IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

EDNA MALDONADO,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. N11A-11-012 MMJ
	)	
BRANDYWINE COUNSELING and UNEMPLOYMENT INSURANCE APPEAL BOARD,	)	
	)	
Appellees.	)	

Submitted: October 1, 2012
Decided: January 31, 2013

On Appeal from Decision of the Unemployment Insurance Appeal Board

AFFIRMED

MEMORANDUM OPINION

Jeffrey K. Martin, Esquire, Martin & Associates, P.A., Wilmington, Delaware, Attorney for Appellant

Jennifer Jauffret, Esquire, Lori A. Brewington, Esquire, Richards, Layton & Finger, Wilmington, Delaware, Attorney for Brandywine Counseling and Community Services

Caroline L. Cross, Esquire, Wilmington, Delaware, Attorney for Unemployment Insurance Board

JOHNSTON, J.

Edna Maldonado ("Claimant") has appealed the September 14, 2011 decision of the Unemployment Insurance Appeal Board ("Board"). The Board affirmed the Appeals Referee's determination that Claimant failed to timely appeal the Claims Deputy's finding that Claimant was ineligible for unemployment benefits.

On this appeal, Claimant contends that the Board abused its discretion in refusing to exercise, *sua sponte*, its authority under 19 *Del. C.* § 3320 to consider the substance of Claimant's untimely appeal. In support of this contention, Claimant advances the following arguments: (1) a departmental error was committed by the Department of Labor's failure to provide Claimant, a native Spanish speaker, with "accurate and effective language access services"; and (2) the Board failed to consider whether "the interests of justice would not be served by inaction."

FACTUAL AND PROCEDURAL CONTEXT

In June 2006, Claimant was hired by Brandywine Counseling and Community Services, Inc. ("BCCS") as a Medical Case Manager. Beginning on October 8, 2010, Claimant took approved FMLA time due to back pain. Claimant was advised by her treating physician, Dr. Tony Bianchetta, not to return to work until January 10, 2011. On December 31,

2010, Claimant was terminated by BCCS due to the expiration of her twelve week FMLA time.

Petition for Unemployment Benefits

On March 10, 2011, Dr. Bianchetta submitted an "Authorization for Release of Information/Doctor's Certificate" to the Department of Labor. On the form, Dr. Bianchetta stated that Claimant was "totally disabled from performing the duties required in []her current occupation" from October 8, 2010 to present [March 10, 2011] due to "depression/anxiety, foot pain due to gout, and back pain." Dr. Bianchetta also stated that Claimant was suffering from chronic renal failure and was being evaluated for a kidney transplant.

On March 13, 2011, Claimant filed a Petition for unemployment benefits with the Department of Labor (the "Department"). In support of her Petition, Claimant also submitted her responses to a questionnaire, generated by the Department of Labor, entitled "Claimant Fact-Finding." The questionnaire required Claimant to: (1) identify her job title and responsibilities; (2) explain the reason for her termination; (3) identify whether any warnings were given to Claimant; and (4) identify what measures were taken by Claimant after warnings were given. Claimant completed the questionnaire in its entirety. Claimant indicated that she was

a Medical Case Manager at BCCS who assisted a caseload of approximately 30 to 40 clients with their "medical treatment, care plans, medications, translation, counseling and education."

Claims Deputy's Determination

On April 5, 2011, the Claims Deputy denied Claimant's Petition for unemployment benefits. The Claims Deputy found that Claimant provided medical documentation indicating that she was totally disabled from performing her required duties and was not permitted to perform any other work. Based on this documentation, the Claims Deputy found Claimant ineligible for unemployment benefits.

The determination was mailed to Claimant on April 5, 2011. The Claims Deputy's decision advised Claimant that the determination would become final on April 15, 2011, unless a written appeal was filed in the interim.

Hearing Before the Chief Appeals Referee

On August 9, 2011, Claimant appealed the Claims Deputy's determination. A hearing was held before the Chief Appeals Referee on August 30, 2011.

Agency Representative's Testimony

At the hearing, Terry Combs-Attarian, a Senior Deputy with the Department of Labor, testified that Claimant filed a Petition for unemployment benefits. On April 5, 2011, a determination was made by Deputy Combs-Attarian that Claimant was ineligible for unemployment benefits. The Deputy's letter of determination further advised Claimant that she had until April 15, 2011 to file an appeal. That letter of determination was mailed to Claimant's address of record.

Claimant's Testimony

Claimant testified that she received Deputy Combs-Attarian's determination in early April 2011. Claimant understood the determination letter to be a denial of benefits because Claimant was completely disabled. Claimant contends, however, that she was unable to read the remainder of the determination letter (which set forth Claimant's appeal rights) because she has difficulty understanding written English. According to Claimant, she is a native Spanish speaker and has difficulty reading and understanding English. Claimant testified that she did not ask her 33-year-old daughter or 14-year-old granddaughter, with whom she resides, to translate the

determination letter.[1] Claimant also testified that she did not ask her English-speaking neighbors to translate the determination letter.

Within a week of receiving the determination letter, Claimant testified that she personally visited the Department of Labor to inquire as to why she was denied benefits.[2] Claimant spoke with a representative and was advised that she had been denied benefits because the Department received Dr. Bianchetta's March 10, 2011 letter, stating that Claimant was totally disabled. The Department provided Claimant with a copy of Dr. Bianchetta's letter. According to Claimant, that was the first time she had seen Dr. Bianchetta's letter.

Claimant advised the representative that she was "completely normal" and "able to work." Claimant testified that the representative gave her another "Authorization for Release of Information/Doctor's Certificate" form and informed Claimant to have Dr. Bianchetta resubmit the form, indicating that Claimant was no longer disabled. According to Claimant, the representative informed her that once the form was submitted, "there

[1] There is no record evidence as to whether Claimant's daughter or granddaughter can read and understand English.

[2] Evidently, Claimant initially attempted to access the Department of Labor's tele-benefits number, but was unable to get through successfully.

w[ould] be no problem" and Claimant could "continue applying for benefits."

Claimant further testified that the representative never informed her of her appeal rights. Claimant acknowledged that she did not specifically ask about her appeal rights, but contends that because she has never filed for benefits before, she was not familiar with the process and did not know her rights.

The following day, Claimant visited Dr. Bianchetta's office[3] and informed the staff that they had submitted the wrong information to the Department. Claimant testified that she provided them with another "Authorization for Release of Information/Doctor's Certificate" form and asked them to submit it to the Department as soon as possible. Claimant provided the staff with the fax number for the Department. Claimant testified that she followed-up with Dr. Bianchetta's office and was informed that the form had been faxed to the Department.

At some point in July 2011, Claimant learned that the Department, in fact, did not receive the second "Authorization for Release of

[3] Claimant testified that she went to the office of Dr. Sophia following her visit to the Department of Labor. The Court believes that Claimant misspoke and was actually referring to Dr. Bianchetta.

Information/Doctor's Certificate" form from Dr. Bianchetta's office.[4] Claimant again contacted Dr. Bianchetta's office, and on July 27, 2011, Dr. Biachetta submitted a completed "Authorization for Release of Information/Doctor's Certificate" form. On the form, Dr. Bianchetta indicated that Claimant was not totally disabled and that, as of July 7, 2011, Claimant was able to return to work without restrictions, aside from a limitation on exposure to extreme hot or cold.

Chief Appeals Referee's Determination

By decision dated September 1, 2011, the Chief Appeals Referee found that Claimant failed to timely appeal the Claims Deputy's determination, which found Claimant ineligible for unemployment benefits. The Chief Appeals Referee found no evidence of any administrative error on the part of the Department of Labor. Rather, it was Claimant's own inaction that resulted in her failure to file a timely appeal. Therefore, the Chief Appeals Referee found the Claims Deputy's determination to be final and binding.

On September 6, 2011, Claimant appealed the Chief Appeals Referee's decision.

[4] It is unclear from the record whether Dr. Bianchetta's office actually submitted the second "Authorization for Release of Information/Doctor's Certificate" form, as requested by Claimant in April 2011.

Board's Decision

By decision dated September 14, 2011, the Board affirmed the Chief Appeals Referee's determination. The Board found no evidence of any administrative error on behalf of the Department that impeded Claimant's ability to file a timely appeal. Rather, according to the Board, "the only alleged reason for the Claimant's delay in filing an appeal was unrelated to any factor within the control of the Department or subject to remedy by the Board." Because Claimant failed to demonstrate that she missed the filing deadline due to "severe circumstances," the Board declined to exercise *sua sponte* its authority under 19 *Del. C.* § 3320 to accept Claimant's untimely appeal. This appeal followed.

STANDARD OF REVIEW

On appeal from the Industrial Accident Board, the Superior Court must determine if the Board's factual findings are supported by substantial evidence in the record.[5] "Substantial evidence" is less than a preponderance of the evidence but is more than a "mere scintilla."[6] It is "such relevant

[5] *Histed v. E.I. DuPont deNemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

[6] *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

evidence as a reasonable mind might accept as adequate to support a conclusion."[7]

The Court also must determine whether the Board abused its discretion by failing to exercise, *sua sponte*, its power to review the record "after the ten-day appeal period where no valid appeal has been filed by the parties."[8] A procedural decision by an administrative agency is not an abuse of discretion "unless it is based on clearly unreasonable or capricious grounds," or the Board's decision "exceeds the bounds of reason in view of the circumstances and ignored recognized rules of law or practice so as to produce injustice."[9] Absent a finding that the Board abused its discretion, the Court must uphold the Board's decision.[10]

DISCUSSION

Pursuant to 19 *Del. C.* § 3318(b), a claimant has ten calendar days, from the date of mailing, to file an appeal of a Claims Deputy's denial of

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[7] *Histed*, 621 A.2d at 342 (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

[8] 19 *Del. C.* § 3320; *Meacham v. Del. Dept. of Labor*, 2002 WL 442168, at *1 (Del. Super.) (citing *Funk v. Unemployment Ins. Appeal Bd.*, 591 A.2d 222, 225 (Del. 1991)). *See also Wilson v. Franciscan Care Ctr.*, 2006 WL 113479, at *1 (Del. Super.) (citation omitted).

[9] *Hobson v. Unemployment Ins. Appeal Bd.*, 2010 WL 4060949, at *1 (Del. Super.) (citing *K-Mart, Inc. v. Bowles*, 1995 WL 269872, at *2 (Del. Super.)).

[10] *Funk*, 591 A.2d at 225.

unemployment benefits.[11] If no appeal is filed within that time period, the Claims Deputy's decision is deemed final.[12] As noted by this Court in *Duncan*, "[t]he time for filing an appeal is an express statutory condition of jurisdiction that is both mandatory and dispositive."[13]

In very narrow circumstances, however, the Board may exercise, *sua sponte*, its authority under 19 *Del. C.* § 3320 to review an untimely appeal.[14] This authority is not to be exercised when an appeal is filed untimely as a result of the claimant's unintentional or accidental actions.[15] Rather, the Board's power under Section 3320 is reserved for "those occasions in which the Department of Labor committed an administrative error that eliminated the opportunity to file a timely appeal or 'where the interests of justice would not be served by inaction.'"[16]

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[11] 19 *Del. C.* § 3318(b) provides that "[u]nless a claimant ... files an appeal within 10 calendar days after such Claims Deputy's determination was mailed to the last known addresses of the claimant ... the Claims Deputy's determination shall be final and benefits shall be paid or denied in accordance therewith."

[12] *Id.*

[13] *Duncan v. Del. Dep't of Labor*, 2002 WL 31160324, at *2 (Del. Super.).

[14] *See Funk*, 591 A.2d 222; *see also Davis v. Starving Students*, 2011 WL 2931134, at *2 (Del. Super.) (finding that the Board's exercise of authority under Section 3320 "is rare, and is generally confined to where an act of an agent of the Board prevented the claimant from filing a timely appeal or in other extreme circumstances.").

[15] *See, e.g., Meacham*, 2002 WL 442168, at *2 (Del. Super.); *Rosembert v. Perdue Inc.*, 1996 WL 662988, at *4 (Del. Super.).

[16] *Meacham*, 2002 WL 442168, at *1 (citing *Funk*, 591 A.2d at 224).

In the case *sub judice*, it is undisputed that Claimant filed an appeal more than three months after receipt of the Claims Deputy's determination letter. Claimant, however, contends that the circumstances of the case warranted the Board to exercise, *sua sponte*, its discretion under 19 *Del. C*. § 3320. Therefore, the sole issue before the Court is whether the Board abused its discretion in failing to consider the substance of Claimant's untimely appeal per its authority under Section 3320.

The Court finds substantial record evidence to support the Board's finding that Claimant's appeal was untimely, and thus, jurisdictionally barred from further appeal. The record establishes that a copy of the Claims Deputy's determination was mailed to Claimant's address of record on April 5, 2011. The determination clearly advised Claimant that she had until April 15, 2011 to file an appeal.[17] Claimant does not dispute that the determination letter was timely received. Claimant, however, did not file an

[17] The determination letter provided as follows:

> If you disagree with this determination, you should ask the Claims Deputy for an explanation. If you are not satisfied with the explanation, you may file an appeal.
>
> ---
>
> **Claimant and Employer Appeal Rights**
> This determination becomes final on 4/15/2011 unless a written appeal is filed.

appeal until August 9, 2011 – more than three months after the filing deadline.

Contrary to Claimant's assertion, her late filing was not attributable to any administrative error on the part of the Department. The record establishes that upon receiving the determination letter, Claimant visited the Department to inquire why she was denied benefits. By her own admission, Claimant did not ask for the determination letter to be translated by a representative of the Department, nor did she inform the representative that she had difficulty understanding written English. Moreover, there is no evidence that Claimant even brought the determination letter with her when she visited the Department.

The Court finds Claimant's assertion – that she did not understand a portion of the determination letter – to be at least dubious. One of her job responsibilities at BCCS was translation services. Further, Claimant submitted to the Board multiple handwritten documents: Petition and "Fact-Finding" questionnaire; "Fact-Finding Statement"; "Appeal Request Notification" dated August 6, 2011; and letter dated August 9, 2011. These documents clearly and articulately stated Claimant's position in English. It is a reasonable inference that Claimant was indeed able to comprehend the lower portion of the determination letter, which set forth her appeal rights.

Even assuming that Claimant did not personally author the listed documents, clearly Claimant was capable of obtaining assistance.

Even assuming*, arguendo*, that Claimant was unable to read and comprehend a portion of the determination letter, Claimant has still failed to demonstrate that the Board abused its discretion in failing to exercise its authority under Section 3320. In *Rosembert*,[18] a case substantially similar to the instant matter, this Court held that the Board did not abuse its discretion in declining to exercise*, sua sponte*, its authority under Section 3320 to hear the claimant's untimely appeal. The claimant in *Rosembert* argued that his failure to timely appeal the Claims Deputy's determination was due to his difficulty reading and comprehending English. The *Rosembert* Court found that the Board acted within its discretion in dismissing the claimant's appeal because claimant's proffered excuse was insufficient to warrant the exercise of authority under Section 3320. According to the Court, the claimant's failure to timely appeal "was his own fault." In support of this finding, the Court noted that although the claimant was unable to read the decision, he made no effort to get someone to translate the Claims Deputy's decision for him. Such circumstances, the Court found, were not severe enough to warrant the Board's exercise of discretion under Section 3320.

[18] 1996 WL 662988 (Del. Super.).

As in *Rosembert*, the Court finds that the circumstances of the case are not so severe as to warrant the Board's exercise of discretion under Section 3320.[19] It is clear to the Court that Claimant's delay in filing her appeal was the result of her own inaction, rather than the result of any administrative error on the part of the Department. Therefore, the Board properly declined to exercise, *sua sponte*, its discretion under Section 3320.

CONCLUSION

The Court finds substantial record evidence to support the decision of the Unemployment Insurance Appeal Board. Claimant's appeal of the Claims Deputy's determination was made well after the ten-day statutory period. Therefore, the Board lacked the jurisdiction to hear the appeal. Further, the record does not indicate the existence of such severe circumstances, rising to the level of injustice, that would allow the Court to conclude that the Board abused its discretion in deciding not to hear the appeal *sua sponte*.

[19] Claimant also takes issue with the Board's application of the "severe circumstances" standard in determining whether to exercise discretion under Section 3320 to accept an untimely appeal. This standard consistently has been utilized by this Court. *See Slater v. J.C. Penny Inc.,* 2012 WL 2905303, at *4 (Del. Super.); *Green v. Contemporary Staffing*, 2012 WL 2700483, at *2 (Del. Super.); *Pletcher v. Unemployment Ins. Appeal Bd*., 2012 WL 1691519, at *1 (Del. Super.); *Husband v. Environmental Design, LLC*, 2012 WL 1413595, at *2 (Del. Super.); *Hansen v. E.I. DuPont De Nemours and Co.,* 2011 WL 3248288, at *3 (Del. Super.).

THEREFORE, the Unemployment Insurance Appeal Board's September 14, 2011 decision is hereby **AFFIRMED.**

IT IS SO ORDERED.

/s/ *Mary M. Johnston*
The Honorable Mary M. Johnston