

**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS**  
**PROVIDENCE, Sc.**  
**SIXTH DIVISION**

**DISTRICT COURT**

**Anthony DaSilva**

**v.**

**Department of Labor and Training,  
Board of Review**

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**A.A. No. 11 - 0182**

**ORDER**

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto. It is, therefore, ORDERED, ADJUDGED AND DECREED

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is hereby AFFIRMED.

Entered as an Order of this Court at Providence on this 30<sup>th</sup> day of January, 2012.

By Order:

\_\_\_\_\_/s/\_\_\_\_\_  
Melvin Enright  
Acting Chief Clerk

Enter:

\_\_\_\_\_/s/\_\_\_\_\_  
Jeanne E. LaFazia  
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS  
PROVIDENCE, Sc. DISTRICT COURT  
SIXTH DIVISION

Anthony DaSilva :  
v. : A.A. No. 11 - 182  
Department of Labor & Training, :  
Board of Review :

**FINDINGS & RECOMMENDATIONS**

**Ippolito, M.** In this case Mr. Anthony DaSilva urges that the Board of Review of the Department of Labor & Training erred when it affirmed a referee's decision to dismiss Mr. DaSilva's appeal from the Department's decision denying him temporary disability benefits because it was filed late. Jurisdiction to hear and decide appeals from decisions made by the Board of Review is vested in the District Court by Gen. Laws 1956 § 28-44-52. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. Because I conclude that the Board's decision is supported by substantial evidence of record and is not otherwise affected by error of law, I must recommend that the decision of the Board of Review affirming the dismissal of his appeal be affirmed.

## FACTS & TRAVEL OF THE CASE

The facts and travel of the case may be briefly stated: Mr. DaSilva was receiving Temporary Disability Insurance (TDI) benefits when, on April 28, 2011, the Director determined the claimant was overpaid and subject to recovery under Gen. Laws 1956 § 28-39-29.

Claimant's appeal was not received by the Board of Review (for assignment to a referee) for over a year — on July 27, 2011. After conducting a hearing on October 18, 2011, Referee Stanley Tkaczyk issued a decision in which he dismissed claimant's appeal because it had been filed long after the expiration of the 15-day appeal period found in Gen. Laws 1956 § 28-41-16(a).

In his October 24, 2011 decision, the referee made the following findings of fact:

On April 28, 2011 the Director issued the decision to the claimant's address of record. Notifying him that he was declared overpaid as a result of an investigation alleging that he had worked and collected that (sic) Disability benefits. The claimant did receive that decision in a timely fashion. However, he took no action on exercising his appeal rights within the fifteen day time period described. The fifteenth day of the appeal period expired on May 13, 2011. The claimant filed his appeal out of time on July 27, 2011. The claimant could provide no explanation as to the reason for not filing an appeal within the fifteen day time period.

Referee's Decision, October 24, 2011, at 1. Based on these findings, the referee made the following conclusions:

The issue in this case is whether or not the claimant filed an appeal out of time with good cause within the meaning of Section 28-41-6

of the Rhode Island Temporary Disability Act.

The burden of proof in establishing good cause for filing an appeal out of time rests solely upon the claimant. The evidence presented establishes that the Director issued a decision to the claimant on April 28, 2011 and that the claimant did receive that decision in a timely fashion. By means of that decision the claimant was informed of his appeal rights and appeal time limit. In specific he had fifteen calendar days in which to exercise his appeal rights. The fifteenth day expired on May 13, 2011. There has been no good cause evidence presented by the claimant to establish that he had good cause for not exercising his appeal rights within that fifteen day time period.

In the absence of that evidence, I must find that the claimant has not established good cause for filing an appeal out of time and the subsequent issue may not be addressed.

Referee's Decision, October 24, 2011, at 1-2. Accordingly, the claimant's appeal was dismissed.

Claimant sought review of this decision and on December 15, 2011 the Chairman of the Board of Review, sitting alone for the Board, issued a brief decision affirming the referee's dismissal of claimant's appeal and adopting the Decision of the Referee as its own. Thereafter, on December 20, 2011, claimant filed a timely pro-se complaint for judicial review in the Sixth Division District Court.

### **STANDARD OF REVIEW**

The standard of review is provided by R.I. Gen. Laws § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

**42-35-15. Judicial review of contested cases.**

\* \* \*

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court “\* \* \* may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are ‘clearly erroneous.’”<sup>1</sup> The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.<sup>2</sup> Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.<sup>3</sup>

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of the Department of Employment Security, 98 R.I. 197, 200, 200 A.2d

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1 Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing R.I. GEN. LAWS § 42-35-15(g)(5).

2 Cahoone v. Board of Review of the Dept. of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

3 Cahoone v. Bd. of Review of Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968). Also D'Ambra v. Bd. of Review,

595, 597 (1964) that a liberal interpretation shall be utilized in construing and applying the Employment Security Act:

\* \* \* eligibility for benefits is to be determined in the light of the expressed legislative policy that “Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family.” G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

#### **APPLICABLE LAW**

The time limit for appeals from decisions of the Director is set by Gen.

Laws 1956 subsection 28-41-16(a), which provides in pertinent part:

(a) \* \* \* Unless the claimant or any other interested party, within fifteen (15) days, except that for good cause shown the fifteen (15) day period may be extended after notification by the Director has been mailed to his or her the last known address, as provided in this section, requests a hearing before the board of review, the determination with reference as to the claim shall be final. At any time within one year from the date of a monetary determination, the director, upon request of the claimant or on his or her own motion, may reconsider his or her the determination if he or she finds that an error in computation or identity has occurred in connection with it, or that additional wages pertinent to the claimant’s status have become available, or if that determination has been made as a result of nondisclosure or misrepresentation of a material fact.

(b) \* \* \*

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Dept of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

(Emphasis added)

Note that while subsection 16(a) includes a provision allowing the 15-day period to be extended (presumably by timely request), it does not specifically indicate that late appeals can be accepted, even for good cause. However, in many cases the Board of Review (or, upon review, the District Court) has permitted late appeals if good cause was shown.

### **ANALYSIS**

The purpose of all tribunals — whether judicial or administrative — is to adjudicate cases on the merits. However, procedural parameters have to be established to avoid anarchy. The time limit for appeals from decisions of the Director to the Referee level is set in Gen. Laws 1956 § 28-41-16(a) to be 15 days. Accordingly, the issue in the case is whether the decision of the Referee (adopted by the Board of Review) that claimant had not shown good cause for his late appeal is supported by substantial evidence of record or whether it was clearly erroneous or affected by other error of law.

Claimant DaSilva indicated that he received the decision but he “just didn’t think about filing.” Referee Hearing Transcript, at 3-4. He stated he “just didn’t know what was going on” and he didn’t remember why he didn’t file. Referee Hearing Transcript, at 4. Subjective explanations such as these have never been, and could never be, accepted as good cause for lateness under the statute; if they were, administrative anarchy would ensue. Therefore, I certainly

cannot say that the Referee was clearly wrong to find that claimant's explanation was insufficient to meet his burden of showing excusable neglect for not having filed a timely appeal. Accordingly, I believe the Referee's decision must be upheld.

Pursuant to Gen. Laws 1956 § 42-35-15(g), the decision of the Board must be upheld unless it was, inter alia, contrary to law, clearly erroneous in light of the substantial evidence of record, or arbitrary or capricious. When applying this standard, this court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact, including the question of which witnesses to believe. Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.

The scope of judicial review by the District Court is also limited by General Laws section 28-44-54 which, in pertinent part, provides:

**28-44-54. Scope of judicial review – Additional Evidence – Precedence of proceedings.** – The jurisdiction of the reviewing court shall be confined to questions of law, and in the absence of fraud, the findings of fact by the board of review, if supported by substantial evidence regardless of statutory or common law rules, shall be conclusive.

Accordingly, I must regretfully conclude that the Referee's decision (accepted and adopted by the Board) that claimant did not demonstrate good cause for his late appeal from the Decision of the Director is supported by substantial evidence of record and is not clearly erroneous.



## CONCLUSION

Upon careful review of the record, I recommend that this Court find that the decision of the Board of Review was not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Further, it is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or arbitrary or capricious. Gen. Laws 1956 § 42-35-15(g)(5),(6).

Accordingly, I recommend that the decision of the Board be AFFIRMED.

\_\_\_\_\_/s/\_\_\_\_\_  
Joseph P. Ippolito  
MAGISTRATE

JANUARY 30, 2012

