2015 IL App (2d) 141041-U
No. 2-14-1041
Order filed September 28, 2015

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

VICTOR BRECKLER, JR.,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 13-MR-1501
	)	
THE DEPARTMENT OF EMPLOYMENT SECURITY BOARD OF REVIEW and THE DEPARTMENT OF EMPLOYMENT SECURITY,	)	
	)	
Defendants-Appellants	)	
	)	Honorable
(Advocate Health Hospital Corp. and Evangelical Hospital Corp., Defendants).	)	Bonnie M. Wheaton
	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in reversing the Board of Review's decision: the appeal to the Board of Review was timely, and thus the Board of Review had jurisdiction to enter its decision, as a fax time-stamp properly showed that the appeal was submitted on the thirty-first day (a Monday) after the initial decision.

¶ 2 The Department of Employment Security, and the Department of Employment Security Board of Review (collectively, "the agency"), appeal from the circuit court's ruling in favor of

Victor Breckler, Jr., on his administrative-review complaint. The court ruled that the Board of Review acted in error when it decided that Breckler had voluntarily quit his job and was ineligible for unemployment benefits from his former employer, which we refer to here as "Advocate." At issue in this appeal is whether Advocate filed an administrative appeal too late, which would have deprived the Board of Review of authority to enter its decision. We hold that the fax imprint on Advocate's letter requesting the review was sufficient to show the request's timeliness, so that untimeliness was not a proper basis for the circuit court's ruling. We further hold that the record is sufficient to support the agency's decision on its merits. We therefore reverse the circuit court's ruling.

¶ 3 I. BACKGROUND

¶ 4 Breckler filed a timely complaint for administrative review against the agency and Advocate.[1] He sought review of a determination by the Board of Review that reversed decisions by the claims adjudicator and referee that would have made him eligible for unemployment compensation. The Board of Review ruled that Breckler had voluntarily left his employment with Advocate and was therefore ineligible. See 820 ILCS 405/601(A) (West 2012) (a person who voluntarily quits a job is ineligible for unemployment benefits).

¶ 5 The agency answered Breckler's administrative-review complaint, certifying a copy of the record of the administrative proceedings.

¶ 6 In this appeal, the contested issue is the timeliness of Advocate's appeal from the claims adjudicator's initial determination, which was in Breckler's favor. The record shows, and the

[1] In the complaint, he named the employer-defendant as "Advocate Health Hospital Corporation, and Evangelical Hospital Corporation." It is not clear that those are separate entities. No employer is a party to this appeal.

parties agree, that that initial decision was dated February 8, 2013. The parties further agree that Advocate had 30 days thereafter to file an appeal. See 820 ILCS 405/800 (the adjudicator's decision becomes final unless the objecting party files an appeal "within 30 calendar days after the delivery of the *** notification *** or within 30 calendar days after such notification was mailed to his last known address").

¶ 7 The record contains a letter from Advocate's representative dated March 11, 2013, seeking review of the February 8, 2013, decision. March 11, 2013, was the 31st day after the decision, but was also a Monday. The record copy of the representative's letter has a fax-machine time label that suggests transmission on March 11, 2013.

¶ 8 On March 14, 2013, the agency sent Breckler a "Notice of Reconsideration and Appeal." It contained the statement, "On 3/13/2013, an appeal has been filed to the Referee."

¶ 9 A telephonic appeal hearing before an administrative law judge took place on April 19, 2013. A transcript of that hearing appears in the administrative record filed by the Board of Review.

¶ 10 At the April 19, 2013, hearing, Breckler testified that he had worked as a fleet mechanic for his employer for 26 years. His last day of work was October 2, 2012. On September 27, 2012, he came to work at 6 a.m., but by late morning he felt lightheaded and had an upset stomach. He arranged for someone to substitute for him at work and then called a supervisor, Phil Shatzel, to report his illness. Shatzel sent a security officer to Breckler, and the officer told Breckler that he had to go to the emergency room. Breckler refused and went home instead. He later explained that he did not feel sick enough to go the emergency room; in this portion of the testimony, he said that the security officer had only asked him if he needed to go to the emergency room.

¶ 11 Breckler reported to work on his next scheduled work day, October 2, 2012. Shatzel and others confronted him and told him that he had to participate in an employee assistance program. Breckler testified that, on that occasion, he was repeatedly asked for his resignation and was asked to turn in his keys. The next day, he spoke to someone at Advocate to try to arrange to participate in the employee assistance program, but the person he spoke to told him that he had already resigned. Breckler further testified that he had never mentioned being on narcotics and had not been on any medication.

¶ 12 Shatzel testified that, on September 27, Breckler had called him and said that he was not feeling well: he was lightheaded and "his wife had taken some of his narcotics away from him and he didn't get to take his medication." When he spoke with Breckler on October 2, he was trying to get Breckler to submit to fitness-for-duty testing—that is, drug-and-alcohol testing. Breckler refused, saying that, under the governing rules for employees, he had 24 hours to report for testing, and he would contact the proper office in that time. Shatzel said that the meeting ended with Breckler saying that he was going to resign and retire. Had Breckler not said that he was going to resign and had he accepted fitness-for-duty testing, he could have kept his employment.

¶ 13 Keely Wimer, an Advocate human-resources specialist who was present at the October 2 meeting, testified that Breckler had said more than once that he was resigning. She told Breckler that, although the consequence of a refusal of fitness-for-duty testing and the employee-assistance program referral generally was termination, his refusal nevertheless would be treated as a resignation in lieu of termination. Breckler refused to write a resignation letter or to sign a letter drafted by Wimer. He said that he would write one the next day. He also refused a packet

of separation information. He then walked out of the meeting. On October 3, Wimer met with Breckler again and gave him a letter summarizing what had happened at the October 2 meeting.

¶ 14 David Uchman, director of patient-support services and campus services, testified that he had been present on October 3, 2012, at Breckler's request. At no time that day did Breckler deny resigning.

¶ 15 The administrative law judge issued a decision dated April 22, 2013. That decision agreed with the initial determination in Breckler's favor, finding that Breckler had not voluntarily left his employment.

¶ 16 Advocate filed a further appeal to the Board of Review. The Board of Review issued a decision in which it found that the testimony on Advocate's behalf was more credible than Breckler's. It thus concluded that Breckler had refused to submit to a fitness-for-duty exam and to take part in an employee assistance program, and had responded to the two requirements by saying that he was resigning. The Board of Review therefore ruled in Advocate's favor.

¶ 17 After the Board of Review filed the record containing the documents we have described above, Breckler filed a brief in the circuit court in support of his complaint. He argued that, because Advocate's request for review of the February 8, 2013, decision was sent more than 30 days after the decision, the Board of Review lacked jurisdiction to conduct its later review. His brief did not address the question of timeliness of a receipt on the 31st day when the 30th day falls over a weekend and did not challenge the Board of Review's decision on its merits.

¶ 18 The agency submitted a brief in support of the Board of Review's decision. On the merits, it argued that " 'the findings and conclusions of the administrative agency on questions of fact shall be held to be *prima facie* true and correct' " (quoting 735 ILCS 5/3-110 (West 2012)). The brief did not address the timeliness of Advocate's request for review.

¶ 19 On September 19, 2014, the court entered an order simply saying, "The Board is reversed." The agency filed a timely notice of appeal.

¶ 20 II. ANALYSIS

¶ 21 As noted, the contested issue here is the timeliness of Advocate's letter appealing the agency's decision of February 8, 2013. The record is sufficient to show that that letter was timely: the Administrative Code allows the time imprint on a fax to the agency to serve as proof of the time of delivery.

¶ 22 On appeal, the agency defends the decision of the Board of Review on its merits. It further argues that Advocate's letter seeking administrative review was timely because it arrived the Monday after the 30th day. It concedes that, if Advocate's letter seeking review of the initial decision had been late, the Board of Review would have lacked subject-matter jurisdiction—more strictly, statutorily granted power—to review the initial decision. See *Wabash County v. Illinois Municipal Retirement Fund*, 408 Ill. App. 3d 924, 930 (2011) ("a decision rendered by an administrative agency that lacks jurisdiction over the parties or the subject matter *** is void and can be collaterally attacked in any court, at any time"); *Charleston Community Unit School District No. 1 v. Illinois Educational Labor Relations Board*, 203 Ill. App. 3d 619, 623 (1990) ("time limitations upon bringing actions before administrative agencies are matters of jurisdiction which cannot be tolled").

¶ 23 Breckler responds that the agency is relying on "hearsay statements and assumptions [made] for the first time on appeal concerning when documents were delivered, received, or even sent to the correct address or telephone number." He does not dispute that the letter would be timely if received by fax on March 11, 2013. He points to the March 14, 2013, "Notice of Reconsideration and Appeal" that gives the date on which Advocate's appeal was "filed" as

March 13, 2013. As in the circuit court, he raises no challenge to the Board's decision on its merits.

¶ 24 The parties agree that review of the issue of whether the agency had jurisdiction of the internal appeal is *de novo*. See *Thompson v. Department of Employment Security*, 399 Ill. App. 3d 393, 395 (2010) (noting that standard for the issue of whether the Board of Review had jurisdiction). When we review a decision of an administrative agency, we examine the final decision of that agency—here, the Board of Review's—and not the lower-level administrative decision or the ruling of the circuit court. *Abbott Industries, Inc. v. Department of Employment Security*, 2011 IL App (2d) 100610, ¶ 15.

¶ 25 On the issue of the agency's jurisdiction, the fax machine's imprint on the representative's letter establishes the timeliness of Advocate's challenged appeal. Facsimile transmission is an authorized method of sending a request for an appeal to the Department of Employment Security. 56 Ill. Adm. Code 2712.1 (1998). Further, "[t]he date imprinted on the document by the Department's telefax machine shall have the same effect as the U.S. Postal Service's postmark" (56 Ill. Adm. Code 2712.1 (1998)), and a "postmark placed on the envelope by the United States Postal Service shall be conclusive evidence of the date of mailing." 56 Ill. Adm. Code 2725.10(d) (2011). Breckler's argument against reliance on the fax imprint is unpersuasive in the face of the rule making the imprint conclusive. That the agency sent Breckler a notice stating that the appeal was "filed" two days later than the fax time-stamp is puzzling, but does not make the stamp less than conclusive. Further, that the agency did not rely on the imprint in the circuit court is of no significance, as our review is of the agency's final decision, and not the decision in the circuit court.

¶ 26 Breckler does not now dispute the principle that receipt of a letter seeking an appeal on the 31st day, when that day is a Monday, is sufficient to make the letter timely. Such a dispute would be futile, as the Administrative Code provides that "[i]f the last day a response is due to be filed is a day on which the Agency is closed, the due date is extended to the end of the next day on which the Agency is open." 56 Ill. Adm. Code 2725.10(c) (2011).

¶ 27 Breckler does not challenge the Board's decision on its merits. Such a challenge would also be futile. The Board of Review based its decision on its factual determination that the witnesses for Advocate were more credible than Breckler when they testified that Breckler had said that he was resigning. We defer to the agency's determinations of witnesses' credibility and, where an issue is one of fact, we reverse only where the determination is against the manifest weight of the evidence. *Matos v. Cook County Sheriff's Merit Board*, 401 Ill. App. 3d 536, 542 (2010). Here, the testimony conflicted as to whether Breckler stated that he was resigning. No basis exists for concluding that the agency was wrong when it found that the multiple witnesses who testified to Breckler's statement that he was resigning were more credible than Breckler, the sole witness who denied that he had said that he would resign. Once one accepts the conclusion that Breckler declared that he was resigning, the conclusion that he voluntarily left his employment necessarily follows.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we reverse the circuit court's decision reversing the Board of Review's finding that Breckler was ineligible for unemployment benefits.

¶ 30 Reversed.