

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert Ray, :
Petitioner :
 :
v. : No. 439 C.D. 2011
 : Submitted: July 29, 2011
Unemployment Compensation :
Board of Review, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: September 20, 2011

Robert Ray (Claimant), *pro se*, petitions for review of an adjudication of the Unemployment Compensation Board of Review (Board) that affirmed the Referee's dismissal of Claimant's appeal as untimely. The Board agreed with the Referee that Claimant's appeal from the UC Service Center's determination denying Claimant's backdated unemployment compensation benefits was not filed within the statutorily mandated 15-day appeal period.¹ Finding no error, we affirm the decision of the Board.

¹ Section 501(e) of the Unemployment Compensation Law, Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, provides in relevant part:

(e) Unless the claimant or last employer or base-year employer of the claimant files an appeal with the board, from the determination contained in any notice required to be furnished by the department under section five hundred and one (a),

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On October 14, 2010, the UC Service Center issued a determination denying Claimant's request for backdated unemployment compensation benefits and mailed it to Claimant's last known home address. Instructions on how and when to file an appeal, if the Claimant so chose, were included with the determination. It stated that the final date of appeal was October 29, 2010, 15 days after the date of the determination

On November 30, 2010, a hearing was held before a Referee on the issue of the timeliness of Claimant's appeal and on the merits of his request for backdated benefits. Claimant testified that he was out of town when the determination was delivered to his home, but that his wife opened the mail and promptly informed him of the contents. Notes of Testimony, 11/30/10, at 2-3. Claimant testified that he e-mailed his appeal to the Board on or about October 20, 2010. *Id.* at 3. He also testified that he faxed a copy of his appeal upon request of Barbara Yuratis, a UC Service Center employee, on November 3, 2010. *Id.* at 3-4.

The Referee found that the determination was sent to Claimant's last known postal address, it was not returned as undeliverable, it informed Claimant of the right to appeal the determination, and it informed Claimant of the October 29, 2010, deadline for such an appeal. The Referee ruled solely on the timeliness issue, dismissing Claimant's appeal for lack of jurisdiction because the statutory

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(c) and (d), within fifteen calendar days after such notice was delivered to him personally, or 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.

43 P.S. §821(e).

appeal period had passed when Claimant's appeal was received via fax on November 3, 2010. Claimant appealed to the Board.

In his appeal to the Board, Claimant produced, for the first time, a fax return receipt dated October 25, 2010. Claimant offered this document as proof that he faxed his appeal to the UC Service Center on that date. Claimant did not present this evidence to the Referee, nor did he testify that he sent a fax to the UC Service Center on October 25. The Board adopted the Referee's findings and conclusions and affirmed the dismissal of Claimant's appeal as untimely. The Board rejected as not credible Claimant's contention that he appealed by e-mail on October 20, 2010. Claimant requested reconsideration, which the Board denied on March 28, 2011. Claimant now petitions for this Court's review.

On appeal,² Claimant argues that he submitted two timely appeals, one by e-mail on or about October 20, 2010, and a second by fax on October 25, 2010. Claimant contends that he faxed his appeal documents again on November 3, 2010, at the request of UC Service Center employee Barbara Yuratis because the Harrisburg office had failed to forward his original appeal to the proper Referee's office. Claimant offers as proof of his timely submittal of an appeal the fax return receipt dated October 25, 2010.

Section 501(e) of the Unemployment Compensation Law provides that a referee's determination is considered final unless an appeal is filed within 15 days after notice is delivered to the claimant personally or mailed to the claimant's last known post office address. 43 P.S. §821(e). This is a jurisdictional

² This Court's scope of review in an unemployment compensation case is limited to determining whether constitutional rights were violated, errors of law were committed, or findings of fact were not supported by substantial evidence. *Lee Hospital v. Unemployment Compensation Board of Review*, 637 A.2d 695, 697 (Pa. Cmwlth. 1994).

requirement that bars the Board from considering a claimant's eligibility for benefits if the appeal is untimely. *DiJohn v. Unemployment Compensation Board of Review*, 687 A.2d 1213, 1215 (Pa. Cmwlth. 1997). The 15-day appeal period is strictly enforced.³ In limited circumstances, the Board may consider an appeal on a *nunc pro tunc* basis if there is a showing of fraud, a breakdown in the administrative process, or non-negligent conduct beyond claimant's control that caused the delay. *U.S. Postal Service v. Unemployment Compensation Board of Review*, 620 A.2d 572, 573 (Pa. Cmwlth. 1993).

The Board is the fact finder in unemployment compensation cases and has complete authority over credibility determinations. *Kelly v. Unemployment Compensation Board of Review*, 776 A.2d 331, 336 (Pa. Cmwlth. 2001). Board findings supported by substantial evidence are conclusive. *Id.* Failure to present evidence to the referee when presented the opportunity to do so is a waiver of the right to use that evidence at a later stage of the proceedings. *See Croft v. Unemployment Compensation Board of Review*, 662 A.2d 24, 28 (Pa. Cmwlth. 1995).

In this case, Claimant argues that this Court should consider evidence that is not part of the record. Claimant had the opportunity at the Referee's hearing to place the fax return receipt into evidence. He did not do so. It is axiomatic that a claimant may not expand the record developed before the referee by attaching documents to subsequent filings. *Id.* at 28.⁴ The Board is "restricted to the facts

³ This Court has held that "an appeal filed one day after the expiration of the statutory appeal period must be dismissed as untimely." *Dumberth v. Unemployment Compensation Board of Review*, 837 A.2d 678, 681 (Pa. Cmwlth. 2003).

⁴ Claimant also suggests that a breakdown in the administrative process caused his faxed appeal of October 25, 2010, to not reach Barbara Yuratis. Like the fax return receipt, Claimant did not **(Footnote continued on the next page . . .)**

and the law pertinent to the issues involved on the basis of evidence *previously* submitted.” *Id.* (emphasis in original). The Board did not err in finding the claim untimely based on the record Claimant made before the Referee. The only evidence of record is the fax received by the UC Service Center on November 3, 2010. Applying the mandatory 15-day appeal period, which ended for Claimant on October 29, 2010, Claimant’s appeal was untimely.

Claimant’s argument that he perfected an appeal by e-mail on or about October 20, 2010, is also unavailing. The Board rejected as not credible Claimant’s claim that he e-mailed an appeal to the Board on October 20, and we may not revisit that credibility determination. *See Kelly*, 776 A.2d at 336. Moreover, Claimant offered no evidence to the Referee that he sent an e-mail to the Board on October 20.

Thus, based on the record, the Board did not err in finding Claimant’s appeal untimely. Likewise, Claimant failed to demonstrate that he should have been permitted to appeal *nunc pro tunc*. Claimant offered no evidence of fraudulent or negligent conduct on the part of the administrative authorities, nor did he establish any non-negligent conduct beyond his control that excused his late appeal. Claimant simply neglected to bring his key evidence to the Referee’s hearing.

For all of the foregoing reasons, we affirm the Board’s adjudication.

MARY HANNAH LEAVITT, Judge

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advance this argument before the Referee and there is no evidence in the record to support Claimant’s assertion. We decline to consider it further.

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v.	:	No. 439 C.D. 2011
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Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 20th day of September, 2011, the order of the Unemployment Compensation Board of Review, dated February 14, 2011, in the above-captioned matter is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge