

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Denise Gentilcore, :  
 :  
 Petitioner :  
 :  
 v. : No. 962 C.D. 2011  
 :  
 Unemployment Compensation : Submitted: November 4, 2011  
 Board of Review, :  
 Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
 HONORABLE RENÉE COHN JUBELIRER, Judge  
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
 BY SENIOR JUDGE KELLEY

FILED: December 2, 2011

Denise Gentilcore (Claimant) petitions, *pro se*, for review of an order of the Unemployment Compensation Board of Review (Board) dismissing her appeal, as untimely, from the Referee's decision pursuant to Section 502 of the Unemployment Compensation Law (Law).<sup>1</sup> We affirm.

Claimant was employed by the Southeastern Pennsylvania Transportation Authority (Employer) and her last day of employment was May 19, 2010. Claimant was discharged for being out of her area without permission.

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §822.

Claimant filed an application for unemployment compensation benefits on May 16, 2010. By Notice of Determination mailed June 18, 2010, the Allentown UC Service Center (Service Center) found that Claimant was ineligible for benefits pursuant to Section 402(e) of the Law.<sup>2</sup> Certified Record (C.R.) at Item 4.

Claimant timely appealed the Service Center's determination to the Referee and a hearing was held on September 3, 2010. C.R. at Item 5. By decision and order mailed September 3, 2010 to Claimant's last known post office address, the Referee affirmed the Service Center's determination and disapproved benefits pursuant to Section 402(e) of the Law. C.R. at Item 9. The Referee's decision advised Claimant that the final date to appeal the Referee's decision and order was September 20, 2010. Id.

Claimant filed a petition for appeal from the Referee's decision with the Board on October 27, 2010. C.R. at 10. By letter mailed November 15, 2010, the Board notified Claimant that her petition for appeal from the Referee's decision and order was untimely because it was filed more than fifteen days after the Referee's decision was mailed to Claimant. C.R. at 11. The Board further notified Claimant that unless it received a reply from Claimant specifically requesting a hearing on the timeliness issue postmarked by November 30, 2010, it would proceed to issue an appropriate order. Id. On November 19, 2010, Claimant requested a hearing regarding the timeliness of her petition for appeal. C.R. at Item 12.

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<sup>2</sup> 43 P.S. §802(e). Section 402(e) provides in pertinent part:

An employe shall be ineligible for compensation for any week---

(e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work, irrespective of whether or not such work is "employment" as defined in the act.

A telephone hearing on the timeliness of Claimant's appeal was heard on February 18, 2011. Claimant was represented by counsel and testified that she was represented at the Referee's hearing by Jason Blinder of the Philadelphia Unemployment Project and that she assumed that Mr. Blinder was going to file a timely appeal on her behalf. Notes of Testimony (N.T.) at 7, C.R. at Item 17. Claimant testified that she requested, at the time of the Referee's hearing, that Mr. Blinder file an appeal on her behalf if she did not prevail. Id. Claimant also testified that she called Mr. Blinder on the day she received the Referee's decision in the mail; however, Claimant was not able to speak with Mr. Blinder so she left him a few messages. N.T. at 8. Claimant testified that when she did speak to Mr. Blinder, he told her that he would consult with his superior and then move forward with an appeal. Id. Claimant testified that despite calling several times, she never spoke to Mr. Blinder again regarding her appeal. N.T. at 9. Claimant testified that she called the unemployment compensation authorities on October 27, 2011 because she had not received any notification regarding her appeal. Id. Claimant testified that she was informed that no appeal had been filed and she could file an appeal at that time to explain the situation as to the lateness of her appeal. Id.

The Board found that: (1) a copy of the Referee's decision and order were mailed to Claimant at her last known post office address; (2) the Referee's decision was accompanied by a notice advising Claimant that she had fifteen days to file a valid appeal; and (3) the Referee's decision was not returned by the postal authorities as undeliverable. Board Decision, Finding of Fact (FOF) 5-7. The Board found further that: (1) Claimant's appeal from the Referee's decision had to be filed on or before September 20, 2010 in order to be timely; (2) Claimant's appeal was filed on October 27, 2011; (3) Claimant was not misinformed or misled by the

unemployment compensation authorities concerning her right or the necessity to appeal; (4) Claimant's filing of a 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; and (5) Claimant believed that her representative had filed an appeal; however, when Claimant contacted the unemployment compensation authorities in late October 2010, she was informed that no appeal had been filed on her behalf. Board Decision, FOF 8-12.

The Board concluded that the negligent failure of a third party to file Claimant's petition for appeal did not excuse the untimely filing of the appeal. Accordingly, the Board dismissed Claimant's appeal from the Referee's decision and order. Claimant now petitions this Court for review of the Board's decision.<sup>3</sup>

Section 502 of the Law, 43 P.S. §822, provides that a party has fifteen days to appeal the decision of the Referee to the Board. The Board's regulation, 34 Pa. Code §101.82, provides that a party seeking to appeal an unemployment compensation determination shall file an appeal on or before the fifteenth day after the date on which notification of the decision was delivered personally or mailed to the party at her last known postal address.

The fifteen-day time period in which to file an appeal is mandatory. UGI Utilities, Inc. v. Unemployment Compensation Board of Review, 776 A.2d 344, 347 (Pa. Cmwlth. 2001). The Board and its Referees are deprived of

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<sup>3</sup> This Court's review of the Board's decision is set forth in Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704, which provides that the Court shall affirm unless it determines that the adjudication is in violation of the claimant's constitutional rights, that it is not in accordance with law, that provisions relating to practice and procedure of the Board have been violated, or that any necessary findings of fact are not supported by substantial evidence. See Porco v. Unemployment Compensation Board of Review, 828 A.2d 426 (Pa. Cmwlth. 2003).

jurisdiction if an appeal is not filed during that time period. Id. The appeal period may be extended beyond the statutory limit only where the appellant establishes that there was fraud or manifestly wrongful or negligent conduct on the part of the administrative authorities. Bass v. Commonwealth, 485 Pa. 256, 260, 401 A.2d 1133, 1135 (1979). An appellant carries a heavy burden to justify an untimely appeal. Blast Intermediate Unit #17 v. Unemployment Compensation Board of Review, 645 A.2d 447, 449 (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, 399 (Pa. Cmwlth. 1981). This Court has also permitted the filing of untimely appeals if the delay was beyond the control of the appellant or her counsel. See Perry v. Unemployment Compensation Board of Review, 459 A.2d 1342, 1343 (Pa. Cmwlth. 1983).

Before this Court, Claimant first contends that she should be permitted to file an untimely appeal because the delay in filing was not due to her negligence but rather the negligence of a third party.<sup>4</sup> Claimant argues that the Board ignored this Court's decision in U.S. Postal Service v. Unemployment Compensation Board of Review, 620 A.2d 572, 572-74 (Pa. Cmwlth. 1993), wherein we held that an untimely appeal may be permitted where the untimeliness is not the result of the petitioner's negligence. Claimant argues further that the Board erred by not inquiring into the circumstances surrounding Mr. Blinder's failure to file Claimant's appeal.

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<sup>4</sup> We note that while Claimant is proceeding in this Court *pro se*, it is clear from the arguments presented by Claimant that she received assistance in preparing the brief in support of her petition for review.

Initially, we note that it was Claimant's burden to justify her untimely appeal. Blast Intermediate Unit #17. The Board had no duty or obligation to inquire into the circumstances surrounding Mr. Blinder's failure to file Claimant's appeal beyond the evidence presented by Claimant. Claimant chose not to have Mr. Blinder appear and explain why he failed to file the appeal; therefore, Claimant must suffer the consequences of that choice.

This Court held in U.S. Postal Service that a failure to send a notice of determination to an employer's correct address or to the employer's designated representative constituted a "breakdown in the unemployment compensation system operations." U.S. Postal Service, 620 A.2d at 574. In the present case, the Referee's decision notes that Claimant and her representative attended the September 3, 2010 hearing before the Referee. C.R. at Item 9. The record further shows that a copy of the Referee's decision and order was mailed to Jason Blinder, Claimant's representative, at the Philadelphia Unemployment Project. Id. C.R. at Item 9. Claimant presented no evidence that Mr. Blinder did not receive a copy of the Referee's decision, that it was returned as undeliverable by the postal authorities, or that the unemployment compensation authorities failed to send a copy to Mr. Blinder as indicated by the record. Accordingly, the Board did not err by concluding that the negligent failure of a third party did not excuse the untimely filing of Claimant's appeal.

Next, Claimant argues that the Board ignored the substantial evidence that there was a breakdown in the administrative process that resulted in the delayed appeal. Claimant points to her testimony wherein she stated that an employee of the Board advised her to file an appeal and that her appeal would be considered if she filed it immediately. Claimant contends that she followed the

employee's directions and yet her appeal was still dismissed as untimely. Claimant argues that this Court has held that the negligence on the part of an employee of the Board is equivalent to fraud and is an excuse for an untimely appeal. Claimant argues further that the Board's failure to make any factual findings regarding the telephone call with the Board's employee requires this Court to remand this matter to the Board to make credibility determinations and factual findings as to that conversation. Claimant contends that the Board's finding that she was not misinformed or misled by the unemployment compensation authorities concerning her right or the necessity to appeal is against the weight of the evidence. We disagree.

The employee's directions to Claimant did not constitute a breakdown in the administrative process. Claimant testified that she telephoned the unemployment compensation authorities in October when she did not receive any notification as to the status of her appeal. N.T. at 9. Claimant testified that "[t]hey suggested that I file and explain the situation as to lateness to the appeal." *Id.* Therefore, contrary to Claimant's assertion, the employee with whom she spoke did not mislead Claimant. The Board provided Claimant with a hearing to explain why her appeal was late and upon consideration of Claimant's explanation, the Board dismissed her appeal. The fact that the Board did not permit the untimely appeal is not the equivalent of fraud or a breakdown in the administrative process. Moreover, Claimant admitted in her testimony that she received a copy of the Referee's decision and the notification regarding her appeal rights within the fifteen day statutory time limit for appealing that decision to the Board. N.T. at 8. Accordingly, Claimant's assertion that she was misled or misinformed by the

Board's employee regarding her appeal rights is meritless and there is no basis to remand to the Board for further findings regarding this issue.

The Board's order is affirmed.

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JAMES R. KELLEY, Senior Judge



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Petitioner	:	
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v.	:	No. 962 C.D. 2011
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

**ORDER**

AND NOW, this 2nd day of December, 2011, the order of the Unemployment Compensation Board of Review entered in the above-captioned matter is affirmed.

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JAMES R. KELLEY, Senior Judge