STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1246

Glenn Eckstrom,
Relator,

vs.

Department of Employment and Economic Development,
Respondent.

Filed March 30, 2010
Affirmed
Minge, Judge

Department of Employment and Economic Development
File No. 21793638-2

Glenn A. Eckstrom, St. Louis Park, Minnesota (pro se relator)

Lee B. Nelson, Amy R. Lawler, Department of Employment and Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Kalitowski, Presiding Judge; Minge, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

MINGE, Judge

Relator brings this certiorari appeal of the unemployment law judge's (ULJ) determination that jurisdiction is lacking. Relator ultimately claims that DEED acted arbitrarily and capriciously by not modifying the date for his benefits account. We affirm.

FACTS

Relator began working for LTF Operations Holdings, Inc. on December 20, 2006, and was laid off on November 7, 2007. Although he was entitled to severance pay and thus would not be eligible to receive unemployment benefits until after January 20, 2008, relator immediately contacted the Department of Employment and Economic Development (DEED) and applied for unemployment benefits.

Pursuant to this application, DEED made a "Determination of Benefits Account" (DBA) for relator on November 13, 2007 and set his account date as November 4, 2007. The account date is important because it establishes the base period used for the DBA. With a November 2007 account date, relator had a base period of July 1, 2006 through June 30, 2007. This base period did not include wage credits earned by relator at LTF after June 30, 2007. Using this base period and the DBA, relator's weekly benefit was $351. The deadline for appealing the DBA was December 3, 2007 (20 calendar days after the DBA was sent).

Relator could have had a base period with more wage credits and had a higher weekly benefit, if, in January 2008, before his severance payments ended, he had withdrawn the account that he had established and opened a new account. The new account would have re-set the account date, and relator's base period would have been October 1, 2006 through September 30, 2007. With the additional wages he had earned in the new base period, the DBA for relator would have resulted in a weekly benefit of $538 ($293 more).

Relator did not realize this diminished benefit level until late 2008, when he compared his situation with an unemployed acquaintance. On December 31, 2008, relator submitted a "letter of appeal" to DEED concerning his account date. Relator stated he was "appealing the start date of [his] November 4, 2007 unemployment benefit account and request[ing] that the account start date be changed to January 2008."

Because relator's appeal was not filed within 20 calendar days from the November 13 mailing date of the DBA, the ULJ concluded he had "no legal authority to hear and consider the appeal" and dismissed relator's appeal for lack of jurisdiction.

Relator requested reconsideration. On March 17, 2009, relator wrote to DEED and enclosed written comments in support of the request. The comments summarized relator's contacts with DEED in an effort to establish that DEED failed to provide him the maximum benefits available by law. The ULJ affirmed the earlier decision. Relator subsequently asserted that his March 17 letter and accompanying comments was initially misfiled by DEED staff and not made available to the ULJ on a timely basis.

This appeal by certiorari followed.

D E C I S I O N

When reviewing an unemployment-benefits decision, the reviewing court may affirm, remand for further proceedings, or reverse or modify the decision if the substantial rights of relator may have been prejudiced because the decision is affected by error of law, unsupported by substantial evidence, or arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d)(4)-(6) (Supp. 2007). The court will not disturb factual findings sustained by substantial evidence. *Id*. Whether an employee is eligible to receive

unemployment benefits is a question of law reviewed de novo. *Bukkuri v. Dep't of Employment & Econ. Dev.*, 729 N.W.2d 20, 21 (Minn. App. 2007).

The basic issue on appeal is whether the ULJ erred in finding that he lacked jurisdiction to hear the merits of relator's claim. Jurisdiction for unemployment-benefit appeals is exclusively established in chapter 268 of the Minnesota Statutes. *Christgau v. Fine*, 223 Minn. 452, 455, 27 N.W.2d 193, 195 (1947) (noting that jurisdiction question hinges on construction of statutes). There is no equitable or common-law entitlement to benefits. Minn. Stat. § 268.069, subd. 3 (Supp. 2007). When the agency has dismissed an appeal for lack of jurisdiction, we decide that question de novo and remand if dismissal was improper. *Christgau*, 223 Minn. at 463, 27 N.W.2d at 199.

To address whether relator's appeal was untimely and the ULJ lacked jurisdiction, we must first decide whether the ULJ correctly characterized relator's claim as an appeal of the DBA. Relator's "letter of appeal" states:

> I am appealing the start date of my November 4, 2007 unemployment benefit account and request that the account start date be changed to January 2008, when I became eligible to receive benefits.

In his request for reconsideration, relator describes the facts surrounding his appeal and reiterates this argument. He claimed that DEED failed to maximize his benefit by not advising him to withdraw his account and reapply. He concluded by requesting that the ULJ "rectify this issue by adding another quarter of earnings to the base period of my [DBA]."

The ULJ interpreted relator's complaint as an appeal of the DBA. In creating the DBA, DEED is charged with determining the account date, base period, and maximum amount of available benefits. Minn. Stat. § 268.07, subd. 1(b) (Supp. 2007). By essentially claiming that an incorrect account date resulted in an erroneous benefit amount and requesting that the ULJ change the DBA's account date, relator's letter appeals DEED's calculation of the DBA. Although he complains that DEED did not advise him to close and reopen his account, the underlying complaint is that his benefit amount was not "maximized." Relator did not claim that DEED discouraged him from withdrawing and reopening or denied him an opportunity to withdraw and reopen his account.

The law is clear that a DBA "is final unless an applicant or base period employer within 20 calendar days after the sending of the determination . . . files an appeal." Minn. Stat. § 268.07, subd 3a(a) (Supp. 2007). DEED sent the DBA on November 13, 2007, and the appeal deadline was December 3, 2007. Relator submitted his appeal on December 31, 2008, more than one year after the deadline elapsed. The appeal was untimely. As such, it cannot be revived, even if there are mitigating circumstances. *Semanko v. Dep't Employment Servs*., 309 Minn. 425, 430, 244 N.W.2d 663, 666 (1976). Because the decision was final and, after the 20-day deadline, unappealable, the ULJ did not have the authority to conduct further review. *In re Emmanuel Nursing Home*, 411 N.W.2d 511, 516 (Minn. App. 1987), *review denied* (Minn. Oct. 13, 1987); *Johnson v. Metro. Med. Ctr*., 395 N.W.2d 380, 382 (Minn. App. 1986).

We note that subsequent to the ULJ proceeding, relator has refined his arguments and that he makes new claims in his brief to this court. The brief alleges that (1) DEED's commissioner should have exercised his statutory power to retroactively amend the DBA within 24 months of application;[1] and (2) DEED's actions prevented relator from filing under Minn. Stat. § 268.07, subd. 3. For the first time on appeal, relator asserts that it would be arbitrary and capricious for DEED not to grant him relief in his situation.

As a general matter, this court does not consider arguments first raised on appeal. *See Thiele v. Stitch*, 425 N.W.2d 580, 582 (Minn. 1988) (declining to consider issues not presented to or decided by the district court). We require the parties, even those that are pro se, to present their claims to the lower tribunal. *See Johnson v. Jensen*, 446 N.W.2d 664, 665 (Minn. 1989) ("As a general rule, litigants are bound on appeal by the theory or theories . . . upon which the case was actually tried."); *Gruenhagen v. Larson*, 310 Minn. 454, 457-58, 246 N.W.2d 565, 568-69 (1976) (binding civil litigant to issues raised below despite pro-se status). This caselaw policy has an administrative-law counterpart in the exhaustion requirement. Generally, unless a claimant has exhausted his administrative remedies by presenting claims to and allowing the agency the opportunity to address a grievance, the reviewing court does not address the claim. *Amcon Corp. v. City of Eagan*, 348 N.W.2d 66, 71 (Minn. 1984). This rule recognizes the role of the administrative agency, promotes judicial efficiency, and provides an adequate record and

[1] The statutes allow aggrieved applicants to ask the commissioner for certain discretionary relief: The "commissioner may, at any time within 24 months from the establishment of a benefit account, reconsider any determination of benefit account and make an amended determination if the commissioner finds that the determination was incorrect for any reason." Minn. Stat. § 267.07, subd. 1(d) (Supp. 2007).

analysis to review on appeal. *Stephens v. Bd. of Regents of Univ. of Minn*., 614 N.W.2d 764, 773-74 (Minn. App. 2000), *review denied* (Minn. Sept. 26, 2000). In keeping with these judicial policies, we therefore do not consider relator's new arguments.

We are not unmindful of relator's dilemma and the perceived unfairness of his situation. We recognize that the unemployment statutes and benefit process have complexities, that materials intended to assist employed persons may not fully explain or alert one to the strategies necessary to maximize benefits, and that not only pro se claimants but attorneys may be unaware of these complexities. But, because the ULJ was not presented with any issue besides the correctness of the DBA, he did not develop a record or legal analysis for us to review. Thus, we do not determine whether, if the matter were fully and properly presented to DEED on a timely basis, the refusal to reopen relator's case would be arbitrary and capricious.

We also note that the arguments pressed by relator do not appear to implicate the type of callous or biased decision making that would mark DEED's action as arbitrary and capricious. To prove an agency acted arbitrary and capriciously, the claimant must demonstrate that the decision relied on improper factors, ignored important issues, ran counter to the evidence, or was highly implausible. *In re Charges of Unprofessional Conduct Contained in Panel File 98-26*, 597 N.W.2d 563, 567 (Minn. 1999). In this case, based on the timing of relator's application for benefits, DEED correctly calculated the account date, base period, and maximum benefit amount. Although DEED is charged with "determin[ing] . . . the maximum amount of unemployment benefits available," Minn. Stat. § 268.07, subd. 1(b), that phrase is defined. *Id.* at subd. 2(d). The section

provides that the maximum benefits available is, based on the account date and base period, the lower of either (1) 33 ½ percent the applicant's total wage credits; or (2) 26 times the applicant's weekly benefit amount. *Id*. Relator does not dispute these calculations. This statutory provision is not an open-ended charge to determine maximum benefits more generally or to advise claimants of gainful strategies and procedural maneuvers within the system.

We understand that the statute grants the commissioner discretion to revisit the application within a 24-month look-back period: "[T]he commissioner may, at any time . . . reconsider any determination . . . for any reason." Minn. Stat. § 267.07, subd. 1(e). But we do not readily find an exercise of that discretion arbitrary and capricious, especially when we find no apparent error in the DBA calculation. *See Coal. of Greater Minn. Cities v. Minn. Pollution Control Agency*, 765 N.W.2d 159, 166 (Minn. App. 2009) (noting judicial deference to agency when statute grants discretion to administrative officers).

Nor does relator indicate a basis for relief under the statutory provision allowing DEED to backdate an account if an applicant attempted to file but was "prevented from filing . . . by the department." Minn. Stat. § 268.07, subd. 3b (Supp. 2007). To grant relief under that provision would require a showing of active misdirection by DEED that would prevent a "bona fide attempt" to reapply. *Morales v. Dep't Employment & Econ. Dev.*, 713 N.W.2d 882, 884 (Minn. App. 2006). In this case there was no such attempt, nor do we have a misstatement or other act that would have prevented an application. Because the finding of no jurisdiction was correct, we affirm the ULJ's decision.

Finally, we consider the claimed misfiling of relator's May 17 letter and accompanying material. Other than relator's comments in his brief, nothing establishes whether DEED staff provided the ULJ with and the ULJ considered relator's March 17 letter and accompanying material. We note that administrative rulings will be reversed if properly submitted salient arguments are ignored. *See Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 669 (Minn. 1984) (noting that the court will reverse agency action as arbitrary and capricious if "danger signals" show the agency has not taken a "hard look at the salient problems"). But the March 17 material, even if properly submitted by relator but misfiled by DEED, was not significant. The original letter of appeal described the nature of relator's claim. The March 17 material largely reasserted those claims without providing any further bases for appeal. Because the material is not relevant to the timeliness issue that determines the outcome of this appeal, the alleged error is not prejudicial to relator. *See In re Expulsion of N.Y.B.*, 750 N.W.2d 318, 327 (Minn. App. 2008) (requiring prejudicial error to reverse quasi-judicial action by education commissioner).

Affirmed.

Dated: