

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Yanise M. Johnson, :
Petitioner :
v. : No. 76 C.D. 2008
Unemployment Compensation : Submitted: April 25, 2008
Board of Review, :
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: July 25, 2008

Yanise M. Johnson (Claimant), *pro se*, petitions for review from an order of the Unemployment Compensation Board of Review (Board), which dismissed Claimant's appeal on the basis that it was untimely. We affirm.

Claimant was last employed on January 26, 2007 by NF String & Son, Inc. (Employer) as a full-time forklift operator. Claimant informed Employer that she would not be able to work because she was undergoing back surgery. Claimant filed an application for unemployment compensation benefits. In the application, Claimant stated that she is not able or available for work because she has not been released by her physician. The Lancaster UC Service Center (Service Center) issued a Notice of Determination on August 22, 2007 denying Claimant's application on the

basis that Claimant was ineligible for benefits under Section 401(d)(1) of the Unemployment Compensation Law (Law)¹ because Claimant was unable to work.

Claimant timely appealed the Service Center's notice to the referee. A hearing was held on September 24, 2007, but Claimant did not appear. The referee found that Claimant failed to sustain her burden of providing cause of a necessitous and compelling nature to voluntarily leave her employment. The referee further found Claimant failed to show that she is available for suitable work. The referee concluded that Claimant was ineligible for benefits pursuant to Sections 402(b)² and 401(d)(1) of the Law. By decision dated September 26, 2007, the referee denied benefits.

From this decision, Claimant filed an appeal with the Board. The Board made the following findings. The referee's decision was mailed to Claimant at her last known address. The referee's decision was accompanied by a notice advising

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §801(d). This section provides:

Compensation shall be payable to any employe who is or becomes unemployed, and who--

(d)(1) Is able to work and available for suitable work: Provided, That no otherwise eligible claimant shall be denied benefits for any week because he is in training with the approval of the secretary nor shall such individual be denied benefits with respect to any week in which he is in training with the approval of the secretary by reason of the application of the provisions of this subsection relating to availability for work or the provisions of section 402(a) of this act relating to failure to apply for or a refusal to accept suitable work.

² 43 P.S. §802(b). This section provides:

An employe shall be ineligible for compensation for any week—

(b) In which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature

that an aggrieved party must file an appeal within 15 days; in order to be timely, Claimant's appeal from the referee's decision had to be filed on or before October 11, 2007. Claimant's appeal was sent by fax with an incorrect date banner; Claimant's appeal was filed on October 16, 2007, per the Service Center stamped receipt date on the fax.

Claimant called the Service Center in regard to opening a claim and filing for benefits prior to receiving the referee's decision. The Service Center told Claimant that her claim was still open and instructed her to file for benefits on Sunday, October 14, 2007. There is no evidence that the Service Center told Claimant she did not have to file an appeal from the referee's decision. Claimant attempted to file for benefits on October 14, 2007, without success. On October 15, 2007, Claimant contacted the Service Center and was advised that she had failed to file an appeal. Although Claimant admits receipt of referee's decision, Claimant alleged that it was the Service Center's responsibility to tell her that she had to file an appeal when she telephoned the Service Center regarding her claim. There is no evidence that Claimant was misinformed or misled by the unemployment compensation authorities concerning her right or the necessity to appeal. There is no evidence that Claimant's filing of the late appeal was caused by fraud or its equivalent by the administrative authorities, a breakdown in the appellate system, or by non-negligent conduct. The Board concluded that Claimant's appeal was untimely. By decision dated December 28, 2007, the Board dismissed Claimant's appeal. This appeal now follows.³

³ This Court's scope of review is limited to determining whether constitutional rights were violated, an error of law was committed, or necessary findings of fact are not supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; Kirkwood v. Unemployment Compensation Board of Review, 525 A.2d 841 (Pa. Cmwlth. 1987).

Claimant raises the following issues for our review:

1. Whether Claimant is entitled to unemployment compensation after being misled by unemployment compensation officials.
2. Whether the Board erred in determining Claimant's eligibility for unemployment compensation benefits under Section 401(d) of the Law.

Claimant contends that her appeal should not have been dismissed as untimely because she was misled by unemployment compensation officials. We disagree.

Under the Law, failure to file an appeal within 15 days ordinarily mandates dismissal of the appeal. Section 501(e) of the Law, 43 P.S. §821. Section 501(e) of the Law provides:

(e) Unless the claimant or last employer ... files an appeal with the board, from the determination contained in any notice required to be furnished by the department^[4] under section five hundred and one (a), (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) (emphasis added). The requirement that an appeal be timely filed is jurisdictional and the Board and its referees have no discretion to accept an untimely appeal. See Southeastern Pennsylvania Transportation Authority v. Unemployment Compensation Board of Review, 661 A.2d 505

⁴ Department of Labor and Industry (Department).

(Pa. Cmwlth. 1995). The party initiating the appeal, Claimant herein, has the burden to prove that the appeal was timely filed. Id.

The 15-day time limit is mandatory and subject to strict application. Lin v. Unemployment Compensation Board of Review, 558 Pa. 94, 735 A.2d 697 (1999); Renda v. Unemployment Compensation Board of Review, 837 A.2d 685 (Pa. Cmwlth. 2003), petition for allowance of appeal denied, 581 Pa. 686, 863 A.2d 1151 (2004). However, where fraud or a breakdown in the administrative process is shown, an appeal from a denial of unemployment compensation benefits may be accepted after the fifteenth day, as set forth by statute, on a *nunc pro tunc* basis. ATM Corp. of America v. Unemployment Compensation Board of Review, 892 A.2d 859 (Pa. Cmwlth. 2006). Negligence on the part of an administrative official may be deemed the equivalent of fraud. Id.

In this case, the last day to file an appeal with the Board was October 11, 2007. Claimant faxed her appeal, which was stamped as received by the Department on October 16, 2007. While Claimant testified that she was misled by unemployment compensation officials, the Board did not find this testimony credible. Claimant admitted that she received the referee's decision, which plainly advised Claimant of the appeal period. Claimant contacted the Service Center to inquire about benefits, not about filing an appeal. There is no evidence that Claimant was advised by the Service Center that she did not have to file an appeal. Based upon our review, the Board did not err in dismissing Claimant's appeal as untimely filed.⁵

⁵ In light of this disposition, we need not address the second issue raised by Claimant.

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

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ORDER

AND NOW, this 25th day of July, 2008, the order of the Unemployment Compensation Board of Review, at B-468245, dated December 28, 2007, is AFFIRMED.

JAMES R. KELLEY, Senior Judge