

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Wendell Zellars,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 338 C.D. 2009
	:	
Unemployment Compensation Board of Review,	:	Submitted: November 20, 2009
	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: February 5, 2010

Wendell Zellars (Claimant) petitions, pro se, for review of the February 11, 2009 order of the Unemployment Compensation Board of Review (Board), which dismissed Claimant’s appeal from the order of the Unemployment Compensation Referee (Referee) as untimely pursuant to Section 502 of the Unemployment Compensation Law (Law).¹ On appeal, Claimant argues that his appeal was filed within the requisite fifteen days and, therefore, the Board erred in finding his appeal untimely.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 822. Section 502 provides, in relevant part, that a referee’s decision shall be “deemed the final decision of the [B]oard, unless an appeal is filed therefrom, within fifteen days after the date of such decision.” 43 P.S. § 822.

The Board made the following findings of fact.

1. [Claimant] filed an application for unemployment compensation benefits on August 10, 2008.
2. [Claimant's] request for benefits was denied by the Department.
3. [Claimant] filed an untimely appeal from this determination.
4. Following a hearing on whether [Claimant's] appeal of the Department's determination was timely, the Referee issued a decision dismissing [Claimant's] appeal.
5. A copy of the Referee's decision was mailed to [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 decision mailed to [Claimant] was not returned by the postal authorities as undeliverable.
8. [Claimant's] appeal from the Referee's decision, in order to be timely, had to have been filed on or before December 1, 2008.
9. [Claimant] alleges that he filed an appeal, by facsimile transmission, on November 13, 2008.
10. [Claimant's] appeal, allegedly filed by fax on November 13, 2008, was never received by the Department.
11. [Claimant's] appeal was filed on December 12, 2008.
12. [Claimant] was not misinformed or misled by the unemployment compensation authorities concerning his right or the necessity to appeal.

13. 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.

(Board Decision, Findings of Fact (FOF) ¶¶ 1-13.) Based on these findings, the Board concluded that, under the mandatory provisions of Section 502 of the Law, Claimant's appeal was untimely and Claimant did not establish his entitlement to *nunc pro tunc* relief. (Board Decision at 2.) Consequently, the Board held that it did not have jurisdiction to consider Claimant's appeal and dismissed Claimant's appeal. (Board Decision at 2-3.) Claimant now petitions this Court for review.²

Claimant argues that his testimony supports the finding that his appeal was timely filed because he stated that he faxed the appeal to the Board on November 13, 2008 and he should not be punished for failing to request a confirmation of his faxed appeal. Although we sympathize with Claimant, this Court will not reverse the Board's determination on these grounds.

Pursuant to Section 502 of the Law, "[i]f an appeal is not filed within fifteen days of [a] determination's mailing date, the [Board] and its referees do not have jurisdiction to rule on the merits of the case." Roman-Hutchinson v. Unemployment Compensation Board of Review, 972 A.2d 1286, 1288 n.1 (Pa. Cmwlth. 2009). "The statutory time limit for filing an appeal is mandatory in the absence of fraud or manifestly wrong or negligent conduct of the administrative authorities, and the

² This Court's review is "limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law and whether necessary findings of fact are supported by substantial evidence." Roman-Hutchinson v. Unemployment Compensation Board of Review, 972 A.2d 1286, 1288 n.2 (Pa. Cmwlth. 2009).

claimant bears a heavy burden to justify an untimely appeal.” Id. The Department of Labor and Industry’s (Department) regulations govern the filing of faxed appeals. The regulation at 34 Pa. Code § 101.82(b)(3)(i) states that the filing date for appeals sent by fax transmission will be determined by: (1) “the date of receipt imprinted by . . . the Board’s fax machine”; (2) if the date imprinted by the Board’s fax machine is not legible, “the date of transmission imprinted on the faxed appeal by the sender’s fax machine”; and (3) “if the faxed appeal is received without a legible date of transmission, the filing date will be the date recorded by . . . the Board when it receives the appeal.” 34 Pa. Code § 101.82(b)(3)(i)(A)-(C). Moreover, 34 Pa. Code § 101.82(b)(3)(ii) warns that a “party filing an appeal by fax transmission is responsible for delay, disruption, interruption of electronic signals and readability of the document and accepts the risk that the appeal may not be properly or timely filed.” This warning was included in the appeal instructions sent to Claimant as part of the Referee’s decision. (Referee Decision at 2.)

Pursuant to Section 502, Claimant had fifteen days from the mailing date of the Referee’s decision, or until December 1, 2008, to appeal that decision to the Board. Claimant testified that he faxed his appeal to the Board on November 13, 2008; however, that testimony does not satisfy the Department’s regulations as to how the filing date for a faxed appeal will be determined. 34 Pa. Code § 101.82(b)(3)(i). Moreover, the record is devoid of evidence that the Board received the faxed appeal. Unfortunately, by filing his appeal by fax, Claimant accepted the risk that his appeal would not be properly or timely filed. 34 Pa. Code § 101.82(b)(3)(ii).

After reviewing the record, the only evidence of the filing date of Claimant’s appeal is the stamp on Claimant’s appeal indicating that it was received by the Board on December 12, 2008. Under the Department’s regulations, where there is no “postmark on the envelope containing the appeal . . . United States Postal Service Form 3817 (Certificate of Mailing),” certified mail receipt, or “postage meter mark on the envelope containing the appeal . . . the filing date will be the date recorded by . . . the Department when it receives the appeal.” 34 Pa. Code § 101.82(b)(1)(i)-(iii). The record contains no envelope with a postmark, no Form 3817, no certified mail receipt, and no envelope with a postage meter stamp; consequently, the filing date of Claimant’s appeal is the date recorded when the Board received the appeal, December 12, 2008. *Id.* Because December 12, 2008 is more than fifteen days from the date of the Referee’s decision, the Board lacked jurisdiction over Claimant’s appeal, and it properly dismissed that appeal pursuant to Section 502.³

Accordingly, we must affirm the order of the Board.

RENÉE COHN JUBELIRER, Judge

³ Moreover, we reject Claimant’s argument that the Board’s determination should be reversed because the actual filing date of Claimant’s appeal could not be determined as there were two dates stamped on the appeal, December 12 and 15, 2008. Because both dates are beyond the December 1, 2008 deadline, neither supports the conclusion that Claimant’s appeal was timely filed.

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	:	
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ORDER

NOW, February 5, 2010, the order of the Unemployment Compensation Board of Review dismissing Wendell Zellars' appeal as untimely is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge