IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

LEROY HEFLEY,   :
                                      :   C.A. No. 09A-01-002 WLW
            Appellant,   :
                                      :
      v.   :
                                      :
UNEMPLOYMENT INSURANCE   :
APPEALS BOARD,   :
                                      :
            Appellee.   :

Submitted: May 13, 2009
Decided: July 17, 2009

ORDER

Upon an Appeal of the Decision of
the Unemployment Insurance Appeal Board.
Affirmed.

Leroy Hefley, *pro se.*

Daniel E. Logan, Jr., Esquire, Department of Justice, Wilmington, Delaware; attorneys for the Unemployment Insurance Appeal Board.

WITHAM, R.J.

This is a *pro se* appeal by Leroy Hefley ("Employee") from a decision of the Unemployment Insurance Appeals Board ("the Board"). The Board affirmed a determination by the Appeals Referee ("the Referee") that the decision of the Claims Deputy is final due to Employee's failure to file a timely appeal.

Decision of the UIAB

On September 11, 2008, a Notice of Determination was mailed to Employee from the Claims Deputy, indicating that Employee was liable for a recoupment of a fraudulent overpayment of benefits to which he was not entitled. The Notice of Determination advised Employee that the last day to appeal the disqualification decision was September 21, 2008.[1] Employee did not filed his appeal until September 25, 2008. The Referee held a hearing on October 28, 2008 to address the issue of timeliness. The Referee issued a decision dated October 31, 2008, in which she held that Employee's late appeal was jurisdictionally barred, and that the circumstances of the case were not severe enough to justify any waiver of the timeliness requirement.

Employee appealed the decision of the Referee to the Board on November 7, 2008, and testified that he did not receive the Claims Deputy's decision until September 25, 2008 because he lived in a rooming house where he did not always

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[1] Employee points out that page 2 of the Referee's decision erroneously states that September 12, 2008 was the last day for Employee to file an appeal instead of September 21, 2008. This typographical error in the Findings of Fact section of the Referee's decision does not impact the outcome of the Court's decision. The correct expiration of the appeal period, September 21, 2008, appeared on the notice sent to Employee.

receive his mail right away. The Board denied further hearing and affirmed the decision of the Referee that Employee's late appeal was jurisdictionally barred.

Employee filed this appeal of the Board's decision on March 27, 2009, arguing that the date he received the Claims Deputy's decision is in question because it was not sent by certified mail. The Board filed an answering brief on April 24, 2009, and Employee filed his reply brief on April 29, 2009.

Standard of Review

This Court's review of a decision of the Unemployment Insurance Appeals Board is limited to a determination of whether there is sufficient substantial evidence in the record to support the Board's findings, and that such findings are free from legal error.[2] Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[3] The Board's findings are conclusive and will be affirmed if supported by "competent evidence having probative value."[4] An appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[5]

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[2] *Employment Ins. Appeals Bd. of the Dep't of Labor v. Duncan*, 337 A.2d 308, 309 (Del. 1975); *Longobardi v. Unemployment Ins. Appeals Bd.*, 287 A.2d 690, 692 (Del. Super. 1971), *aff'd*, 293 A.2d 295 (Del. 1972).

[3] *Oceanport Indus. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986).

[4] *Geegan v. Unemployment Comp. Comm'n*, 76 A.2d 116, 117 (Del. Super. 1950).

[5] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

The Board's decision to accept an untimely appeal *sua sponte* is discretionary.[6] Therefore, this Court is limited in its scope of review to whether the Board abused its discretion.[7] A procedural decision such as the Board's decision to deny this untimely appeal is not an abuse of discretion unless it is based on "clearly unreasonable or capricious grounds [or] the Board exceeded the bounds of reason in view of the circumstances and ignored the recognized rules of law or practice so as to produce injustice."[8] Absent an abuse of discretion, the Court must affirm the Board's decision.[9]

Discussion

Section 3318(b) of Title 19 of the Delaware Code provides:

> 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 and the last employer, the Claims Deputy's determination shall be final and benefits shall be paid or denied in accordance therewith.[10]

The ten-day appeal period set forth in § 3318(b) is jurisdictional and neither the Referee nor the Board has the power to accept an appeal filed by a claimant beyond

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

[7] *Id.*

[8] *Russell v. Unemployment Ins. Appeal Bd.*, 2000 WL 1211216, at *2 (Del. Super. Mar. 31, 2000) (quoting *K-Mart, Inc. v. Bowles*, 1995 WL 269872, at *2 (Del. Super. Mar. 23, 1995)).

[9] *Funk*, 591 A.2d at 225.

[10] 19 *Del. C.* § 3318(b) (2008).

the appeal period.[11] "Where the lateness of the appeal is due to the claimant's

unintentional or accidental actions, and not due to an administrative error, the Claims

Deputy's determination will become final and § 3318(b) will jurisdictionally bar the

claim from further appeal."[12]

Nonetheless, under 19 *Del. C.* § 3320, the Board has the power to hear a late

appeal *sua sponte* "in those cases where there has been some administrative error on

the part of the Department of Labor which deprived the claimant of the opportunity

to file a timely appeal, or in those cases where the interests of justice would not be

served by inaction."[13] Cases where the Board has exercised its power under § 3320

to hear an untimely appeal have been few and far between.[14]

The Board found that Employee's appeal of the Claims Deputy's decision was

untimely because he filed his appeal beyond the ten-day appeal period set forth in 19

Del. C. 3318(b). As a result, the Board determined that it lacked jurisdiction to hear

the appeal. The record clearly reflects that Employee filed his appeal four days after

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[11] *Crawford v. Unemployment Ins. Appeal Bd.*, 1999 WL 458725, at *2 (Del. Super. Jun. 18, 1999) (citing *Rosembert v. Perdue Inc.*, 1996 WL 662988, at *3 (Del. Super. Sep. 12, 1996).

[12] *Hartman v. Unemployment Ins. Appeal Bd.*, 2004 WL 772067, at *2 (Del. Super. Apr. 5, 2004).

[13] *Sheppard v. GPM Investments, LLC*, 2008 WL 193317, at *2 (Del. Super. Jan. 23, 2008) (citing *Funk*, 591 A.2d at 225) (holding that the Board did not abuse its discretion in refusing to exercise its power under 19 *Del. C.* § 3320 when the appeal was untimely because of the claimant's problems receiving his mail in a timely manner for which the Department of Labor had no responsibility)).

[14] *Funk*, 591 A.2d at 225.

the expiration of the appeal period. Therefore, there is substantial evidence on the record to support the Board's conclusion, and the Court finds that it is free from legal error.

The Court also finds that the Board did not abuse its discretion when it affirmed the Referee's determination, or when it declined to hear the appeal pursuant to 19 *Del. C.* § 3320. Employee maintains that a question remains as to when he received the Claims Deputy's determination because it was not sent by certified mail. There is no evidence, however, that there was any administrative error on the part of the Department of Labor in sending the notification by regular mail to Employee's last known address. Furthermore, the Court finds that these circumstances do not rise to a level where the Board would be required to act in the interests of justice.

Conclusion

For the foregoing reasons, the decision of the Unemployment Insurance Appeals Board is *affirmed*. IT IS SO ORDERED.

      /s/ William L. Witham, Jr.
      R.J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution