

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jane Bennese, :  
Petitioner :  
 :  
v. : No. 2279 C.D. 2007  
 : Submitted: August 15, 2008  
Unemployment Compensation :  
Board of Review, :  
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE McCLOSKEY

FILED: September 24, 2008

Jane Bennese (Claimant) petitions pro se for review of an order of the Unemployment Compensation Board of Review (Board), affirming the referee's decision dismissing Claimant's appeal as untimely pursuant to Section 501(e) of the Unemployment Compensation Law (Law).<sup>1</sup> We now affirm.

Claimant began working for Children's Behavioral Health, Inc. (Employer) in Johnstown, Pennsylvania on September 1, 2006, in a Therapeutic Support Staff position. Claimant's last day of work was June 8, 2007. Claimant subsequently sought unemployment compensation benefits and on July 13, 2007, a notice of determination was issued by the local job center. The notice indicated that Claimant voluntarily quit her employment in order to attend school at Old Dominion University (ODU) in

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<sup>1</sup> Act of December 5, 1936, Second Executive Sess., P.L. (1937), as amended, 43 P.S. § 821(e).

Norfolk, Virginia and was ineligible for benefits under Section 402(b) of the Law, 43 P.S. §802(b).

Claimant also received a notice of determination from the local job center, dated July 18, 2007, which indicated that her request for backdating her compensable weeks of benefits was being denied as she did not sustain her burden of proof in showing that she was able and available for suitable employment.

Claimant appealed both of the local job center's determinations.<sup>2</sup> Claimant mailed both appeals on August 2, 2007, when she returned from ODU.<sup>3</sup> (Claimant's Brief at 8). With respect to the appeal from the July 13, 2007, determination, Claimant first alleged that she did not work for Employer because her client was unavailable for a week and a half. She then alleged that when the client was available, she did not work because she discovered that her client and the client's family were "infested with head lice." (Claimant's Brief, "Exhibits", at 13a). Upon finding the head lice problem, Claimant alleged that she asked Employer for "either a new case" or "to sub for another case," but that neither option was presented to her by Employer. (Claimant's Brief,

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<sup>2</sup> In her appeal from the July 18, 2007, determination, Claimant alleged that she was able and available for work even though she was attending school at ODU. She alleged that she had worked and gone to school previously in 2001 through 2002 and, thus, it was a "viable scenario" that she could do the same now. (Claimant's Brief, "Exhibits", at 14). The issues in this appeal were whether claimant registered for work and continued to report, whether she filed a valid application for benefits and whether she was able and available for work. The hearing was scheduled and held on August 20, 2007, the same day as the scheduled hearing for the appeal of the previous determination and before the same referee. After hearing, the referee concluded that although the "evidence of record clearly indicate[d] that the claimant was confused" about the reporting requirements, she "substantially conformed to these reporting requirements" in filing her claim for benefits for claim weeks ending June 30, 2007 through July 14, 2007. (Referee's Decision, August 24, 2007). Therefore, the referee reversed the local job center's determination and found that Claimant was not ineligible for benefits. Employer did not appeal this determination.

<sup>3</sup> Claimant attended ODU from June 18, 2007, through July 31, 2007. (Claimant's Brief at 13).

“Exhibits”, at 13b). Thus, Claimant asserted that because of all of those circumstances, “[a]t the last minute” she decided to attend ODU to pursue her teaching license. (Claimant’s Brief, “Exhibits”, at 13b). A hearing on this appeal was scheduled for August 20, 2007. The notice of hearing indicated that the specific issue to be considered was the timeliness of the filing of the appeal and that no testimony concerning the merits of the case was to be taken.

At the scheduled hearing before the referee, Claimant testified on her own behalf. Employer did not appear at the hearing. After the hearing, on August 23, 2007, the referee issued his decision and order. The referee concluded that the notice of determination was mailed to the Claimant’s last known post office address on July 13, 2007. He found that the notice adequately informed Claimant that any appeal had to be filed within fifteen days of the date of the mailing of the determination. Therefore, the referee concluded that the last day in which Claimant could file her appeal was July 30, 2007. The referee found that Claimant’s appeal was filed on August 2, 2007 when she returned to her home in Johnstown after completing schooling at ODU in Virginia. The referee noted that Claimant was not “misinformed nor in any way misled regarding the right of appeal or the need to appeal.” (Referee’s Decision, August 23, 2007, Finding of Fact No. 6). Thus, pursuant to Section 501(e) of the Law, the referee concluded that he had no jurisdiction to consider an appeal filed after the expiration of the statutory appeal period and, therefore, he dismissed her appeal.

Next, Claimant filed an appeal to the Board from the referee’s decision and order. In her appeal letter, Claimant alleged that she had spoken to a representative at the local job center and was asked certain questions concerning her availability for work. Claimant asserted that the representative had made an incorrect assumption that because she was in school she was not able to work, as she had previously worked while

earning her bachelor's degree and was still seeking work while attending school in Virginia. She also asserted that her mother had received the correspondence from the local job center, opened the mail, but never informed her of the contents of the letter. Claimant asserted that her mother may not have been able to read the contents of the letter as she had had recent cataract surgery.

In its decision, issued on October 12, 2007, the Board, after consideration of the entire record, including Claimant's testimony before the referee, noted that the Court's holding in Guat Gnoh Ho v. Unemployment Compensation Board of Review, 525 A.2d 874 (Pa. Cmwlth. 1987), was controlling. It found that the facts in Guat Gnoh Ho and the facts in the present matter were almost the same, as both claimants were made aware of the receipt of a notice of determination by a third party but were not told what information was contained in the notice. The Board noted that this Court concluded in Guat Gnoh Ho that it was the claimant's failure to take measures to ascertain the contents of the letter which resulted in the delayed filing of the appeal and, therefore, the appeal was properly dismissed as untimely. Thus, the Board concluded that the referee properly found that Claimant's appeal was untimely and affirmed his decision.

On November 13, 2007, Claimant appealed the Board's decision to this Court. By order dated December 26, 2007, this Court dismissed Claimant's appeal as untimely indicating that it was filed more than thirty days after the determination for which she was seeking review was entered. Claimant filed a motion for reconsideration in which she alleged that her petition for review was mailed on November 9, 2007, but not received by the Court until November 13, 2007. Claimant asserted that the rules required only that the petition be mailed in a timely manner. Subsequently, on January

16, 2008, we granted Claimant’s motion for reconsideration, vacated our prior order and reinstated her petition for review which is now before this Court.

On appeal,<sup>4</sup> Claimant argues that the “Department of Labor holds the Claimant to a standard that includes no margin of error, negligent or non-negligent, while the administration itself does not adhere to its own standard.” (Claimant’s Brief at 10). Claimant then argues that the local job center representative wrongfully interpreted the information she gave to him and recites a long list of alleged errors. For example, Claimant alleges that the representative was unwilling to help her “at a crucial time in claim” because he did not know if Claimant was actually the caller. *Id.* She also asserts that at the hearing before the referee, the referee said that he was unsure if an explanation letter that she mailed to him, at the direction of “Vivian” in the Altoona job center, was in the record, when in fact it did appear in the record. *Id.* Claimant also argues at length with regard to the reasons she left Employer and her reasons for returning to school to pursue her teaching license.

While Claimant raises numerous arguments in her brief to this Court, the specific subject matter of Claimant’s present appeal is the timeliness or untimeliness of her appeal from the local job center’s notice of determination and the resulting decisions that dismissed her appeal. Claimant admits that she filed an untimely appeal but argues that “she was misinformed and misled by the bureau’s representative as to the filing of

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<sup>4</sup> Our scope of review is limited to a determination of whether constitutional rights were violated, an error of law was committed or whether necessary findings of fact are supported by substantial evidence. Shrum v. Unemployment Compensation Board of Review, 690 A.2d 796 (Pa. Cmwlth.), petition for allowance of appeal denied, 548 Pa. 663, 698 A.2d 69 (1997). Moreover, the Board is the ultimate finder of fact and questions of credibility and evidentiary weight are matters for the fact finder and not a reviewing court. Stringent v. Unemployment Compensation Board of Review, 703 A.2d 1084 (Pa. Cmwlth. 1997).

the appeals.” (Claimant’s Brief at 10). Claimant argues that she contacted the local job center two weeks before the filing deadline and the representative “said he could not divulge the information contained in the letter to the Claimant nor could he share the status of the claim . . . [because] there was no way to ascertain that the caller was actually the Claimant.” (Claimant’s Brief at 14). Claimant asserts that she then requested that the information be made available to her through the Internet but the representative declined to grant such a request. She alleges that the representative never informed her that her claim was in appeal status or that her right or necessity to appeal was in jeopardy without the information contained in the letter. Claimant argues that the representative “expressed no semblance of urgency” and never “properly redirected her inquiry.” (Claimant’s Brief at 15). She argues that the representative never “alluded to any indication that the claims were in jeopardy” and that, had he done so, she would have been in a position to timely file and proceed accordingly. *Id.* Claimant alleges that the representative’s actions, or inactions, indicate that there was an administrative breakdown as he neglected his duty to inform or properly direct her. Finally, Claimant requests that this Court reverse the decision and order of the Board and referee as they were not supported by substantial evidence, not rational and not in accordance with law.

Section 501(e) of the Law provides that unless the claimant or last employer files an appeal from the determination contained in any notice within fifteen calendar days after such notice was delivered to him personally, or was mailed to his last known post office address, such determination shall be final and compensation shall be paid or denied in accordance with the determination. 43 P.S. § 821(e). An appeal filed only one day after the expiration of the fifteen-day statutory appeal period must be dismissed as untimely. *See Dumberth v. Unemployment Compensation Board of Review*, 837 A.2d 678 (Pa. Cmwlth. 2003). The appeal periods, even at the

administrative level, are jurisdictional and may not be extended as a matter of grace or indulgence. Id.

Claimant admits that her appeal was untimely filed. (Claimant's Brief at 10). Claimant admitted to the referee that she "did not in fact" file a timely appeal. (N.T. at 5). The referee so found and the Board affirmed that finding. There is no dispute that the statutory appeal period ended on July 30, 2007, and that her appeal was mailed two days thereafter. Thus, we cannot say that the referee or the Board erred in concluding that her appeal was untimely.

However, our analysis does not end here. Fraud, negligence of an administrative official or breakdown in the administrative process may justify an appeal nunc pro tunc in cases where the claimant has failed to comply with the mandatory time limits. Stana v. Unemployment Compensation Board of Review, 791 A.2d 1269 (Pa. Cmwlth.), petition for allowance of appeal denied, 572 Pa. 717, 813 A.2d 848 (2002). Nevertheless, the party seeking to justify an untimely appeal carries a heavy burden. Blast Intermediate Unit # 17 v. Unemployment Compensation Board of Review, 645 A.2d 447 (Pa. Cmwlth. 1994).

Although Claimant sets forth a number of arguments alleging that the local job center representative violated his duty to inform her of the necessity of filing a timely appeal, we find those arguments without merit. We agree with the Board's conclusion that the facts in Guat Gnoh Ho are similar enough to the facts in the present matter to be controlling. In Guat Gnoh Ho, after filing for benefits, the claimant had to leave the country to care for an ailing mother. A notice of determination was mailed to her post office address and received by her husband while she was with her mother. Because her husband did not understand English, he was only able to tell the claimant that she had received a letter concerning her unemployment compensation. As he could

not inform her of the contents of the letter, she did not file an appeal from the determination until she returned home, read the letter herself and learned that she had been denied benefits. Her appeal was filed almost two months after the statutory appeal period had ended. She argued that she should be allowed to file an appeal nunc pro tunc because of the extraordinary circumstances and because she filed an appeal immediately upon her return to the United States.

This Court held that the Board properly dismissed the claimant's appeal because it was the claimant's failure to take the appropriate measures to find out about the contents of the letter, when told that a letter concerning her unemployment claim was received, that caused the delay in the filing of her appeal. In the present case, Claimant admits that her mother was "collecting" her mail for her while she was away in Virginia at school. (N.T. at 3). She states first that her mother did not open the letter containing the notice of determination, but then asserts that she "did open it and she said it didn't say anything, but there was an appeal letter in it." (N.T. at 3, 4). Claimant then testifies that she "waited until [she] got home" to fill out the enclosed appeal form and then sent a letter explaining why she did not send it out by the deadline of July 30, 2007. (N.T. at 4). Similar to Guat Gnoh Ho, it was Claimant's failure in this case to take measures to ascertain the contents of the letter which resulted in the delay in filing the appeal. Thus, Claimant's appeal was untimely and properly dismissed by the referee and the Board.

Accordingly, the order of the Board is affirmed.

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JOSEPH F. McCLOSKEY, Senior Judge



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Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

**ORDER**

AND NOW, this 24<sup>th</sup> day of September, 2008, the order of the  
Unemployment Compensation Board of Review is affirmed.

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JOSEPH F. McCLOSKEY, Senior Judge