IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Matthew J. Gullo,	:	
Petitioner	:	
	:	
v.	:	No. 975 C.D. 2010
	:	Submitted: December 3, 2010
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: January 4, 2011

Matthew J. Gullo (Claimant) has filed a *pro se* petition for review from an order of the Unemployment Compensation Board of Review (Board) affirming the decision of the Referee denying him unemployment compensation benefits because he failed to timely file an appeal within 15 days of the notice of determination that he received from the Department of Labor and Industry (Department) as required under Section 501(e) of the Unemployment Compensation Law (Law).[1] Because Claimant's untimely filing was due to his own fault, we affirm the Board's decision.

[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 provides:

(Footnote continued on next page…)

Claimant was employed by Lackmann Culinary Services (Employer) with his last date of employment on May 11, 2009. He filed a claim for unemployment compensation benefits, and the Department denied benefits because it determined that Claimant voluntarily terminated his employment and did not provide a necessitous and compelling reason for doing so. The Notice of Determination (Notice) indicated that Claimant was ineligible for benefits beginning with the week ending August 8, 2009, under both Section 402(b) and Section 401(f) of the Law.[2]

(continued…)

> 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.

[2] Section 402(b) of the Law, 43 P.S. §802(b), provides:

> An employe shall be ineligible for compensation for any week –
>
> (b) In which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature, irrespective of whether or not such work is in "employment" as defined in this act.

Section 401(f) of the Law, 43 P.S. §801(f), provides, in pertinent part:

> Compensation shall be payable to any employe who is or becomes unemployed, and who-
>
> (f) Has earned, subsequent to his separation from work under circumstances which are disqualifying under the provisions of subsections 402(b), 402(e) and 402(h) of this act, remuneration for

(Footnote continued on next page…)

The Notice also indicated that Claimant's last day to appeal the denial of benefits was September 25, 2009, and was mailed to Claimant's mailing address of 706 Dekalb Street, 1st Floor, Bridgeport, PA 19405-1138.

Claimant filed an appeal from that decision with a Referee, but the appeal was filed after the deadline of September 25, 2009, on October 6, 2009. Along with his appeal he filed a "Good Cause for Filing of Late Appeal" letter indicating that he filed his appeal late because he was a patient at the Valley Forge Medical Center from September 1, 2009, through September 19, 2009, and did not receive his mail until September 24, 2009, because it was being held for him. He also did not have the opportunity to fully review the appeal with a family member until October 3, 2009.

A hearing was held before a Referee at which time testimony was heard on both the timeliness issue and the issue of Claimant's termination. Claimant testified that he had been hospitalized from September 1st through September 19th for drug and alcohol rehabilitation. During those dates, his address was 706 Dekalb Street in Bridgeport, although he currently was living at a new address. When he was released from the hospital, he went home and read his mail, including the Notice, which would have been on September 20th. He stated that he had learning disabilities and did not fully understand what he read so he contacted some of his family to go

(continued…)

> services in an amount equal to or in excess of six (6) times his weekly benefit rate irrespective of whether or not such services were in "employment" as defined in this act.

over it with him "and when that was done the appeals were filed and sent out." (January 4, 2010 Hearing Transcript at 8.) Claimant stated that he did not notice that there was a last day to file an appeal on the Notice when he read it because he did not fully understand it. When asked by the Referee if he had been treated recently for any learning disability, he responded that he had not but had been treated all through his school years. Claimant said he graduated high school in 2004.

Regarding his job with Employer, he stated that he worked there almost three years as a full-time dishwasher and he voluntarily quit that position. He stated that he left there due to unfair treatment explaining that initially, he was promoted to a line cook and then he was demoted after he was involved in a car accident on April 13, 2009, and had a concussion. When he returned to work, Employer tried to put him back to work washing dishes even though his rate of pay was that of his promotion. When he tried to come back into the building, he was not allowed in without an original return-to-work slip, and his supervisor called him "retarded." He also stated that he had been called names on a daily basis such as "idiot," "stupid," "retard" and "dumb."

Claimant's mother testified that Claimant was incorrect about the date he reviewed his mail because he was released from the hospital on September 20th and stayed at her house for a few days. "It was a couple of days before he even got back to his house to go through some paperwork, so I think that it was probably later than the 20th when he actually got it." (January 4, 2010 Hearing Transcript at 11.) She said it was probably six to 10 days before she had the opportunity to actually read the paperwork that Claimant had received from the Department so that she could help

him with the appeal. Claimant's mother stated that she typed the appeal and "had [Claimant] read them and then I re-read them to him and to make sure that it was accurate as far as factual data and then he signed them." *Id.* Claimant's mother concurred that her son told her that he was being called names at work and went to work with him the day he was not allowed back in the building due to not having the original workslip.

Denise Drury (Drury), Manager of Human Resources and Benefits for Employer, testified by telephone that she had not received any of the paperwork for the hearing due to being at another location and could not testify regarding anything she heard because she was unfamiliar with the file and only became familiar when she received a notice of the hearing.

The Referee found that the Department had determined that Claimant was not entitled to benefits based upon his separation from employment from Lackmann Culinary Services. Claimant also had not earned six times his weekly benefit rate in subsequent employment. The Referee then determined that Claimant's appeal was untimely filed and did not reach the issue of whether he was terminated from his employment. In making that determination, he found that the Department had mailed its Notice to Claimant's then address of record – 706 Dekalb Street in Bridgeport, and that it was received at that address. The last day to file a timely appeal was September 25, 2009, and Claimant did not file his appeal until October 6, 2009. Claimant did not indicate that he was misinformed or misled by any representative of the Department, and his late appeal was not caused by an act of fraud, a breakdown in the administrative process or by any non-negligent conduct of

himself or a third party. The Referee found that although Claimant was hospitalized in September 2009, he was discharged on September 19, 2009, and he testified that he came across the Notice on either September 20th or 21st but he wanted to consult with family members.

Claimant filed an appeal with the Board from the Referee's decision furnishing the Board with a doctor's note signed by Heidi J. Yutzler-Overton, D.O. (Dr. Yutzler-Overton) stating the following:

> Matthew needed help from a family member to file his appeal for unemployment secondary to difficulty with reading comprehension. He had an IEP from 3rd to 12th grade for reading difficulties.

Despite this doctor's note, the Board affirmed the Referee, and this appeal by Claimant followed.[3]

On appeal, Claimant argues that the Board erred in finding his appeal was untimely because 1) he is incompetent due to having "Multiple learning, emotional and physical disabilities inclusive of reading and reading comprehension and 2) the failure to make provision for mental and physical deficiency or illiteracy constitutes an administrative breakdown that warrants allowance of Claimant's

[3] Our scope of review of the Board's decision and order is limited to determining whether the Board committed an error of law, whether constitutional rights were violated, or whether necessary findings of fact were supported by substantial evidence. *Hessour v. Unemployment Compensation Board of Review*, 942 A.2d 194 (Pa. Cmwlth 2008).

appeal *nunc pro tunc*."[4] (Claimant's brief at 11.) Claimant further argues that the Referee is not a qualified physician and improperly found that Claimant "was not so incapacitated by any disability that he could not have filed an appeal by September 25, 2009 had he chosen to do so."

Claimant relies on *Lewis v. Unemployment Compensation Board of Review*, 814 A.2d 829 (Pa. Cmwlth. 2003), for the proposition that the Board made no provision for his mental deficiency and illiteracy, which constituted a breakdown in the administrative system. *Lewis* involved a claimant who suffered from cognitive disorder, learning disorder, spelling disorder, reading disorder, mathematics disorder and a mixed anxiety depressive disorder, and who misspelled her own last name when she gave testimony. Her tests indicated that she had an IQ lower than 80 which was educable mentally retarded. She called the unemployment office several times for help and sought help from others, even taking her appeal form to her school to get help from a teacher and filled out the form to the best of her ability. Because the Board did not make sufficient findings regarding the claimant's intellectual functioning level, the lack of adequate instruction about the filing of an appeal constituted a breakdown in the administrative process that justified a *nunc pro tunc* appeal.

[4] A *nunc pro tunc* appeal will be granted "(1) where an appeal is not timely because of non-negligent circumstances…as they relate to appellant…and (2) the appeal is filed within a short time after the appellant…learns of and has an opportunity to address the untimeliness, and (3) the time period which elapses is of very short duration, and (4) appellee is not prejudiced by the delay, the court may allow an appeal *nunc pro tunc." Cook v. Unemployment Compensation Board of Review*, 543 Pa. 381, 384-85, 671 A.2d 1130, 1131 (1996).

However, in *Dull v. Unemployment Compensation Board of Review*, 955 A.2d 1077 (Pa. Cmwlth. 2008), this Court held that a claimant who also had filed a late appeal due to her inability to read and an IQ of 76 was not entitled to a *nunc pro tunc* appeal because:

> Claimant was prevented by her own negligence from filing a timely appeal because she neglected to have someone read her mail…Here the Claimant exercised no diligence at all, did not communicate with the [Service Center] regarding her difficulties, and failed to conduct her affairs in a reasonable manner by having someone open and read her mail. This is not something that Claimant was unable to do. Claimant testified she does just that now. But at the time, she did not solicit help with her mail because she was embarrassed and "tried to keep her illiteracy secret."…We will not hold the UCBR or related agencies responsible for accommodating illiteracy where claimants fail to disclose their illiteracy and fail to make reasonable efforts to obtain appropriate assistance.

Id., 955 A.2d at 1080-1081.

That is not the case here. There was no evidence presented that Claimant had a mental deficiency or was illiterate or that Claimant is "educable mentally retarded." To the contrary, Claimant testified that he could read and that he graduated from high school. Despite Claimant's testimony that he had an IEP in high school and attended special classes, his mother's testimony that he had "learning disorders" that prevented him from being unable to discern what the Notice said about the deadline for filing an appeal, and Dr. Yutzler-Overton's note stating that Claimant required help in filing his appeal due to his difficulty with reading comprehension, Claimant testified that he opened the Notice between the 19th and 21st

of September and read the Notice. Even if Claimant had trouble with comprehension, the Board found that there was ample time that he could have taken the Notice to his mother before the 25th if he wanted to consult with her, and we find no fault with the Board's determination.

As for Claimant's argument that the Referee could not find that Claimant was not capable of timely filing his appeal because the Referee was not a qualified physician, the Referee did not need to be a physician to make such a finding based on the above. Further, Dr. Yutzler-Overton never testified that Claimant could not comprehend what he read in the Notice; she only provided a note to the Board that Claimant needed help filing his appeal secondary to his difficulty with reading comprehension. Because the Board is the ultimate fact finder and determiner of credibility in unemployment cases, *McCarthy v. Unemployment Compensation Board of Review*, 820 A.2d 1266 (Pa. Cmwlth. 2003), and it affirmed the Referee's decision, we cannot disturb that determination on appeal.

Accordingly, the order of the Board is affirmed.

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DAN PELLEGRINI, JUDGE

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O R D E R

AND NOW, this 4th day of January, 2011, the order of the Unemployment Compensation Board of Review, dated March 22, 2010, at B-497255, is affirmed.

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DAN PELLEGRINI, JUDGE