for moving forward with the appeal at that stage of the process became ill, which caused the delay in the timely filing of the appeal. In the case now before the Court, Claimant provides no testimony that a medical condition prevented her from being able to make arrangements relating to her mail or to contact the Service Center. Claimant's testimony establishes that despite having filed her claim for unemployment compensation benefits six days prior to leaving for vacation, she made no arrangements with friends, family, or postal authorities to ensure that she received any determination that may be mailed by the Service Center. The *only* step that Claimant took to notify the Service Center of her planned vacation and absence from her residence was the placement of *one* telephone call, which resulted in a *busy* signal. There is no testimony of record that Claimant made any

other attempts to contact the Service Center or otherwise monitor her claim or mail.

Thus, the real cause of Claimant's late filing was that she took no steps regarding receipt of her mail before or during her absence or to otherwise monitor her claim. Claimant offers no reason for her failure to contact friends, family, or postal authorities to make arrangements for her mail or to provide an alternative address. Claimant also offers no reason for her failure to make additional attempts to call the Service Center after she received a busy signal. For those reasons, we cannot conclude that Claimant established non-negligent circumstances justifying the filing of an appeal *nunc pro tunc*. The Board, therefore, properly dismissed Claimant's appeal as untimely.⁴

Accordingly, the order of the Board is affirmed.

P. KEVIN BROBSON, Judge

⁴ We reject Claimant's contention that the Board was somehow unaware of our Supreme Court's decisions in *Cook* and *Bass* and, therefore, failed to consider whether non-negligent circumstances existed to justify an appeal *nunc pro tunc*. To the contrary, in finding of fact number 9, the Board specifically found that the delay in filing was not the result of non-negligent circumstances. (R.R. at 7a.) The Board further explained that "the facts establish that any delay in the claimant's filing was because of her own negligence in failing to make accommodations to retrieve her mail." (*Id.*) There is no need, therefore, for the matter to be remanded for a determination as to whether the delay in filing resulted from non-negligent circumstances.

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	:	
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ORDER

AND NOW, this 15th day of June, 2011, the order of the Unemployment Compensation Board of Review is hereby **AFFIRMED**.

P. KEVIN BROBSON, Judge