MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE
COURT OF APPEALS OF INDIANA

E.R.,

Appellant-Petitioner,

v.

Review Board of the Indiana Department of Workforce Development,

Appellee-Respondent.

March 28, 2022

Court of Appeals Case No. 21A-EX-1766

Appeal from the Review Board of the Indiana Department of Workforce Development

Steven F. Bier, Chairman, Lawrence A. Dailey, Member, Heather D. Cummings, Member

Review Board No. 21-R-3924

Tavitas, Judge.

Case Summary

[1] E.R. appeals the decision of the Review Board of the Indiana Department of Workforce Development ("Review Board"), which affirmed the decision of the Administrative Law Judge ("ALJ") after E.R. failed to participate in the hearing before the ALJ. E.R. argues that she had good cause for her failure to appear. Finding that E.R. has failed to demonstrate good cause for her failure to appear, we affirm the Review Board's decision.

Issue

[2] E.R. raises one issue, which we restate as whether the Review Board erred by affirming the ALJ's dismissal of E.R.'s claim after E.R. failed to participate in the hearing before the ALJ.

Facts

[3] E.R. was employed as a bus driver for M.S.D. Decatur Township. E.R. took a medical leave and, when her medical leave was over, she attempted to return to work. She was informed that, due to the Covid-19 pandemic, a job was unavailable to E.R. E.R. applied for unemployment compensation benefits. A claims investigator with the Department of Workforce Development concluded that E.R. was "not eligible for benefits based on wages from this employer. It has been established the claimant is expected to return to the employment when the recess ends. In accordance with IC 22-4-14-7, base period wages from all educational institutions are not useable during the customary recess." Ex. Vol. III p. 3.

[4] E.R. appealed the decision, and the matter was set for a hearing before an ALJ on June 24, 2021. E.R. was informed that the hearing would take place by telephone at the number E.R. was to provide. E.R. was provided with detailed instructions on how to provide her telephone number for the hearing. E.R. did not provide any contact information to the ALJ and failed to participate in the appeal hearing. Accordingly, the ALJ dismissed E.R.'s appeal.

[5] E.R. then appealed the ALJ's decision to the Review Board. On July 30, 2021, the Review Board adopted and incorporated the ALJ's "findings of fact and conclusions of law" and affirmed the ALJ's decision. Appellant's App. Vol. II p. 18. E.R. now appeals.

Analysis

[6] E.R. appeals the decision of the Review Board, which affirmed the ALJ's dismissal of E.R.'s appeal. Our Supreme Court has held that the "standard of review of appeal of a decision of the [Review] Board is threefold: (1) findings of basic fact are reviewed for substantial evidence; (2) findings of mixed questions of law and fact—ultimate facts—are reviewed for reasonableness; and (3) legal propositions are reviewed for correctness." *Recker v. Rev. Bd. of Ind. Dep't of Workforce Dev.*, 958 N.E.2d 1136, 1139 (Ind. 2011).

[7] Decisions of the Review Board are "conclusive and binding as to all questions of fact." Ind. Code § 22-4-17-12(a). When the decision of the Review Board is challenged, we make an inquiry into: "(1) 'the sufficiency of the facts found to sustain the decision' and (2) 'the sufficiency of the evidence to sustain the

findings of fact.'" *J.M. v. Rev. Bd. of Indiana Dep't of Workforce Dev.*, 975 N.E.2d 1283, 1286 (Ind. 2012) (quoting I.C. § 22-4-17-12(f)). We neither reweigh the evidence nor assesses witness credibility, and we consider only the evidence most favorable to the Board's findings. *Id.* We will reverse the Board's decision only if there is no substantial evidence to support the Board's findings. *Id.* We are not bound by the Review Board's conclusions of law, but "'[a]n interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself.'" *Chrysler Group, LLC v. Rev. Bd. of the Ind. Dep't of Workforce Dev.*, 960 N.E.2d 118, 122-23 (Ind. 2012) (quoting *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000)).

[8] Indiana Code Section 22-4-17-3(a) required that E.R. be provided "a reasonable opportunity for a fair hearing." We have held, however, that "a party to an unemployment hearing may voluntarily waive the opportunity for a fair hearing where the party received actual notice of the hearing and failed to appear at or participate in the hearing." *Art Hill, Inc. v. Rev. Bd. of Indiana Dep't of Workforce Dev.*, 898 N.E.2d 363, 368 (Ind. Ct. App. 2008). In fact, 646 Indiana Administrative Code 5-10-6(c) provides:

> If the appealing party in a hearing pending before an administrative law judge or the review board fails to appear for a scheduled hearing, after having received due notice, the administrative law judge or the review board shall dismiss the appeal, and the underlying, appealed determination shall be deemed final, unless the appeal is reinstated pursuant to the provisions of this rule.

[9] E.R. contends, however, that she demonstrated "good cause"[1] for missing the hearing and argues that "when a claimant fails to participate in a hearing due to circumstances outside of their control, the claimant has good cause for reinstatement of their appeal." Appellant's Br. p. 8 (relying on *S.S. v. Rev. Bd. of Indiana Dep't of Workforce Dev.*, 941 N.E.2d 550, 556 (Ind. Ct. App. 2011)). E.R.'s argument fails.

[10] First, in support of her claim of good cause, E.R. relies upon an affidavit provided in her appendix on appeal, but the affidavit was not provided to the Review Board below.[2] "Evidence may not be submitted for the first time on appeal." *Indiana Bus. Coll. v. Hollowell*, 818 N.E.2d 943, 952 (Ind. Ct. App. 2004). Accordingly, we cannot consider E.R.'s affidavit.

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[1] The "good cause" language appears to relate to 646 Indiana Administrative Code 5-10-7, which provides:

> (a) A party appealing an initial determination of a deputy, or a party appealing a decision of an administrative law judge, may withdraw the appeal by written request. For an appeal pending before an administrative law judge, the request shall be filed with the presiding administrative law judge. For an appeal pending before the review board, the request shall be filed with the chairperson of the review board. If the request is approved, the underlying determination, or decision, shall become final.
>
> (b) After an appeal has been withdrawn, the appealing party may file a request for reinstatement of the appeal within seven (7) days after the date the notice of withdrawal was sent. For an appeal before an administrative law judge, the request shall be filed with the director of unemployment insurance appeals, or the director's designee. For an appeal pending before the review board, the request shall be filed with the chairperson of the review board, or the chairperson's designee. The request for reinstatement must show *good cause* for the reinstatement, and will be granted or denied at the discretion of the director of unemployment insurance appeals, or the director's designee, or the chairperson of the review board, or the chairperson's designee, depending upon the level of the appeal. No appeal shall be reinstated more than once after a withdrawal.

(emphasis added). E.R., however, did not follow the provisions of this administrative rule.

[2] E.R.'s affidavit is dated December 21, 2021, the date that her Appellant's Appendix was filed.

[11] Second, E.R. was provided with detailed instructions on how to provide her telephone number for the hearing before the ALJ. E.R. failed to do so and does not deny that she was aware of the hearing. Under these circumstances, we cannot say that E.R. was denied a reasonable opportunity for a fair hearing. *See, e.g., Art Hill, Inc.*, 898 N.E.2d at 368 ("Art Hill received notice of the hearing, had an opportunity to be heard, and voluntarily failed to participate in the hearing. Therefore, Art Hill was not denied due process when the ALJ conducted the telephone hearing without its participation.").

Conclusion

[12] E.R. has failed to demonstrate that the Review Board erred when it affirmed the ALJ's dismissal of E.R.'s appeal. We affirm.

[13] Affirmed.

Bradford, C.J., and Crone, J., concur.