

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

JAMES W. TORBERT II,	)	
	)	C.A. No. K13A-11-002 JTV
Appellant,	)	
	)	
v.	)	
	)	
UNEMPLOYMENT INSURANCE	)	
APPEAL BOARD,	)	
	)	
Appellee.	)	

Submitted: February 21, 2014

Decided: May 28, 2014

James W. Torbert, II, *Pro Se*.

James T. Wakley, Esq., Department of Justice, Wilmington, Delaware. Attorney
for Appellee.

*Upon Consideration of Appellant's
Appeal From Decision of the
Unemployment Insurance Appeal Board*
AFFIRMED

VAUGHN, President Judge

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ORDER

Upon consideration of the appellant's opening brief and the record of the case, it appears that:

1. This is an appeal by claimant James T. Torbert, II, from the Unemployment Insurance Appeals Board's decision which denied Mr. Torbert's request to file an untimely appeal. The Board dismissed Mr. Torbert's appeal as untimely and affirmed the determination that Mr. Torbert was ineligible to receive unemployment benefits pursuant to 19 *Del. C.* § 3302(11)(H).

2. On May 31, 2013, Mr. Torbert received a letter from the Department of Labor terminating his unemployment benefits because he was receiving commissions from his employment as a realtor. Included at the bottom of the letter was a notification which stated: "[t]his determination becomes final on 6/10/2013 unless a written appeal is filed. Your appeal must be received or postmarked on or before the date indicated." On September 17, 2013, more than three months late, Mr. Torbert filed an appeal from the May 31 decision. On August, 22, 2013, a hearing was held before a Department of Labor Appeals Referee solely to determine whether to excuse Mr. Torbert's untimely filing of the appeal. On October, 10, 2013, the Referee issued a decision concluding that Mr. Tobert's untimely appeal could not be considered pursuant to 19 *Del. C.* § 3318(b).¹ In reaching this conclusion, the Referee found that

¹ 19 *Del. C.* § 3318(b) states, "[u]nless a claimant or a last employer who has submitted a timely and completed separation notice in accordance with Section 3317 of this title files an appeal within 10 calendar days after such Claims Deputy's determination was mailed to the law known addresses of the claimant and the last employer, the Claims Deputy's determination shall be final and benefits shall be paid or denied in accordance therewith."

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the decision was mailed on May 31, 2013 to Mr. Torbert's address of record and that "there is no evidence to suggest that the claimant's late filing of his appeal was the result of any mistakes or errors made by the Department of Labor."²

3. On October 18, 2013, Mr. Torbert filed a timely appeal with the Board contesting the Referee's decision. Mr. Torbert argued that he was never notified that his claim for employment was denied. The Board conducted a hearing on October 23, 2013, found no error in the Referee's decision, and therefore affirmed the Referee's decision.

4. Mr. Torbert filed a Notice of Appeal in this Court contending that he never received the decision; that he followed all of the instructions from the Department of Labor; and that the commissions he received from working as a realtor should not disqualify him from unemployment benefits pursuant to 19 *Del. C.* § 3302(11)(H). In response, the Board declined to address Mr. Torbert's substantive arguments, but asserted that the Board's decision was supported by substantial evidence and free from legal error or abuse of discretion.

5. The function of the reviewing court is to determine whether substantial evidence supports the Board's findings and whether those findings are free from legal error.³ "The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings."⁴ If there is substantial evidence and no

² Record at 16.

³ *Noel-Liszkiewicz v. La-Z-Boy*, 68 A.3d 188, 191 (Del. 2013).

⁴ *Id.* (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)).

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mistake of law, the Board's decision must be affirmed.⁵

6. Pursuant to 19 *Del. C.* § 3318(c), a Referee's decision "[s]hall be deemed to be final unless within 10 days after the date of the notification or mailing of such decision further appeal [to the Board] is initiated pursuant to § 3320 of this title." While the ten-day appeal period is jurisdictional, the Board may exercise its discretion and accept an untimely appeal, "[w]here there has been some administrative error on the part of the Department . . . or in those cases where the interests of justice would not be served by inaction."⁶ The Board's discretionary decision to deny an untimely appeal is a matter of procedure and can only be an abuse of discretion if "it is based on clearly unreasonable or capricious grounds" or "the Board exceeds the bounds of reason in view of the circumstances and had ignored recognized rules of law or practice so as to produce injustice."⁷

7. I conclude that the the Board's decision is supported by substantial evidence and free from legal error. The Referee's decision was mailed to Mr. Torbert at his correct address on May 31, 2013. Mr. Torbert argues that there were some mailing issues at his house and that he doesn't remember receiving the decision. However, in his opening brief to this Court, Mr. Torbert admits that he did received

⁵ *City of Newark v. Unemployment Ins. Appeals Bd.*, 802 A.2d 318, 323 (Del. Super. Mar. 2, 2002).

⁶ 19 *Del. C.* § 3320.

⁷ *Hartman v. UIAB*, 2004 WL 772067, at *2 (Del. Super. Apr. 5, 2004).

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the decision, but didn't understand its effects.⁸ I am not persuaded that the circumstances rise to the level where the interests of justice would require discharging statutory guidelines. Ultimately, Mr. Torbert's arguments are insufficient to waive the timeliness requirement and warrant acceptance of his late appeal. I conclude that the Board did not abuse its discretion in denying to hear the appeal.

9. For the foregoing reasons, the decision of the Board is ***affirmed***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

cc: Prothonotary
cc: Order Distribution
File

⁸ Mr. Torbert states, "[o]n 05-31-2013 I was sent a letter by the Division of unemployment (Exhibit F) Stating that my claim (for unemployment benefits) was being denied." Op. Br. at 3.