

The claimant was paid \$24,000 in gross wages, but put \$12,000 in a 401k. She also had a net business income of \$25,307.00. As a claimant's PUA benefits are based on gross wages paid and net business income for 2019, her total income for 2019 is \$49,307.00 (\$24,000 + \$25,307.00).

**Board of Review
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Issue ID: N6-F9KK-7TFV

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) modifying the claimant's entitlement to Pandemic Unemployment Assistance (PUA benefits). We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part.

The claimant filed a claim for PUA benefits with the DUA, effective May 10, 2020, which was approved in a Notice of Income Verification Determination issued on May 27, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner modified the agency's initial determination, finding the claimant presented sufficient evidence to verify \$37,307.00 in income for the calendar year 2019, in a decision rendered on October 9, 2020. We accepted the claimant's application for review.

Benefits were awarded based on the review examiner's determination that the claimant's total verified wages for 2019 were \$37,307.00. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant presented sufficient information to verify that she was eligible for PUA benefits based upon her income for the 2019 calendar year in the total amount of \$37,307.00, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

The review examiner's findings of fact are set forth below in their entirety:

1. The claimant filed a claim for Pandemic Unemployment Assistance (PUA) which was determined to be effective May 10, 2020.

2. On her application for PUA benefits, the claimant reported to the Department of Unemployment Assistance (DUA) that she earned \$50,353.00 in the 2019 calendar year.
3. In 2019, the claimant was a self-employed global health consultant, working through her company which was incorporated as a S-Corporation.
4. As proof of her 2019 income, the claimant submitted a W-2 form which shows gross wages as \$12,000.00. The claimant also submitted a Schedule K-1 of her Form 1120s which shows her ordinary business income as \$26,353 with \$1,406.00 in expenses.

Ruling of the Board

In accordance with our statutory obligation, we review the record and the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject only the portion of Finding of Fact # 4 that states the claimant's 2019 gross wages totaled \$12,000.00 as that amount is unsupported by the record. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant presented evidence sufficient to verify her 2019 income as \$37,307.00.

The claimant in this case seeks PUA benefits, which is a new unemployment benefit program provided under the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, and administered by the U.S. Secretary of Labor.¹ The CARES Act specifies that a claimant's benefit rate under the PUA program is governed by 20 CFR 625.6, which provides, in relevant part, as follows:

(a) In all States, except as provided in paragraphs (c) and (d) of this section, the amount . . . payable to an unemployed worker or unemployed self-employed individual for a week of total unemployment shall be the weekly amount of compensation the individual would have been paid as regular compensation, as computed under the provisions of the applicable State law for a week of total unemployment. In no event shall such amount be in excess of the maximum amount of regular compensation authorized under the applicable State law for that week.

(1) Except as provided in paragraph (a)(2) or (b) of this section, in computing an individual's weekly amount . . . qualifying employment and wage requirements and benefit formula of the applicable State law shall be applied

(2) For the purposes of paragraph (a)(1) of this section the base period to be utilized in computing the . . . weekly amount shall be the most recent tax year

¹ Pub. L. 116-136 (Mar. 27, 2020), § 2102.

that has ended for the individual (whether an employee or self-employed)
The self-employment income to be treated as wages for the purpose of computing the weekly amount under this paragraph (a) shall be the net income reported on the tax return of the individual as income from all self-employment

The CARES Act also incorporates applicable state law in determining a claimant's covered employment and wages. This includes G.L. c. 151A, § 1, which provides, in relevant part, as follows:

(s)(A) "Wages", every form of remuneration of an employee subject to this chapter for employment by an employer, whether paid directly or indirectly, including salaries, commissions and bonuses, and reasonable cash value of board, rent, housing, lodging, payment in kind and all remuneration paid in any medium other than cash.

In accordance with applicable state law and the governing provisions of the CARES Act, a claimant's PUA benefit will be calculated based on a claimant's gross wages as well as net income from any self-employment for the 2019 calendar year. *See* 20 CFR 625.6(a)(1) and (2).

The employer, which is solely owned by the claimant, had ordinary business income of \$26,353.00 with \$1,406.00 in expenses for 2019. Finding of Fact # 4. As such, the claimant's net business income was \$25,307.00 (\$26,343.00 in income minus \$1,046.00 in expenses). In addition, the claimant also had W-2 wages that must be considered in determining the claimant's benefit rate under the PUA program.

The review examiner concluded that the claimant's 2019 gross wages totaled \$12,000.00 based solely upon the information contained in line one of the claimant's W-2, which was entered into the record as Exhibit 1.² However, Exhibit 2 is the employer's 2019 form 1120S, U.S. Income Tax Return for an S Corporation, and page 10 of this form shows that the employer paid the claimant W-2 wages totaling \$24,000 during FY 2019. This information is verified by the claimant's W-2, which shows the claimant was paid \$12,000 in wages and paid a further \$12,000 in deferred compensation. Her W-2 also shows that she paid medicare and social security tax on a total of \$24,000 in wages.³

Pursuant to the statutory authority granted to DUA in G.L. c. 151A § 38(a), the agency promulgated regulations requiring employers only to report wages paid to a claimant in her base period. *See* 430 CMR 5.04(1); Naples v. Comm'r of Department of Employment and Training, 412 Mass. 631 (1992) (a claim is to be based upon when wages are paid, not earned). As DUA calculates monetary eligibility based on wages paid to the claimant, both the claimant's W-2 and the employer's 2019 Schedule K-1 are evidence sufficient to show that the gross wages paid to the claimant in 2019 totaled \$24,000.00. The claimant's decision to invest as deferred compensation

² We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

³ This evidence is also part of the unchallenged evidence before the review examiner.

all, or a portion of, the wages paid to her does not alter the fact that she was paid gross wages totaling \$24,000.00 for services rendered during 2019.

In accordance with the provisions of the CARES Act and applicable regulations, the claimant's PUA benefit rate is based on both the claimant's \$24,000.00 gross wages plus the \$25,307.00 net business income. Thus, the claimant's total 2019 income is \$49,307.00.

We, therefore, conclude as a matter of law that, the claimant's PUA benefit entitlement should be calculated based on a total 2019 income of \$49,307.00.

The review examiner's decision is affirmed in part and reversed in part. The claimant is monetarily eligible for PUA benefits, but her weekly rate and total PUA benefits shall be calculated based upon her total income of \$49,307.00 for the 2019 calendar year.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 25, 2020



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS
STATE DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

LSW/rh