

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

PETER SLATER,)	
)	
Appellant,)	
)	
v.)	C.A. No. N11A-09-010 JOH
)	
J.C. PENNY INCORPORATED and)	
UNEMPLOYMENT INSURANCE)	
APPEAL BOARD,)	
)	
Appellees.)	

Date Submitted: April 3, 2012
Date Decided: July 17, 2012

*Upon Appeal from a Decision of the Unemployment
Insurance Appeal Board—**AFFIRMED***

Peter Slater, Wilmington, Delaware, *pro se* Appellant.

Caroline Lee Cross, Esquire, Deputy Attorney General, Delaware Department of Justice,
Wilmington, Delaware, Attorney for Unemployment Insurance Appeal Board.

HERLIHY, Judge

Procedural History

This case is a *pro se* appeal from the Unemployment Insurance Appeal Board (“Board”). Peter Slater (“Claimant”) filed for unemployment benefits in December 2009.¹ A Claims Deputy from the Department of Labor, Division of Unemployment Insurance (“Agency”) subsequently found Claimant ineligible for unemployment benefits and issued an eligibility determination which was mailed to him on June 3, 2010.² He filed an appeal of the determination on December 2, 2010 and attended a July 26, 2010 Appeals Referee hearing held solely on the issue of the timeliness of his appeal.³ The Appeals Referee found that the Claims Deputy’s determination of ineligibility was final and binding, due to Claimant’s late appeal, and the Board affirmed the Appeals Referee’s decision, finding further review of the case was jurisdictionally barred.⁴

Factual Background

Claimant worked at J.C. Penney Co. as the Men’s Department Supervisor. His last day of work at J.C. Penney Co. was November 4, 2009.⁵ He filed for unemployment benefits on December 13, 2009.⁶ J.C. Penney Co. indicated to the Agency that Claimant

¹ *Slater v. J.C. Penney Co.*, Appeal No. 10748075 (Del. U.I.A.B. July 27, 2011) [hereinafter “*Ref.’s Decision*”], *aff’g* Determination of Claims Deputy (June 3, 2010); R. at 7.

² *Slater v. J.C. Penney Co.*, Appeal No. 10740875 (Del. U.I.A.B. Aug. 10, 2011) [hereinafter “*Board Decision*”], *aff’g* Decision of Appeals Ref. (July 27, 2011); R. at 31.

³ *Id.* at 31.

⁴ *Id.* at 32.

⁵ *Ref.’s Decision*, *supra* note 1, at 6.

⁶ *Id.* at 5.

worked regular, part-time hours from December 13, 2009 to December 22, 2009, resulting in the Claims Deputy's determination of Claimant's ineligibility for benefits dated June 3, 2010.⁷ The record indicates the Agency mailed Claimant a letter, notifying him of the Deputy's determination on June 3, 2010. The Agency sent the letter to his most recent address on record.⁸ There was no record of that letter being returned as undeliverable by the United States Postal Service ("USPS").⁹

The last day to appeal the Claims Deputy's determination was June 13, 2010.¹⁰ Claimant filed his appeal in person on December 2, 2010.¹¹ He testified that he learned of the eligibility determination for the first time on December 2, 2010, and the Agency indicated that his appeal was untimely.¹²

After filing his appeal on December 2, 2010, the Agency did not contact him. He finally contacted the agency on June 13, 2011 and spoke to an Appeals Referee who informed him that the Agency had no record of his appeal on December 2.¹³ He then

⁷ Determination Letter, R. at 1.

⁸ *Id.* at 1.

⁹ *Board Decision, supra* note 2, at 32.

¹⁰ 19 *Del. C.* §3318(b) ("Unless a claimant . . . files an appeal within 10 calendar days after such Claims Deputy's determination was mailed to the last known address[] of the claimant. . . , the Claims Deputy's determination shall be final and benefits shall be paid or denied in accordance therewith."); *Board Decision, supra* note 2, at 31 (indicating June 13, 2010 as the last day to file an appeal to the determination mailed on June 3, 2010).

¹¹ *Board Decision, supra* note 2, at 31.

¹² *Id.* at 17.

¹³ *Id.* at 18.

faxed the Agency a Claims Deputy's determination letter dated December 6, 2010, which referred to Claimant's December 2 appeal and denied further review of Claimant's eligibility for unemployment benefits.¹⁴ The Agency then discovered that a former Agency employee never processed Claimant's December 2 appeal, meaning the "appeals section" of the Agency office never received the appeal.¹⁵ The appeal was then processed on the day of Claimant's call, June 13, 2011, and notification of a scheduled Appeals Referee Hearing was sent to Claimant on July 7, 2011.¹⁶

An Appeals Referee held a hearing on July 26, 2011, solely on the issue of timeliness.¹⁷ Claimant admitted to filing his appeal on December 2, 2010, long after the June 13 deadline,¹⁸ but asserted that he never received the eligibility determination in the mail.¹⁹ The Appeals Referee's conclusion of law provided that exceptions to the timeliness of appeals could only be made if a mistake made by Agency employees precluded him from receiving the mailing in a timely manner.²⁰ The Appeals Referee also asserted that properly addressed mail from the Agency is presumed to have reached the

¹⁴ Appellant's Fax Notice to Ref., R. at 2-3.

¹⁵ Tr. Ref. Hr'g, *supra* note 12, at 19.

¹⁶ Notice of Ref. Hr'g, R. at 4.

¹⁷ *Board Decision*, *supra* note 2, at 31.

¹⁸ *Ref.'s Decision*, *supra* note 1, at 6; *See also*, Appellant's Reply 2.

¹⁹ *Ref.'s Decision*, *supra* note 1, at 6.

²⁰ *Id.* at 7.

Claimant, unless mitigating circumstances exist.²¹ The Referee further concluded that the mere assertion of non-receipt is not a sufficient mitigating circumstance, and affirmed the determination of the Claims Deputy.²²

Following Claimant's timely appeal of the Appeals Referee's decision, the Board reviewed the Referee's findings on August 10, 2011 and issued a decision upholding the Appeals Referee's decision on August 15, 2011.²³ It found no evidence of Agency error in the mailing of the determination letter.²⁴ The Board also found that Claimant did not present a compelling reason or severe circumstance that would prompt the Board to exercise its rarely-used discretion to re-hear a time-barred case.²⁵

Claimant filed an "appeal" to the Board rather than an appeal to this Court. The Board viewed the "appeal" as a request for re-hearing. It found no basis to exercise its limited discretion to reopen the underlying determination decision or to rehear the decision that his appeal was untimely. It denied the "re-hearing" on September 7, 2011. Claimant timely appealed that decision to this Court.²⁶

²¹ *Id.* at 7.

²² *Id.* at 7.

²³ *Board Decision, supra* note 2, at 35.

²⁴ *Id.* at 32.

²⁵ *Board Decision, supra* note 2, at 35.

²⁶ *Board Decision, Sept. 7, 2011* at 35.

*Parties' Contentions*²⁷

Claimant argues that he never received the eligibility determination letter and suggests that the Agency may never have mailed the letter. He explains his experience with occasions of erroneously delivered mail, despite a correct address label. He claims he now manages his bills online because of problems caused by previous USPS misdeliveries of his mail. He argues that placing the burden of proof on a claimant to produce evidence of non-receipt is unjust; a claimant would have no evidence of misdelivery if the letter was not returned to the claimant or the Agency. He also contends that his lack of knowledge that a decision was rendered adds to the inequity of the Agency's assumption of receipt absent contradicting evidence.

Claimant notes that Agency error has made the appeals process for his case both lengthy and difficult.²⁸ He also re-argues facts concerning his former employment with J.C. Penney Co., which are of no significance to the immediate matter of timeliness. For the aforementioned reasons, Claimant asks that the Board be directed to exercise its discretion to consider his determination case *sua sponte*.

In response, the Board argues that Claimant's untimely appeal of the Claims Deputy's June, 2010 determination precludes further review of the case. It further contends that it did not abuse its discretion in denying a further hearing on Claimant's appeal. The Board also asserts that Claimant had sufficient notice and opportunity to

²⁷ J.C. Penney Corp. has not filed a brief with this Court. *See* Final Delinquent Br. Notice, *Slater v. J.C. Penney Co.*, Del. Super., C.A. No. N11A-09-010 JOH (Mar. 7, 2012).

²⁸ Appellant's Br. 9.

appeal the initial determination, satisfying the requirements of due process. It states that Claimant's mere assertion that he never received the eligibility determination is not enough to overcome the legal presumption of receipt of mail that was properly addressed by the Agency.

Standard of Review

This Court must determine whether the Board's decision is free from legal error and supported by substantial evidence.²⁹ Such evidence is that which reasonably supports the Board's decision.³⁰ The Court will determine whether the decision is supported by substantial evidence from the Agency record, and will not consider evidence outside of the Agency record.³¹ Though this Court must review the evidence to determine its substantiality and legal adequacy, it is not this Court's position to resolve questions of Claimant's credibility or questions of fact resulting from that review.³²

In a case where the issue is the Board's discretion to reopen or not reopen a matter, this Court must also consider whether there was an abuse of discretion.³³ Where the Board did not abuse its discretion to re-hear a case after an untimely appeal, the Board's decision must be affirmed.³⁴ The Board abuses its discretion when its decision is

²⁹ *Stoltz Mgmt. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del.1992).

³⁰ *See, e.g., Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Brown v. City of Wilmington*, 1995 WL 653460, at *2 (Del. Super. Sept. 21, 1995).

³¹ *See Petty v. U. of Del.*, 450 A.2d 392, 396 (Del. 1982).

³² *See 19 Del. C. § 3323; Johnson v. Chrysler Corp.*, 312 A.2d 64, 66 (Del. 1965).

³³ *Funk v. Unemployment Ins. Appeal Bd.*, 591 A.2d 222, 225 (Del. 1991).

clearly based on unreasonable grounds or produces injustice that defies sanctioned rules of law or practice.³⁵

Discussion

Title 19 section 3318(b) and (c) of the Delaware Code provide ten-day time limits to file appeals of Agency decisions:

(b) Unless a claimant... files an appeal within 10 calendar days after such Claims Deputy's determination was mailed to the last known addresses of the claimant and the last employer, the Claims Deputy's determination shall be final and benefits shall be paid or denied in accordance therewith...

(c) Unless the appeal is withdrawn, an appeals tribunal, after affording the parties reasonable opportunity for fair hearing, shall affirm, modify or reverse the decision of the deputy. The parties shall be duly notified of the tribunal's decision, together with its reason therefore, which shall be deemed to be final unless within 10 days after the date of notification or mailing of such decision further appeal is initiated pursuant to § 3320 of this title....

This Court has continuously relied on case law interpreting the time limit under section 3318(c) to provide support for its decisions interpreting its time limit.³⁶

The Court finds the Board's decision to not reopen the case and finding the appeal was untimely is free from legal error and is supported by substantial evidence. Further, the Board did not abuse its discretion by rejecting Claimant's appeal as untimely and

³⁴ *Id.* at 225.

³⁵ *Hefley v. Unemployment Ins. Appeals Bd.*, 2009 WL 5177136, at *1 (Del. Super. July 17, 2009) (quoting *Russell v. Unemployment Ins. Appeal Bd.*, 2000 WL 1211216, at *2 (Del. Super. Mar. 21, 2000) (quoting *K-mart, Inc. v. Bowles*, 1995 WL 269872, at *2 (Del. Super. Mar. 23, 1995))).

³⁶ *See, e.g., Meacham v. Del. Dep't of Labor*, 2002 WL 442168 (Del. Super. Jan. 25, 2002); *Lively v. Dover Wipes Co.*, 2003 WL 21213415, (Del. Super. May 16, 2003); *Anderson v. Comfort Suites*, 2003 WL 304359, (Del. Super. Feb. 12, 2003).

deciding not to reopen the issue of eligibility. Claimant presented evidence of neither error in the course of the mailing nor severe circumstances rising to the level of injustice.

Substantial Evidence Supports the Board Decision

Substantial evidence supports the decision that Claimant's appeal was untimely. The appeal was filed months late, and there is no evidence of a mailing error on the part of the Agency which would inhibit the timely receipt of the determination. The Claimant is, therefore, presumed to have received the determination of ineligibility in a timely fashion.³⁷ Claimant offered no evidence before the Appeals Referee to rebut this presumption.

Title 19 section 3318 of the Delaware Code provides for a ten-day time limit on appeals of determination letters from the Agency.³⁸ The ten-day period begins to run on the date the determination is mailed to the claimant.³⁹ Where a claimant fails to provide proof that his or her appeal was filed within the ten-day period, and Agency records indicate a late filing, substantial evidence exists to find the appeal was filed late.⁴⁰ Agency records here indicate that the final day to appeal the Claims Deputy's

³⁷ *Lively*, 2003 WL 21213415, at *1.

³⁸ 19 *Del. C.* § 3318(b).

³⁹ *Lively*, 2003 WL 21213415, at *1 (citing *Bowers v. Unemployment Ins. Appeal Bd.*, 1998 WL 283401, at *4 (Del. Super. 1998)) ("The 10 day period for filing an appeal begins running on the date of mailing unless the mailing fails to reach the recipient because of a mistake made by Claims[sic] Deputy.").

⁴⁰ *Rieger v. KJM Transp.*, 2001 WL 1729128, at *3 ¶20 (Del. Super. Dec. 10, 2001) (finding that agency records indicating a late filing was sufficient as substantial evidence to support the Agency decision to reject the late appeal, despite conflicting testimony by Claimant).

determination was June 13, 2010. He admits to filing the appeal on December 2, 2010. Substantial evidence exists to find that Claimant filed an untimely appeal.

In addition to the late filing, there was no mailing error by the Agency that inhibited Claimant's timely receipt of the determination letter. If a mailing fails to reach a claimant because of an error made by the Agency, the ten-day time limit does not preclude further review of the case.⁴¹ The absence of record evidence of error—on the part of the Agency in mailing the Claims Deputy's determination to Claimant—is sufficient to find substantial evidence indicating the Agency's mailing was free from error.⁴² Agency records, including documents submitted by Claimant, reflect the correct address for him. He received prior and subsequent mailings from the Agency at his record address, and he provided no proof of Agency error relating to the mailing of the determination letter. There was an indefensible delay in setting a hearing on the appeal he requested on December 2, 2010, but that error did not affect his receipt of the determination letter. Agency records indicate that the letter was mailed on June 3, 2010 and do not indicate the mailing being returned as undeliverable by the USPS. Therefore, substantial evidence exists to support that the Agency was free from error in the mailing.

⁴¹ *Lively*, 2003 WL 21213415, at *1.

⁴² *Hartman v. Unemployment Ins. Appeal Bd.*, 2004 WL 772067, at *2 ¶11 (Del. Super. Apr. 5, 2004) (finding that when the Agency fulfilled its responsibility of mailing the determination to the claimant's address of record, no error on the Agency existed that would delay claimant's receipt of the determination.).

Absent Agency error in the mailing, the correctly addressed determination letter is presumed to have been received by Claimant.⁴³ This presumption is not absolute and may be rebutted, but a mere denial of receipt is not a sufficient rebuttal.⁴⁴ He argues that he never received the determination letter, although he offers no evidence to support his argument other than his testimony of non-receipt—which is not sufficient to rebut the presumption.

In summary, substantial evidence supports the Board’s decision, finding that Claimant’s appeal was filed late and that Agency error did not inhibit Claimant’s timely receipt of the determination mailing. Therefore, he is presumed to have received the mailing—a presumption for which he has no successful rebuttal. Substantial evidence supports the decision to reject the appeal as untimely.

The Board did not Abuse its Discretion

In the immediate case, the Board did not abuse its discretion to reopen Claimant’s determination case *sua sponte*. That decision was based on reasonable grounds and did not produce injustice. Claimant’s failure to show that the untimely appeal was the consequence of severe circumstances resulting in injustice indicates that the Board exercised proper discretion by refusing to re-hear Claimant’s case.

⁴³ *Lively*, 2003 WL 21213415, at *1.

⁴⁴ *Brown*, 1995 WL 653460, at *3 (citing *Jackson v. Unemployment Ins. Appeal Bd.*, 1986 WL 11546, at *3 (Del. Super. Sept. 24, 1986)) (“The addressee’s mere denial of receipt of the notice is insufficient to rebut this presumption.”).

In the course of its normal functions, the Board lacks the power to accept a late appeal.⁴⁵ It has discretion to exercise its jurisdiction to re-hear a case that has been time-barred⁴⁶ when failure to do so would result in inequity.⁴⁷ This inequity must be presented to the Board through Claimant's presentation of a *severe circumstance* or *compelling reason* for the late filing, in order for the Board to exercise that limited discretion.⁴⁸ As discussed previously, substantial evidence supports the Board's decision to reject the case as untimely. No evidence of fraud was presented, and the Court finds no legal error in the decision. The Board had reasonable grounds upon which to rest its decision to reject the appeal.

Additionally, no severe circumstances warrant the exercise of *sua sponte* jurisdiction in this case. Claimant's assertion of non-receipt is not a sufficient severe circumstance.⁴⁹ Claimant does not provide evidence that an error occurred, rather he claims that any number of errors may have occurred that could have precluded him from receiving the mailing. Claimant fails to recognize that by suggesting that an error could have occurred on the part of the Agency or the USPS, he leaves room for the possibility that the reason he did not receive the determination was due to his own error.

⁴⁵ *Chrysler Corp. v. Dillon*, 327 A.2d 604 (Del. 1974). *See also, Lively*, 2003 WL 21213415, at *1 ("The time for filing an appeal is an express statutory condition of jurisdiction that is both mandatory and dispositive.").

⁴⁶ 19-1000-1201 Del. Code Regs. § 7.1 (providing that a decision to grant a motion for rehearing is within the discretion of the Board).

⁴⁷ *Lively*, 2003 WL 21213415, at *1.

⁴⁸ *Id.* at *2; *Morra*, 2004 WL 1965825, at *3.

⁴⁹ *See Lively*, 2003 WL 21213415, at *1; *Funk*, 591 A.2d at 225.

The possibilities for error which he raises, were considered by the Board and the Agency, and are questions of credibility which this Court does not address. Since merely raising the possibility that an error occurred does not substantially prove Agency or USPS error, nor does it substantially prove that Claimant was faultless, this Court cannot find inequity in the Board's decision.⁵⁰ Further, Claimant's loss of benefits and subsequent overpayment requirement are insufficient to demonstrate severe circumstances rising to the level of injustice.⁵¹

Conclusion

For the reasons stated herein, the decision of the Board is **AFFIRMED**.

IT IS SO ORDERED.

J.

⁵⁰ *Funk*, 591 A.2d at 226.

⁵¹ *Morra*, 2004 WL 1965825, at 3.