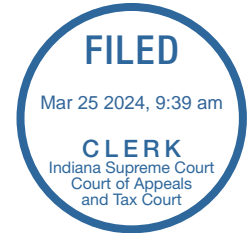


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE
Court of Appeals of Indiana

P.D.,

Appellant-Petitioner

v.

Review Board of the Indiana Department of Workforce
Development,

Appellee-Respondent

March 25, 2024

Court of Appeals Case No.
23A-EX-2464

Appeal from the Review Board of the Indiana Department of
Workforce Development

Gabriel Paul, Chairman
Larry A. Dailey, Member
Heather D. Cummings, Member

Case No.
23-R-2341

Memorandum Decision by Judge Crone
Judges Bailey and Pyle concur.

Crone, Judge.

Case Summary

- [1] P.D. appeals the decision of the Review Board of the Indiana Department of Workforce Development (IDWD) affirming the administrative law judge’s (ALJ) dismissal of P.D.’s appeal of the denial of her request for waiver of unemployment insurance benefit overpayment. We affirm.

Facts and Procedural History

- [2] In September 2022, a claims investigator for the IDWD determined that P.D. was not eligible for waiver of unemployment insurance benefit overpayment in the amount of \$10,468. P.D., who was represented by counsel, appealed that determination on May 30, 2023. A telephonic hearing before the ALJ was continued by agreement of the parties to September 15, 2023. P.D. failed to appear for the appeal hearing, but her counsel appeared. Specifically, the ALJ attempted to reach P.D. at the number her attorney provided, but the call went to voicemail. The ALJ left a voicemail and informed P.D. that he would call back in ten minutes. P.D.’s attorney was then able to contact P.D., and he informed the ALJ that he had just spoken with her and that she was currently “awaiting” the ALJ’s second call. Tr. Vol. 2 at 16. The ALJ immediately called P.D. back, but she did not answer her phone. P.D.’s attorney then tried twice to

reach P.D, but his calls went “directly to her voicemail.” *Id.* at 18. The ALJ then stated on the record that, due to P.D.’s failure “to participate” in the hearing despite “multiple attempts” to allow her to do so, he believed that dismissal of her appeal was appropriate. *Id.* P.D.’s attorney did not object or indicate that he wished to or was prepared to proceed in her absence. Rather, he affirmatively agreed with the ALJ’s decision stating, “Yes sir,” and “I understand your honor.” *Id.* The ALJ subsequently issued an order dismissing P.D.’s appeal, finding that “[t]he party who requested the appeal failed to participate in the appeal hearing scheduled on September 15, 2023.” Appellant’s App. Vol. 2 at 4.

- [3] P.D., by counsel, appealed the ALJ’s decision to the Review Board. The appeal document simply alleged that “the reason for this appeal is telephonic connection issues between ALJ and attorney and Claimant.” *Id.* at 5. The appeal did not specifically challenge the ALJ’s sole finding of fact supporting dismissal. No additional evidence or documentation was submitted. The Review Board subsequently affirmed the ALJ’s dismissal of P.D.’s appeal without a hearing, adopting and incorporating the ALJ’s finding. P.D., now pro se, appeals to this Court.

Discussion and Decision

- [4] When reviewing a decision of the Review Board, our standard of review is threefold: “(1) findings of basic fact are reviewed for substantial evidence; (2) findings of mixed questions of law and fact [...] are reviewed for reasonableness;

and (3) legal propositions are reviewed for correctness.” *Recker v. Rev. Bd. of Ind. Dep’t of Workforce Dev.*, 958 N.E.2d 1136, 1139 (Ind. 2011) (citing *McClain v. Rev. Bd. of Ind. Dep’t of Workforce Dev.*, 693 N.E.2d 1314, 1318 (Ind. 1998)). Further, “[w]e neither reweigh evidence nor judge the credibility of witnesses; rather, we consider only the evidence most favorable to the Review Board’s findings.” *J.M. v. Rev. Bd. of Ind. Dep’t of Workforce Dev.*, 975 N.E.2d 1283, 1286 (Ind. 2012) (citing *McClain*, 693 N.E.2d at 1318). We will reverse the Review Board’s decision “only if there is no substantial evidence to support the Review Board’s findings.” *Id.*

[5] Here, the Review Board adopted the ALJ’s sole finding in support of dismissal that “[t]he party who requested the appeal failed to participate in the appeal hearing scheduled on September 15, 2023.” Appellant’s App. Vol. 2 at 4. P.D. concedes that she failed to appear and participate in the appeal hearing. She further acknowledges that “[i]f the appealing party in a hearing pending before an administrative law judge ... fails to appear for a scheduled hearing, after having received due notice, the administrative law judge or the review board shall dismiss the appeal....” 646 Ind. Admin. Code 5-10-6(c). Nevertheless, P.D. asserts that the ALJ’s dismissal was erroneous and should not have been affirmed by the Review Board because, even though she did not personally appear at the hearing, her attorney appeared on her behalf and therefore, the appeal hearing should have proceeded in her absence. *See* Ind. Code § 22-4-17-3.2 (providing in relevant part that “[a] claimant for benefits may be represented

by: the claimant in person” or “an attorney[.]”). We conclude that P.D. has waived our review of this issue because she failed to raise it below.

[6] First, P.D. failed to raise this issue before the ALJ. After both P.D.’s attorney and the ALJ had tried to contact P.D. multiple times to no avail, the ALJ indicated that he believed that dismissal of her appeal was appropriate due to her failure to appear and participate. P.D.’s attorney neither objected to this assessment nor did he indicate to the ALJ that he was willing to or prepared to proceed on her behalf in her absence. Rather, her attorney affirmatively agreed with the ALJ’s assessment of dismissal in replying, “Yes sir.” and “I understand your honor.” Tr. Vol. 2 at 18.

[7] Then, in her appeal document filed with the Review Board, P.D. did not specifically challenge the ALJ’s reason for dismissing her claim, namely that she failed to appear and participate in the appeal hearing. Moreover, nowhere in the Review Board appeal document does P.D. allege what she does now: that her attorney did in fact appear on her behalf in accordance with Indiana Code Section 22-4-17-3.2 and was improperly denied the opportunity to participate and/or present evidence.¹ The bald statement that “the reason for this appeal is telephonic connection issues between ALJ and attorney and Claimant” was insufficient to alert the Review Board of the issue P.D. now attempts to place

¹ Indeed, as noted above, the record belies this assertion.

before us.² Appellant’s App. Vol. 2 at 5. Accordingly, we conclude that P.D. has waived appellate review. *See Pessouore v. Frito Lay, Inc.*, 219 N.E.3d 119 (Ind. Ct. App. 2023) (noting that it is well established that a litigant cannot raise an issue for the first time on appeal). The Review Board’s decision is affirmed.

[8] Affirmed.

Bailey, J., and Pyle, J., concur.

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Indiana Attorney General

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² We further note that P.D. failed to explain to the Review Board, and has failed to explain to this Court, what evidence her attorney intended to or was prepared to present in her absence. From what we can surmise from the record, her attorney believed that her failure to appear at the appeal hearing was fatal to her claim.