

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John H. Kohnlein, :
Petitioner :
 :
v. : No. 2324 C.D. 2007
 : Submitted: June 13, 2008
Unemployment Compensation Board of :
Review, :
Respondent :

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER

FILED: July 16, 2008

John H. Kohnlein (Petitioner) requests the Court's review of the order of the Unemployment Compensation Board of Review (Board) that dismissed his appeal as untimely pursuant to Section 502 of the Unemployment Compensation Law (Law), Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §822.¹ Petitioner contends that the Board failed to realize the significance of pertinent evidence and that a "misapplication of justice" occurred.

¹Section 502 of the Law provides:

Where an appeal from the determination or revised determination, as the case may be, of the department is taken, a referee shall, after affording the parties and the department reasonable opportunity for a fair hearing, affirm, modify, or reverse such findings of fact and the determination or revised determination, as the case may be, of the department as to him shall appear just and proper. The parties and their attorneys or other representatives of record and the department shall be duly notified of the time and place of a referee's hearing and of the

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On April 3, 2007, the Altoona UC Service Center mailed its notice of redetermination granting benefits to Petitioner. Brown Daub Auto Sales, Inc. (Employer) appealed the Service Center's determination. A referee conducted a telephone hearing in which Petitioner and Employer's two witnesses, represented by a tax representative, testified. On June 15, 2007, the referee reversed the Service Center's decision, determining that Petitioner was ineligible for benefits under Section 402(e) of the Law, 43 P.S. §802(e), because he was discharged for willful misconduct. He appealed to the Board by appeal letter bearing a postmark date of September 27, 2007. The Board made the following findings of fact:

4. Following a hearing on the merits, the Referee issued a decision which denied the claimant benefits.
5. A copy of the Referee's decision was mailed to the claimant at his last known post office address on the same date.
6. The decision was accompanied by notice advising that the interested parties had fifteen (15) days in which to file a valid appeal.
7. There is no indication that the decision mailed to the claimant was returned by the postal authorities as undeliverable.

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referee's decision, and the reasons therefor, which shall be deemed the final decision of the board, unless an appeal is filed therefrom, within fifteen days after the date of such decision the board acts on its own motion, to review the decision of the referee. A memorandum of testimony of any hearing before any referee shall be made and be preserved for a period of ninety days following expiration of the period for filing an appeal from the final decision rendered in the case.

8. The claimant's appeal from the Referee's decision, in order to be timely, had to have been filed on or before July 2, 2007.
9. The claimant's appeal was filed by letter postmarked on September 27, 2007.
10. On October 16, 2007, the claimant was advised by letter of his opportunity to request that a hearing be held to determine whether or not his appeal was timely.
11. The claimant failed to respond to the Board by the required date.

In dismissing the appeal under Section 502 of the Law, the Board reasoned in part:

Section 502 of the Pennsylvania Unemployment Compensation Law provides that unless an interested party institutes an appeal to the Board from the Referee's decision within fifteen (15) days after its mailing date, the decision shall be deemed a final decision of the Board. An appeal to the unemployment compensation authorities is timely if it is filed on or before the last day to appeal. ... The provisions of this Section of the Law are mandatory, and the Board has no jurisdiction to accept an appeal filed after the expiration of the statutory appeal period absent limited exceptions not relevant herein.

Pursuant to 34 Pa. Code §101.61, the appeals of parties who are notified in writing by the Board that their appeals appear to be untimely and who do not reply or request a hearing on the issue of timeliness within 15 days shall be dismissed.^[2] Here, the claimant has not

²The Board's regulation at 34 Pa. Code §101.61(c) states:

(c) If an application for further appeal has been filed, which appears has been filed beyond the applicable time limit, and a request for a hearing is received by the Board within such 15-day period, the case shall be assigned to a referee to conduct a hearing for and on behalf of the Board on the issue of the timeliness of the application for further appeal, and on the merits, if it appears that

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requested a hearing after proper notification from the Board.

Board Decision, p. 2. The Court's review of the Board's decision is limited to determining whether a constitutional violation or an error of law occurred, whether any Board practice or procedure was not followed and whether necessary findings are supported by substantial evidence. *Procito v. Unemployment Compensation Board of Review*, 945 A.2d 261 (Pa. Cmwlth. 2008).

Petitioner requests a reexamination of the evidence based on his belief that the Board committed oversight and failed to examine all of the evidence.³ The Board says that it properly dismissed the appeal as Petitioner failed to establish the criteria for an appeal nunc pro tunc. Citing *Cook v. Unemployment Compensation Board of Review*, 543 Pa. 381, 671 A.2d 1130 (1996), and *ATM Corp. of America v. Unemployment Compensation Board of Review*, 892 A.2d 859 (Pa. Cmwlth.

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the appeal was in fact timely filed. Notice of the hearing shall be mailed to the last known post office address of each interested party. If the Board finds that the application for further appeal was not timely filed, the Board will issue a decision only on this issue. If the Board finds that the application for further appeal was timely filed, the Board will proceed to either allow or disallow the application for further appeal, and notification thereof shall be mailed to the last known post office address of each interested party. If the application for further appeal is allowed, the Board will proceed to review the established record and render a decision on the merits of the case.

³Relying upon *Rapid Pallet v. Unemployment Compensation Board of Review*, 707 A.2d 636 (Pa. Cmwlth. 1998), the Board argues that Claimant has waived the issue of timeliness of his appeal because it has not been adequately developed in his brief. Although Claimant's argument may not be artfully presented, it is clear that Claimant argues administrative error on the part of the Board, which is a basis for allowing the filing of an appeal nunc pro tunc. Therefore, the Court will address the timeliness issue.

2006), the Board reiterates that an appeal nunc pro tunc is permitted only where there are extraordinary circumstances involving fraud, administrative breakdown or non-negligent conduct. Petitioner did not explain his failure to timely appeal.

Section 502 of the Law provides that "the referee's decision ... shall be deemed the final decision of the board, unless an appeal is filed therefrom, within fifteen days after the date of such decision...." The Court explained in *UGI Utilities, Inc. v. Unemployment Compensation Board of Review*, 776 A.2d 344 (Pa. Cmwlth. 2001), that the fifteen-day time period is mandatory. The appeal period is jurisdictional and precludes either the Board or a referee from further considering a matter. *Southeastern Pennsylvania Transportation Authority v. Unemployment Compensation Board of Review*, 661 A.2d 505 (Pa. Cmwlth. 1995). A claimant must show fraud or a breakdown in the administrative process to justify an appeal nunc pro tunc. *United States Postal Service v. Unemployment Compensation Board of Review*, 620 A.2d 572 (Pa. Cmwlth. 1993).

The last day for Petitioner to timely appeal from the referee's June 15, 2007 decision was July 2, 2007. The Board found that his appeal was postmarked September 27, 2007, which is well beyond the fifteen-day appeal deadline. The Board afforded Petitioner an opportunity to request a hearing on the issue of the timeliness of his appeal, but he failed to do so and has offered no basis before this Court to substantiate his claim of entitlement to an out-of-time appeal. Under *United States Postal Service* his failure to timely appeal without adequate excuse mandates dismissal. Because the Board did not err in dismissing the appeal, the Court affirms the Board's order.

DORIS A. SMITH-RIBNER, Judge

Judge Simpson did not participate in the decision of this case.

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Unemployment Compensation Board of	:	
Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 16th day of July, 2008, the Court affirms the order of the Unemployment Compensation Board of Review.

DORIS A. SMITH-RIBNER, Judge