IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MICHAEL STEMMER,	)	
	)	
Employee-Appellant,	)	
	)	
v.	)	C.A. No. N12A-03-017 JRJ
	)	
COLBY ENTERPRISES,	)	
	)	
Employer-Appellee	)	
	)	
and	)	
	)	
UNEMPLOYMENT INSURANCE APPEAL BOARD,	)	
	)	
Appellee.	)	

Date Submitted: August 17, 2012
Date Decided: November 14, 2012

OPINION

Upon Appeal from the Unemployment Insurance Appeal Board: **AFFIRMED**

Michael Stemmer, *pro se*, 723 South Warnock Street, Philadelphia, PA 19147, Employee-Appellant.

Robert D. Goldberg, Esquire, 921 North Orange Street, Wilmington, DE 19899, Attorney for Employer-Appellee, Colby Enterprises.

Caroline Lee Cross, Esquire, Deputy Attorney General, Department of Justice, Carvel State Office Building, 820 North French Street, 6th Floor, Wilmington, DE 19801, Attorney for Appellee Unemployment Insurance Appeal Board.

JURDEN, J.

I. INTRODUCTION

Michael Stemmer, (the "Employee") appeals the decision of the Unemployment Insurance Appeal Board (the "Board") affirming the denial of unemployment benefits. First, the Board denied the Employee's application for further review, upholding the determination of the Appeals Referee (the "Referee") that the Employee failed to file a timely appeal. The Court finds that the Board's decision is supported by substantial evidence and that the Board neither erred as a matter of law nor abused its discretion. Second, the Board denied the Employee's motion for a rehearing. The Court finds that the Board did not abuse its discretion in denying a rehearing. Consequently, the Board's decisions are **AFFIRMED**.

II. FACTS AND PROCEDURAL HISTORY

The Employee last worked for Colby Enterprises (the "Employer") on November 14, 2011.[1] The Employee applied for unemployment benefits shortly thereafter, but was denied on December 12, 2011.[2] The Referee found that the denial dated December 12, 2011, was mailed the same day, to Employee's address: 723 South Warnock Street, Philadelphia, PA 19147.[3] The Employee confirms this is his correct mailing address but claims that he never received the initial denial.[4] The Employee had ten days (until December 22, 2011) to file an appeal.[5] The Delaware Department of Labor (the "Department") has "no record of the decision being returned in the mail."[6] The Department did not receive the Employee's written appeal until January 9, 2012.[7]

[1] Transcript of Record at 20, *Stemmer v. Colby Enters.*, N12A-03-017 JRJ (Del. Super. June 13, 2012) [hereinafter Record].
[2] *Id.*; *see also id.* at 10-11 and 22, where the Delaware Department of Labor enters the December 12 determination into evidence and the Employee has no objections.
[3] *Id.* at 20.
[4] *Id.*
[5] *Id.*
[6] *Id.* at 10.
[7] *Id.*

The Employee claims that he "never received a letter whatsoever" before December 30, 2011.[8] According to the Employee, he had been told by "somebody" at the Department that the decision would be made "either in the second or third week of December most likely."[9] But the Employee did not "think much of it" when that third week came because "it was Christmas week."[10] According to the Employee, he called the Department on December 27, 2011, because he had "heard nothing after Christmas."[11] The Employee is adamant: he "received nothing" in the mail from the Department until "after the New Years" when a letter arrived dated December 30, 2011.[12] In response to the December 27, 2011, phone conversation with the Employee, the Department "resent" the original determination informing the Employee that unemployment benefits were denied and that he had until December 22, 2011, to appeal.[13] The Employee mailed his written appeal on January 9, 2012.[14]

An Unemployment Insurance Appeal Hearing (the "Hearing") was held on January 31, 2012.[15] There, the Referee found that the Department mailed the determination denying benefits to the Employee's correct address on December 12, 2011.[16] The Referee also found that the Employee mailed his appeal on January 9, 2012.[17] Because (1) "[t]he issue in this case is whether the [Employee] filed a timely appeal"; and (2) the relevant "statutory provision[18] is explicit and mandates that unless [an appeal is filed] within ten calendar days after a determination [is] mailed, [the determination] shall be final"; the Referee found that the

[8] *Id.* at 12.
[9] *Id.* at 13.
[10] *Id.*
[11] *Id.*
[12] *Id.* at 14.
[13] *Id.* at 14-15.
[14] Brief on Appeal from UIAB Board dated March 6, 2012 at 2, *Stemmer v. Colby Enters.*, N12A-03-017 JRJ (Del. Super. July 5, 2012) [hereinafter Brief].
[15] Record at 8.
[16] *Id.* at 20-21.
[17] *Id.*
[18] 19 *Del. C.* § 3318(b).

Employee "filed a late appeal and therefore, the decision . . . disqualifying [him] from benefits is final and binding."[19]

The Employee timely appealed the Referee's decision.[20] On February 29, 2012, the Board denied the Employee's application for further review and affirmed the Referee's decision, holding that "[t]he Board finds no evidence of Department[al] error which prevented the [Employee] from filing a timely appeal."[21] On March 14, 2012, the Employee appealed the Board's decision, but directed the appeal to the Board itself.[22] The Board treated the March 14 appeal as a motion for rehearing, which the Board denied because the motion "rais[ed] no new issues, nor [did] it present an[y] evidence of Departmental error."[23] On March 26, 2012, the Employee timely appealed the Board's decision to the Superior Court.[24]

III. STANDARD OF REVIEW

The Superior Court is limited when reviewing a decision on appeal from the Board. Factual findings, "if supported by evidence . . . , shall be conclusive, and . . . the Court shall be confined to questions of law."[25] Thus, the Court "does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions."[26] Instead, "[t]he position of the [Court] on appeal is to determine only whether or not there was substantial evidence to support the findings of the Board."[27] Substantial evidence

[19] Record at 21.
[20] *Id.* at 27.
[21] *Id.* at 35.
[22] *Id.* at 33 and 34.
[23] *Id.* at 30.
[24] *Id.* at 40-41.
[25] 19 *Del. C.* § 3323(a).
[26] *Johnson v. Chrysler Corp.*, 59 Del. (9 Storey) 48, 51 (Del. 1965).
[27] *Gen. Motors Corp. v. Freeman*, 164 A.2d 686, 689 (Del. 1960).

"means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion";[28] it is "more than a scintilla but less than a preponderance."[29]

In addition, "[t]he scope of review for any court considering an action of the Board is whether the Board abused its discretion.[30] "An abuse of discretion occurs when the Board 'acts arbitrarily or capriciously' or 'exceeds the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice.'"[31] Thus, "[a] discretionary ruling of the Board will not be disturbed on appeal unless it is based on 'clearly unreasonable or capricious grounds.'"[32]

Accordingly, this Court shall determine whether the Board's findings of fact are supported by substantial evidence,[33] shall review questions of law *de novo*,[34] and shall overturn discretionary decisions of the Board only upon abuse of discretion.[35]

IV. ISSUES

The Court considers three issues. The first issue is whether the Board erred in affirming the Referee's decision that the Employee "failed to file a timely appeal pursuant to the jurisdictional requirements."[36] The second issue is whether the Board abused its discretion when it denied the Employee's application for further review because it "[found] no evidence of Department[al] error which prevented the [Employee] from filing a timely appeal."[37] The third

[28] *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994), citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).
[29] *Olney*, 425 A.2d at 614.
[30] *Funk v. Unemployment Ins. Appeal Bd.*, 591 A.2d 222, 225 (Del. 1991).
[31] *Straley v. Advanced Staffing, Inc.*, 2009 WL 1228572, at *2 (Del. Super. Apr. 30, 2009) (internal citations omitted).
[32] *K–Mart, Inc. v. Bowles*, 1995 WL 269872, at *2 (Del. Super. Mar. 23, 1995) (internal citations omitted).
[33] *See Strunk v. Ne. Music Programs*, 2012 WL 1409625, at *2 (Del. Super. Jan. 18, 2012), citing *K–Mart*, 1995 WL 269872, at *2.
[34] *See id.*, citing *Harris v. Logisticare Solutions*, 2010 WL 3707421, at *2 (Del. Super. Sept. 10, 2010); *cf. Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994).
[35] *Funk*, 591 A.2d at 225.
[36] Record at 21 and 35.
[37] *Id.* at 35.

issue is whether the Board abused its discretion when it denied the Employee's motion for rehearing.[38]

V. ANALYSIS

A. Filing a Timely Appeal

The Employee has the burden of proving that he did not receive the determination by mail due to a mistake made by the Department.[39]

According to the Delaware Code, "[u]nless a claimant . . . files an appeal within [ten] calendar days after [a] determination was mailed to the last known addresses of the claimant and the last employer, the . . . determination shall be final."[40] Specifically, "the ten-day period begins to run on the date of mailing unless the mailing fails to reach a party because of some mistake made by employees of the Department of Labor."[41] Thus, the Employee had ten days from the time his determination letter was mailed to mail his own appeal, unless the Department made a mistake.

The Employee claims he did not receive the determination in the mail. The Employee reasons, then, that the Department made some mistake and the Employee's ten-day period did not begin until he received the resent determination. However, "in Delaware there is a rebuttable presumption that mail has been received by the party to whom it was addressed if it is correctly addressed, stamped, and mailed."[42] The "mere denial of receipt of the notice is insufficient to rebut this presumption."[43] Moreover, "[l]ack of evidence of any mailing error by the Department of Labor supports the presumption that properly mailed and addressed mail was

[38] *Id.* at 30.
[39] *Straley v. Advanced Staffing, Inc.*, 2009 WL 1228572, at *3 (Del. Super. Apr. 30, 2009).
[40] 19 *Del. C.* § 3318(b).
[41] *Funk*, 591 A.2d at 224.
[42] *Straley*, 2009 WL 1228572, at *3, citing *State ex rel. Hall v. Camper*, 347 A.2d 137, 138 (Del. Super. 1975).
[43] *Brown v. City of Wilmington*, 1995 WL 653460, at *3 (Del. Super. Sept. 21, 1995).

received."[44] Thus, the Employee has the burden of providing some evidence that the Department made some mistake that would warrant an extension of his ten-day appeal period.

During the Hearing, the Department testified that "the decision [disqualifying the Employee from receipt of benefits] was mailed to the [Employee's] address of record."[45] The Employee confirmed the address.[46] The Department further testified that "[t]he Department has no record of the decision being returned in the mail."[47] The Employee's only response was a repeated "I never received that in the mail."[48] The Employee presented no evidence of any mistake on the part of the Department; only the repeated and flawed syllogism that, because he did not receive the determination in the mail, the Department must have made a mistake in mailing it.[49] As a result, the Board found that the Employee did not rebut the presumption and affirmed the Referee's decision to deny the Employee's appeal.

The Court must affirm the findings of the Board if they are supported by "more than a scintilla" of evidence.[50] Here, the Department testified that it mailed the determination denying benefits on December 12, 2011, and the Employee verified the address. The burden, then, rested upon the Employee to provide some evidence that the Department made a mistake that kept the determination from reaching its destination. His testimony that the determination was not received is not enough to show a mistake by the Department. Moreover, the fact that the Employee offered no evidence of mistake supports the presumption that the properly mailed and

[44] *Straley*, 2009 WL 1228572, at *3.
[45] Record at 10.
[46] *Id.*; *cf. id.* at 16.
[47] *Id.* at 10.
[48] *Id.* at 15; *see also id.* at 3, 12, 13, 14, and 15.
[49] Throughout his Brief, the Employee argues repeatedly that "the post office does make mistakes." *See, e.g.*, Brief at 2, 3, and 4. The Employee fails to understand his burden under the law. With testimony from the Department that it mailed the determination to the correct address (and with the validity of the address verified), the burden falls upon the Employee to show that *the Department*—not the U.S. Postal Service—made some mistake. The Employee fails to offer any evidence of any mistake on the part of the Department.
[50] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

addressed mail was received. Therefore, the Court finds that there is substantial evidence to support the Board's conclusion that the Department did, in fact, mail the determination on time and to the correct address. Because the Employee's appeal arrived after the statutory ten-day period, he did not timely appeal and the determination is final.

B. Application for Further Review

The Board has broad discretion when deciding whether to review the record regarding the failure to file a timely appeal.[51] The Court cannot disturb a discretionary ruling of the Board unless it was based upon clearly unreasonable or capricious grounds. Here, the Board denied the Employee's application for further review because it found "no evidence of Department[al] error which prevented the [Employee] from filing a timely appeal."[52] Because there is substantial evidence to support the Board's finding, the Court affirms the Board's discretionary decision to deny review.

C. Motion for Rehearing

The Board has broad discretion when deciding whether to grant a motion for rehearing.[53] Moreover, the Court cannot disturb a discretionary ruling of the Board unless it was based upon clearly unreasonable or capricious grounds. Here, the Board denied the Employee's motion for rehearing because it found that the motion "raises no new issues, nor does it present an[y] evidence of Departmental error."[54] The Employee's motion for rehearing reargues the issues

[51] 19 *Del. C.* § 3320(a) ("The [Board] may on its own motion, affirm, modify, or reverse any decision of an appeal tribunal on the basis of the evidence previously submitted . . . or it may permit any of the parties to such decision to initiate further appeal before it."); *Funk v. Unemployment Ins. Appeal Bd.*, 591 A.2d 222, 225 (Del. 1991) ("Section 3320 grants the Board wide discretion over the unemployment insurance benefits appeal process."); *see also Anderson v. Comfort Suites*, 2004 WL 304359 (Del. Super. Feb. 12, 2004); and *Straley v. Advanced Staffing, Inc.*, 2009 WL 1228572 (Del. Super. Apr. 30, 2009).
[52] Record at 35.
[53] 19 *Del. C.* § 3320(a) ("The [Board] may on its own motion, affirm, modify, or reverse any decision of an appeal tribunal on the basis of the evidence previously submitted . . . or it may permit any of the parties to such decision to initiate further appeal before it."); *Funk v. Unemployment Ins. Appeal Bd.*, 591 A.2d 222, 225 (Del. 1991) ("Section 3320 grants the Board wide discretion over the unemployment insurance benefits appeal process.").
[54] Record at 35.

initially presented to the Referee and to the Board.[55] In addition, the motion argues that the Board abused its discretion by denying the Employee's application for further review.[56] Because there is substantial evidence to support the Board's initial finding, and because the Court already affirmed the Board's decision to deny further review, the Court affirms the Board's discretionary decision to deny a motion for rehearing.

VI. CONCLUSION

Because there is substantial evidence to support the finding that the Employee failed to file a timely appeal, and because the Board did not abuse its discretion when considering the Employee's application for further review and motion for rehearing, the Board's decision to deny unemployment benefits is **AFFIRMED**.

IT IS SO ORDERED.

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Jan R. Jurden, Judge

cc: Prothonotary

[55] Record at 33.
[56] *Id.*