

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Karen Ridgeway, :
 :
 Petitioner :
 :
 v. : No. 1977 C.D. 2009
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 :
 Unemployment Compensation : Submitted: February 19, 2010
 Board of Review, :
 :
 Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
 HONORABLE JOHNNY J. BUTLER, Judge
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY SENIOR JUDGE KELLEY

FILED: March 29, 2010

Karen Ridgeway (Claimant) petitions, pro se, for review of the order of the Unemployment Compensation Board of Review (Board) dismissing her appeal as untimely pursuant to Section 501(e) of the Unemployment Compensation Law (Law).¹ We affirm.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 821(e). Section 501(e) states:

(e) Unless the claimant ... files an appeal with the board, from the determination contained in any notice required to be furnished by the department ... within fifteen calendar days after such notice ... 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.

On December 17, 2008, Claimant filed a claim for unemployment compensation benefits upon the termination of her employment as a business analyst with Aetna Insurance. On January 7, 2009, a Notice of Determination was issued by the Erie UC Service Center in which it was determined that Claimant was eligible for benefits, but that a prorated amount of \$548.00 was deductible from her weekly benefits pursuant to 402(h) of the Law² based upon her earnings from a sideline business of newspaper delivery. The notice stated that the last day that Claimant could appeal the determination was January 22, 2009.

On January 26, 2009, Claimant submitted a petition for an appeal of this determination. A telephone hearing on the petition was scheduled for March 5, 2009. When the Referee attempted to contact Claimant by telephone, he was connected to an answering machine. See N.T. 3/5/09³ at 1. As a result, the

² Section 402(h) of the Law provides, in pertinent part:

An employe shall be ineligible for compensation for any week—

* * *

(h) In which he is engaged in self employment: Provided, however, That an employe who is able and available for full-time work shall be deemed not engaged in self-employment by reason of continued participation without substantial change during a period of unemployment in any activity ... undertaken while customarily employed by an employer in full-time work whether or not such work is “employment” as defined in this act and continued subsequent to separation from such work when such activity is not engaged in as a primary source of livelihood. Net earnings received by the employe with respect to such activity shall be deemed remuneration paid or payable with respect to such period as shall be determined by rules and regulations of the department.

43 P.S. § 802(h).

³ “N.T. 3/5/09” refers to the transcript of the hearing conducted before the Referee on March 5, 2009.

Referee proceeded to the hearing without receiving testimony. Id. at 1-2. On March 13, 2009, the Referee mailed a decision to Claimant dismissing her appeal as untimely pursuant to Section 501(e) of the Law.

On March 24, 2009, Claimant filed an appeal of the Referee's decision with the Board in which she requested another hearing. On May 7, 2009, the Board issued an order remanding the matter for a new hearing. On May 20, 2009, a telephone hearing was conducted before a Referee acting as the Board's hearing officer.

On August 13, 2009, the Board mailed Claimant a Decision and Order in which it made the following findings of fact:

1. A Notice of Determination (determination) was issued to the claimant on January 7, 2009, denying benefits.
2. A copy of this determination was mailed to the claimant at her last known post office address on the same date.
3. The claimant received the determination prior to the last day to file a timely appeal.
4. The notice informed the claimant that January 22, 2009, was the last day to file a timely appeal.
5. The claimant filed her appeal by fax on January 26, 2009.
6. The claimant was not misinformed or misled by the unemployment compensation authorities concerning her right or the necessity to appeal.
7. The filing of the late appeal was not caused by fraud or its equivalent by the administrative authorities, a breakdown in the appellate system, or by non-negligent conduct.

8. The claimant was confused as to whether she was granted or denied benefits.

9. The claimant then waited to receive a letter from the newspaper company she had been delivering newspapers for to file her appeal, which caused her to file a late appeal.

Board Decision at 1-2.

In addition, the Board made the following relevant conclusions:

Section 501(e) of the Law provides that a determination shall become final and compensation shall be paid or denied in accordance therewith unless an appeal is filed within fifteen (15) days after the date of said determination. An appeal to the unemployment compensation authorities is timely if it is filed on or before the last day to appeal. In this case, the appeal was filed by the claimant on January 26, 2009, which was after the expiration of the statutory appeal period. The claimant has not established good cause for filing a late appeal. The claimant's confusion over whether she was denied benefits, and her waiting for a letter from the newspaper company that she had delivered newspapers for are not good cause for filing a late appeal. The provisions of this section of the Law are mandatory; the Board and its Referees have no jurisdiction to allow an appeal filed after the expiration of the statutory appeal period absent limited exceptions not relevant herein. Therefore, the Referee properly dismissed the claimant's petition for appeal.

Board Decision at 2. Based on the foregoing, the Board determined that Claimant's appeal was properly dismissed as untimely under Section 501(e) of the Law, and issued an order affirming the Referee's decision. Id. Claimant then filed the instant petition for review.⁴

⁴ This Court's scope of review in an unemployment compensation appeal is limited to determining whether an error of law was committed, whether constitutional rights were violated, or

(Continued....)

All of the claims raised by Claimant in this appeal relate to the Board's error in dismissing her appeal as untimely under Section 501(e) of the Law. In particular, Claimant asserts that the Board should have allowed her to file an untimely appeal of the Notice of Determination because there was confusion regarding whether she was granted or denied benefits under the notice, and because she was gathering evidence in support of her claim for benefits.

As noted above, Section 501(e) of the Law provides that unless a claimant files an appeal with respect to a notice of determination within fifteen calendar days after it was mailed to his last known post office address, such determination will be final and compensation shall be paid or denied in accordance therewith. 43 P.S. § 821(e); Stana v. Unemployment Compensation Board of Review, 791 A.2d 1269 (Pa. Cmwlth. 2002). It is well settled that a failure to timely appeal an administrative agency's action is a jurisdictional defect; consequently, the time for taking an appeal cannot be extended as a matter of grace or mere indulgence. Sofronski v. Civil Service Commission, 695 A.2d 921 (Pa. Cmwlth. 1997).

Thus, an appellant carries a heavy burden to justify an untimely appeal. Blast Intermediate Unit #17 v. Unemployment Compensation Board of

whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704; Hercules, Inc. v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Wheelock Hatchery, Inc. v. Unemployment Compensation Board of Review, 648 A.2d 103 (Pa. Cmwlth. 1994). In addition, issues of credibility are for the Board which may either accept or reject a witness' testimony whether or not it is corroborated by other evidence of record. Chamoun v. Unemployment Compensation Board of Review, 542 A.2d 207 (Pa. Cmwlth. 1988). Findings of fact are conclusive upon review provided that the record, taken as a whole, contains substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977).

Review, 645 A.2d 447 (Pa. Cmwlth. 1994). Absent fraud, there is a presumption of regularity of the administrative authorities. Cameron v. Unemployment Compensation Board of Review, 430 A.2d 396 (Pa. Cmwlth. 1981). As a result, an appeal nunc pro tunc may be allowed where the delay in filing the appeal was caused by extraordinary circumstances involving fraud or some breakdown in the administrative process, or non-negligent circumstances related to the appellant, his counsel or a third party. Cook v. Unemployment Compensation Board of Review, 543 Pa. 381, 671 A.2d 1130 (1996).

Section 101.53 of the Board’s regulations provides that the “[m]ailing of notices ... to the parties at their last known addresses as furnished by the parties to ... the Department, shall constitute notice of the matters therein contained.” 34 Pa. Code § 101.53. In addition, “[w]here notice is mailed to a claimant’s last known address and not returned by the postal authorities as undeliverable, the claimant is presumed to have received it and is barred from attempting to appeal after the expiration of the appeal period. *Mihelic v. Unemployment Compensation Board of Review*, [399 A.2d 825 (Pa. Cmwlth. 1979).” Allison v. Unemployment Compensation Board of Review, 424 A.2d 629, 630-631 (Pa. Cmwlth. 1981). See also Johnson v. Unemployment Compensation Board of Review, 401 A.2d 4 (Pa. Cmwlth. 1979) (“The presumption is that the notice has been timely received where the decision, bearing notice of the appeal expiration date, was properly addressed and has not been returned by the postal authorities. *Devito [v. Unemployment Compensation Board of Review*, 186 A.2d 639 (Pa. Super. 1962).”).

In this case, at the remand hearing before the Referee, Claimant acknowledged that she received the Notice of Determination mailed by the Service Center to her on January 7, 2009, and that the notice indicated in three separate

areas that she was required to file an appeal by January 22, 2009. See N.T. 5/20/09 at 4-5. In addition, although Claimant testified regarding the confusion as to whether or not she had been granted benefits under the Notice of Determination, and what evidence was necessary to establish her right to benefits, she never testified that she was misinformed or misled by the unemployment compensation authorities concerning her right or the necessity to appeal. See Id. at 5-7. As a result, there is absolutely no evidence demonstrating that the delay in filing the instant appeal was caused by extraordinary circumstances involving fraud or some breakdown in the administrative process, or non-negligent circumstances related to the appellant, her counsel or a third party. See Id.⁵

In short, Claimant failed to sustain her heavy burden to justify an untimely appeal. See, e.g., Phares v. Unemployment Compensation Board of Review, 482 A.2d 1187, 1189 (Pa. Cmwlth. 1984) (“Under the principle set forth in *Pickering* [*v. Unemployment Compensation Board of Review*, 471 A.2d 182 (Pa. Cmwlth. 1984)], the OES representative’s error in the present case constituted only an administrative interpretation of the law which was not equivalent to *fraudulent deprivation* of Claimant’s appeal rights. The case involves at most legal error, not fraud or manifestly wrongful or negligent conduct, which would justify extension of the statutory time limit for appeals.”) (emphasis in original). As a result, the Board did not err in dismissing her appeal as untimely under Section 501(e) of the Law.

⁵ Moreover, even if Claimant had testified that misinformation or misleading information had been conveyed to her, such testimony could have been rejected by the Board as not credible. As noted above, issues of credibility are for the Board which may either accept or reject a witness’ testimony whether or not it is corroborated by other evidence of record. Chamoun.

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

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Petitioner	:	
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v.	:	No. 1977 C.D. 2009
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 29th day of March, 2010, the order of the Unemployment Compensation Board of Review, dated August 13, 2009, at No. B-487034, is AFFIRMED.

JAMES R. KELLEY, Senior Judge