

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CONNIE MILLER,	:	
	:	C.A. No. K13A-10-004 WLW
Appellant,	:	
	:	
v.	:	
	:	
BBSI and UNEMPLOYMENT	:	
INSURANCE APPEAL BOARD,	:	
	:	
Appellee.	:	

Submitted: February 11, 2014

Decided: March 13, 2014

ORDER

Upon the Appeal of a Decision of the
Unemployment Insurance Appeal Board.

Affirmed.

Connie L. Miller, *pro se*

James T. Wakley, Esquire of the Department of Justice, Wilmington, Delaware;
attorney for the Unemployment Insurance Appeal Board.

WITHAM, R.J.

The issue before the Court is whether the Unemployment Insurance Appeal Board correctly denied Appellant's motion for a new hearing after the Board dismissed Appellant's case due to Appellant's prior failure to appear at his scheduled hearing.

FACTS AND PROCEDURE

This is a *pro se* appeal by Connie L. Miller (hereinafter "Appellant") from the decision of the Unemployment Insurance Appeal Board (hereinafter "the UIAB" or "the Board") denying Appellant's motion for a rehearing.

Appellant was employed as a production line worker by BBSI, an employment agency in Dover, from February of 2010 until his termination in April of 2013. Appellant worked at Playtex, but was not considered a Playtex employee; Appellant's employer was BBSI. Appellant's supervisor at BBSI had previously warned Appellant in January of 2013 about going through proper channels at BBSI rather than Playtex concerning any work issues. Appellant was warned that subsequent misconduct could result in termination.

On April 9, 2013 Appellant was suspended by Playtex for leaving his line. Rather than initially contact BBSI about his suspension, Appellant went to Playtex's Human Resources Department to file a complaint. Appellant eventually contacted his supervisor at BBSI later that day, but Appellant also proceeded to contact his immediate supervisor at Playtex (about an outstanding vacation day, according to Appellant) and a coworker at Playtex. When BBSI learned about this, BBSI terminated Appellant for insubordination and improper contact with BBSI's clients.

Appellant filed a claim for unemployment benefits with the Department of Labor. On May 29, 2013, a Claims Deputy disqualified Appellant from the receipt of benefits on the basis that Appellant was terminated for just cause in connection with Appellant's work. An Appeals Referee conducted a telephone hearing on June 19, 2013 in which Appellant and Appellant's supervisor at BBSI participated. By decision dated June 27, 2013, the Appeals Referee affirmed the determination of the Claims Deputy.

Appellant timely appealed the Referee's decision to the Board, and a hearing was scheduled for September 4, 2013. Appellant failed to appear for his hearing, and the Board dismissed the appeal. Nearly one month later, on October 1, 2013 Appellant contacted the Board and requested a new hearing. Appellant claimed that his wife had signed for receipt of the notice of the hearing, and forwarded the notice to another address without Appellant's knowledge.

By decision dated October 2, 2013, the Board denied Appellant's motion for a rehearing on the grounds that the Board's September 4 decision dismissing the appeal had become final. The Board declined to exercise its discretion to hold a new hearing and did not address the merits of Appellant's case.

STANDARD OF REVIEW

As with appeals from all administrative agencies, when a decision of the UIAB is appealed, this Court's scope of review is limited to "determining whether the Board's findings and conclusions are supported by substantial evidence and free from

legal error.”¹ Substantial evidence means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”² This Court will not weigh the evidence, determine questions of credibility, or make its own factual findings.³ The Court considers the record in the light most favorable to the prevailing party below.⁴ Questions of law are reviewed *de novo* “to determine whether the Board erred in formulating or applying legal concepts.”⁵ If there is substantial evidence and no error of law, the Board’s decision will be affirmed, unless the Board committed an abuse of discretion.⁶ An abuse of discretion occurs when the Board “acts arbitrarily or capriciously, or exceeds the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce

¹*Sandefur v. Unemployment Ins. App. Bd.*, 1993 WL 389217, at *2 (Del. Super. Aug. 27, 1993) (citations omitted).

²*Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966)).

³*Hopkins Const., Inc. v. Unemployment Ins. App. Bd.*, 1998 WL 960713, at *2 (Del. Super. Ct. Dec. 17, 1998) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

⁴*Smith v. Placers, Inc.*, 1993 WL 603375, at *2 (Del. Super. Nov. 17, 1993) (citation omitted).

⁵*Gaskill v. BesTemps*, 2013 WL 5785288, at *2 (Del. Super. Oct. 2, 2013) (citing *PAL of Wilmington v. Graham*, 2008 WL 2582986, at *4 (Del. Super. Ct. June 18, 2008)).

⁶See *PAL of Wilmington*, 2008 WL 2582986, at *4 (citing *Funk v. Unemployment Ins. App. Bd.*, 591 A.2d 222, 225 (Del. 1991)); *Sikorski v. Boscov’s Dept. Store*, 1995 WL 656831, at *1 (Del. Super. Ct. Sept. 22, 1995) (citations omitted).

injustice.”⁷

DISCUSSION

The Board “may permit” any party before it to initiate further appeal following a decision by the Board.⁸ A party has 10 days from the date of notification or mailing of a decision to initiate further appeal from the decision.⁹ In *Funk v. Unemployment Insurance Appeal Board*, the Board declined to consider the substance of the claimant’s appeal because the claimant did not timely appeal the Appeals Referee’s decision.¹⁰ The claimant argued that the postal service accidentally delivered the Appeals Referee’s decision to his parent’s house, and the claimant appealed the decision the day after he eventually received it—after the ten-day statutory period had expired.¹¹ The Delaware Supreme Court found that the ten-day period was “reasonable” and held that the claimant’s rights were not violated by the Board’s refusal to accept the untimely appeal.¹² The Supreme Court based its decision on two grounds: the claimant should have expected that it was possible for the postal service to misdeliver the mail, and the misdelivery was due to no fault by the Department of

⁷ *PAL of Wilmington*, 2008 WL 2582986, at *1 (citations and internal quotations omitted).

⁸ 19 *Del. C.* § 3320(a).

⁹ 19 *Del. C.* § 3318(c).

¹⁰ *Funk*, 591 A.2d at 224.

¹¹ *Id.*

¹² *Id.* at 226.

Labor.¹³ The Court noted that the Board retained the discretion to hear untimely appeals *sua sponte*, but indicated that this would likely only be done when presented with “unusual” cases.¹⁴

The Court finds that the instant appeal falls squarely within the Supreme Court’s holding in *Funk*. While this case involves Appellant’s untimely request for a rehearing after failing to appear for his original scheduled hearing, rather than an initial appeal from the Appeals Referee, the rationale of *Funk* still applies. Nearly a month had passed before Appellant contacted the Board about a rehearing, long after the ten-day period had expired. Appellant had timely appealed the decision of the Appeals Referee, so Appellant should have reasonably expected that something was awry when he did not promptly receive notice of the date of his Board hearing. The misdelivery was also due to no fault on the part of the Department of Labor or the Board. Further, the Board’s decision is indicative of an implicit credibility determination—*i.e.*, the Board did not find Appellant’s claim that his wife purposely misdirected the notice of his hearing to another address to be credible. Such credibility determinations are not within the limited scope of this Court’s standard of review for appeals from agency decisions.

Finally, Appellant does not address the Board’s October 2 decision at all in his opening and reply briefs, and merely makes a general statement that he acted in a

¹³ *Id.*

¹⁴ *See id.*

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timely manner. Thus, Appellant has failed to establish that the Board abused its discretion by declining to consider his untimely motion for a new hearing.

CONCLUSION

In light of the substantial evidence in support of the UIAB's decision, as well as the absence of any error of law or abuse of discretion, the decision of the UIAB must be, and is, hereby **AFFIRMED**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh