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ARKANSAS COURT OF APPEALS

DIVISION III
No. E 10-45

NATASHA L. PRICE APPELLANT V. DIRECTOR, DEPARTMENT OF WORKFORCE SERVICES and POINTER TRAIL FAMILY CLINIC APPELLEES	**Opinion Delivered** FEBRUARY 9, 2011 APPEAL FROM THE ARKANSAS BOARD OF REVIEW [NO. 2010-BR-81] AFFIRMED

JOHN B. ROBBINS, Judge

This appeal concerns the timeliness of an appeal from an unemployment administrative decision to the Appeals Tribunal level. The Board of Review determined, as did the Appeals Tribunal, that appellate jurisdiction was lacking due to an untimely filing of the appeal. Appellant Natasha L. Price appeals to us contending that although her appeal was technically postmarked two days beyond the deadline, the tardiness was due to circumstances beyond her control. We affirm the Board's decision.

On appeal from the Board of Review, its findings of fact are conclusive if supported by substantial evidence. *Walls v. Director*, 74 Ark. App. 424, 49 S.W.3d 670 (2001). That is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *George's, Inc. v. Director*, 50 Ark. App. 77, 900 S.W.2d 590 (1995). We review the

appeal in the light most favorable to the Board's decision. *Id.* Credibility calls are for the finder of fact, here the Board. *Bradford v. Director*, 83 Ark. App. 332, 128 S.W.3d 20 (2003). If fair-minded persons could reach the Board's conclusion, it must be affirmed. *Id.*

Here, the evidence revealed that Price had worked for appellee Pointer Trail Family Clinic since July 2008 as a licensed practical nurse. She was terminated in September 2009. She promptly filed for unemployment benefits, and the Department of Workforce Services issued a written decision denying her claim. Atop the one-page notice, it recited "Mailing Date Of Notice: 10/23/2009." The notice included the basis of the disqualification, the time-period of disqualification, the statute supporting the basis for disqualification, and the following provision:

> APPEAL RIGHTS: ACA § 11-10-524(A) provides that a party entitled to this notice may file an appeal within 20 calendar days after the mailing of the notice to his last known address. An appeal may be filed by either completing a written appeal form (which may be obtained from any Department Of Workforce Services Office) or by writing to the Arkansas Appeal Tribunal, P.O. Box 8013, Little Rock, AR 72203. If an appeal is filed, please attach a copy of this form to the appeal letter and continue to file weekly claims to protect your benefit rights. All correspondence relating to an appeal should include the claimant's Social Security number. For more information, refer to your UI handbook or contact your local Department of Workforce Services Office.

The twentieth day from the mailing of the notice was November 12. Price called the Department on November 13, twenty-one days after the decision was mailed, to see what if anything she should do to begin receiving benefits. On that same date, she placed her Petition For Appeal To Appeal Tribunal in the mailbox, although it was not postmarked until

November 14, twenty-two days after the original decision was mailed. Her appeal was dismissed as untimely.

Pursuant to statute, Ark. Code Ann. § 11-10-524(a)(1) (Supp. 2009), an appeal of an agency decision of the Department of Workforce Services "shall be considered to have been filed as of the date of the postmark on the envelope." Subsection (a)(2) provides:

> However, if it is determined by the appeal tribunal or the Board of Review of the department that the appeal is not perfected within the twenty-calendar-day period as a result of circumstances beyond the appellant's control, the appeal may be considered as having been filed timely.

Price sought a hearing on the timeliness of her appeal, and a telephone hearing was conducted for that purpose. *Paulino v. Daniels*, 269 Ark. 676, 559 S.W.2d 760 (Ark. App. 1980). Price argued that her tardiness was due to circumstances beyond her control, including confusion, hormonal imbalances, and illness. Price also contended that it was unfair that the employer was permitted to file a tardy initial response to her claim that contained the evidentiary basis for her disqualification.

After the telephone hearing before the Appeals Tribunal, it determined that Price (1) had the ability and necessary information to file an appeal but did not do so, and (2) did not demonstrate that the late filing was due to circumstances beyond her control. Therefore, the Appeals Tribunal dismissed the appeal. Price appealed that decision to the Board of Review, which affirmed the decision to dismiss.

The Board's decision set forth a review of Price's testimony presented at the telephone hearing. Price testified that she received the notice on October 29, which stated she was fired

for falsifying company records, which she vehemently denied. She said she read through the following paragraph on the ten-week period of disqualification, but she thought that meant she would receive benefits after ten weeks had passed. She admittedly failed to read the final paragraph about appeal rights, which she attributed to being "flustered." Price did read the whole letter some time after November 12. Price said she called the local office on November 13 to ask what she needed to do to receive benefits and was told she needed to work ten weeks prior to being eligible. Price decided to appeal, and she was instructed to mail it immediately, which she did, although it was not postmarked until November 14.

Price stated that a few days after mailing her appeal, she realized she had been suffering from an ectopic pregnancy of twelve weeks' duration. She said she had been "incredibly sick," suffering from hormonal changes, a lot of confusion, and illness that confined her to bed in the previous weeks. She said that these were a few of the circumstances that made it "impossible" to understand and follow the procedures correctly. Price added that it was unfair that her employer was allowed to file its paperwork late in regard to her claim for unemployment, so she should be given similar leeway.

On this testimony, the Board found that Price's failure to read the entirety of the one-page notice, which included the provision on appeal, was a circumstance within her control. It further found that Price's failure to clarify her status or how to proceed within the appeals period was within her control. It also found that, although Price contended that she was unable to understand fully her rights or act on those rights due to suffering an ectopic

pregnancy, she failed to present sufficient evidence to demonstrate that her condition incapacitated her physically or mentally for the relevant days in which to appeal. Finally, it found that although Price perceived she did not receive equal treatment because the employer was permitted to file a tardy initial response to her claim, entirely different procedures and penalties were involved. Price appeals this decision to us.

We examine this appeal under the standards previously stated. Price spends a great deal of her brief on the topic of the employer's tardy initial response to her claim for unemployment benefits. Like the Board, we do not see this as particularly relevant where different procedures and penalties are involved. The employer was subject to a deadline to respond to the initial claim pursuant to a department regulation (Regulation 15), the consequence of which would be a loss of a monetary benefit in the employer's contributory account with the Department of Workforce Services. The statutory provision at issue, Ark. Code Ann. § 11-10-524(a), concerns appeals of the substantiality of the evidence; it implicates jurisdiction. We disagree that Price's perceived disparate treatment mandates the Board to find that her appeal should have been considered timely filed.

To the gravamen of her complaint—that she demonstrated circumstances beyond her control that prevented her from timely filing her appeal—we affirm the Board. The Board has the discretion to find that a tardy appeal is actually timely. The burden of proof is on the claimant. *See Hobbs v. Daniels*, 17 Ark. App. 167, 705 S.W.2d 900 (1986). The operative statutory wording is "may," not "shall." Moreover, this is a fact-intensive inquiry driven in

large part by credibility determinations. *See Mellon v. Director*, 49 Ark. App. 48, 901 S.W.2d 27 (1995). We are not at liberty to make credibility determinations at this level of review; it is a function for the Board of Review. *Bradford v. Director, supra*. Here, the Board was not convinced by a preponderance of the evidence that Price was prevented by mental or physical incapacity from filing her appeal in a timely manner. Because there is substantial evidence upon which the Board rendered this decision, even if we would have decided differently if we had been in the Board's position, we affirm the dismissal for lack of jurisdiction.

Board affirmed; appeal dismissed.

WYNNE and GLOVER, JJ., agree.