

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0829

Affirmed
Ineligible for Mixed Earner Unemployment Compensation

PROCEDURAL HISTORY: On July 26, 2021, the Oregon Employment Department (the Department) served a Notice of Determination for Mixed Earner Unemployment Compensation (MEUC) concluding that claimant was not eligible to receive MEUC benefits effective December 27, 2020. Claimant filed a timely request for hearing. On September 17, 2021, the Department served another Notice of Determination for Mixed Earner Unemployment Compensation (MEUC) concluding that claimant was not eligible to receive MEUC benefits effective December 27, 2020. Claimant filed a timely request for hearing. On May 25, 2022, ALJ Monroe conducted a combined hearing on the July 26, 2021 administrative decision and the September 17, 2021 administrative decision. On July 19, 2022, ALJ Monroe issued Orders No. 22-UI-198528 and 22-UI-198529, affirming the July 26, 2021 and September 17, 2021 administrative decisions, respectively, by concluding that claimant was ineligible to receive MEUC benefits for the weeks including December 27, 2020 through September 4, 2021 (weeks 53-20 through 35-21). On July 25, 2022, claimant filed applications for review of Orders No. 22-UI-198528 and 22-UI-198529 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 22-UI-198528 and 22-UI-198529. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2022-EAB-0828 and 2022-EAB-0829).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) On July 13, 2019, claimant filed an initial claim for regular unemployment insurance (regular UI) benefits. Between 2019 and 2021, claimant claimed benefits for numerous weeks, and the Department paid claimant regular UI benefits and benefits from several other state and federal programs.

(2) Claimant claimed Mixed Earner Unemployment Compensation (MEUC) benefits for the weeks including December 27, 2020 through September 4, 2021 (weeks 53-20 through 35-21). These are the weeks at issue. The Department did not pay claimant MEUC benefits for the weeks at issue.

(3) Prior to filing his initial claim, claimant and his wife owned a residential property in Seaside, Oregon that they offered for short-term rental on Airbnb and similar services. Claimant's customers typically rented the property for one or two days at a time. For the 2018 tax year, claimant and his wife jointly reported net income of \$10,647 relating to their rental of the property. Claimant and his wife personally managed the rental property, and cleaned it after each rental. Claimant and his wife reported the income on IRS Form 1040 Schedule E, "Supplemental Income and Loss." Exhibit 2 at 4. Claimant later provided a copy of this form to the Department in support of his claim for MEUC benefits.

CONCLUSIONS AND REASONS: Claimant was not eligible for MEUC benefits during the weeks at issue.

Title II, Subtitle A, Section 2104 of the Coronavirus Aid, Relief, and Economic Security Act of 2020 ("the CARES Act"), 15 U.S.C. § 9001 - 9141, provides, in relevant part:

(a) Federal-State Agreements.—Any State which desires to do so may enter into and participate in an agreement under this section with the Secretary of Labor (in this section referred to as the "Secretary"). Any State which is a party to an agreement under this section may, upon providing 30 days' written notice to the Secretary, terminate such agreement.

(b) Provisions of Agreement.—

(1) Federal pandemic unemployment compensation.—Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to—

(A) the amount determined under the State law (before the application of this paragraph), plus

(B) an additional amount of \$600 (in this section referred to as "Federal Pandemic Unemployment Compensation").

(2) Allowable methods of payment.—Any Federal Pandemic Unemployment Compensation provided for in accordance with paragraph (1) shall be payable either—

(A) as an amount which is paid at the same time and in the same manner as any regular compensation otherwise payable for the week involved; or

(B) at the option of the State, by payments which are made separately from, but on the same weekly basis as, any regular compensation otherwise payable.

* * *

15 U.S.C. § 9023.

The Consolidated Appropriations Act, 2021, Division N, Title II, Subtitle A, Chapter I, Subchapter I, the Continued Assistance for Unemployed Workers Act of 2020 (“the CAA”) provides, in relevant part:

SECTION 261. MIXED EARNER UNEMPLOYMENT COMPENSATION.

(a) In General.—Section 2104(b) of the CARES Act (15 U.S.C. 9023(b)(1)), as amended by section 1103, is further amended—

(1) in paragraph (1)—

(A) in subparagraph (B), by striking the period at the end and inserting “, plus”;
and

(B) by adding at the end the following: “

(C) an additional amount of \$100 (in this section referred to as ‘Mixed Earner Unemployment Compensation’) in any case in which the individual received at least \$5,000 of self-employment income (as defined in section 1402(b) of the Internal Revenue Code of 1986) in the most recent taxable year ending prior to the individual's application for regular compensation.”; and

(2) by adding at the end the following:

“ (4) Certain documentation required.—An agreement under this section shall include a requirement, similar to the requirement under section 2102(a)(3)(A)(iii), for the substantiation of self-employment income with respect to each applicant for Mixed Earner Unemployment Compensation under paragraph (1)(C). ”.

* * *

26 U.S.C. § 1402 provides, in relevant part:

(a) Net earnings from self-employment

The term “net earnings from self-employment” means the gross income derived by an individual from any trade or business carried on by such individual, less the deductions allowed by this

subtitle which are attributable to such trade or business, plus his distributive share (whether or not distributed) of income or loss described in section 702(a)(8) from any trade or business carried on by a partnership of which he is a member; except that in computing such gross income and deductions and such distributive share of partnership ordinary income or loss—

(1) there shall be excluded rentals from real estate and from personal property leased with the real estate (including such rentals paid in crop shares, and including payments under section 1233(2) of the Food Security Act of 1985 (16 U.S.C. 3833(2)) to individuals receiving benefits under section 202 or 223 of the Social Security Act) together with the deductions attributable thereto, unless such rentals are received in the course of a trade or business as a real estate dealer; except that the preceding provisions of this paragraph shall not apply to any income derived by the owner or tenant of land if (A) such income is derived under an arrangement, between the owner or tenant and another individual, which provides that such other individual shall produce agricultural or horticultural commodities (including livestock, bees, poultry, and fur-bearing animals and wildlife) on such land, and that there shall be material participation by the owner or tenant (as determined without regard to any activities of an agent of such owner or tenant) in the production or the management of the production of such agricultural or horticultural commodities, and (B) there is material participation by the owner or tenant (as determined without regard to any activities of an agent of such owner or tenant) with respect to any such agricultural or horticultural commodity[.]

* * *

(b) Self-employment income

The term “self-employment income” means the net earnings from self-employment derived by an individual (other than a nonresident alien individual, except as provided by an agreement under section 233 of the Social Security Act) during any taxable year; except that such term shall not include—

(1) in the case of the tax imposed by section 1401(a), that part of the net earnings from self-employment which is in excess of (i) an amount equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) which is effective for the calendar year in which such taxable year begins, minus (ii) the amount of the wages paid to such individual during such taxable years; or

(2) the net earnings from self-employment, if such net earnings for the taxable year are less than \$400.

For purposes of paragraph (1), the term “wages” (A) includes such remuneration paid to an employee for services included under an agreement entered into pursuant to the provisions of section 3121(l) (relating to coverage of citizens of the United States who are employees of foreign affiliates of American employers), as would be wages under

section 3121(a) if such services constituted employment under section 3121(b), and (B) includes compensation which is subject to the tax imposed by section 3201 or 3211[.]

* * *

(c) Trade or business

The term “trade or business”, when used with reference to self-employment income or net earnings from self-employment, shall have the same meaning as when used in section 162 (relating to trade or business expenses), except that such term shall not include—

(1) the performance of the functions of a public office, other than the functions of a public office of a State or a political subdivision thereof with respect to fees received in any period in which the functions are performed in a position compensated solely on a fee basis and in which such functions are not covered under an agreement entered into by such State and the Commissioner of Social Security pursuant to section 218 of the Social Security Act;

(2) the performance of service by an individual as an employee[.]

* * *

26 CFR § 1.1402(a)-4 provides:

Rentals from real estate.

(a) In general. Rentals from real estate and from personal property leased with the real estate (including such rentals paid in crop shares) and the deductions attributable thereto, unless such rentals are received by an individual in the course of a trade or business as a real-estate dealer, are excluded. Whether or not an individual is engaged in the trade or business of a real-estate dealer is determined by the application of the principles followed in respect of the taxes imposed by sections 1 and 3. In general, an individual who is engaged in the business of selling real estate to customers with a view to the gains and profits that may be derived from such sales is a real-estate dealer. On the other hand, an individual who merely holds real estate for investment or speculation and receives rentals therefrom is not considered a real-estate dealer. Where a real-estate dealer holds real estate for investment or speculation in addition to real estate held for sale to customers in the ordinary course of his trade or business as a real-estate dealer, only the rentals from the real estate held for sale to customers in the ordinary course of his trade or business as a real-estate dealer, and the deductions attributable thereto, are included in determining net earnings from self-employment; the rentals from the real estate held for investment or speculation, and the deductions attributable thereto, are excluded. Rentals paid in crop shares include income derived by an owner or lessee of land under an agreement entered into with another person pursuant to which such other person undertakes to produce a crop or livestock on such land and pursuant to which (1) the crop or livestock, or the proceeds thereof, are to be divided between such owner or lessee and such other person, and (2) the share of the

owner or lessee depends on the amount of the crop or livestock produced. See, however, paragraph (b) of this section.

* * *

(c) Rentals from living quarters -

(1) No services rendered for occupants. Payments for the use or occupancy of entire private residences or living quarters in duplex or multiple-housing units are generally rentals from real estate. Except in the case of real-estate dealers, such payments are excluded in determining net earnings from self-employment even though such payments are in part attributable to personal property furnished under the lease.

(2) Services rendered for occupants. Payments for the use or occupancy of rooms or other space where services are also rendered to the occupant, such as for the use or occupancy of rooms or other quarters in hotels, boarding houses, or apartment houses furnishing hotel services, or in tourist camps or tourist homes, or payments for the use or occupancy of space in parking lots, warehouses, or storage garages, do not constitute rentals from real estate; consequently, such payments are included in determining net earnings from self-employment. Generally, services are considered rendered to the occupant if they are primarily for his convenience and are other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only. The supplying of maid service, for example, constitutes such service; whereas the furnishing of heat and light, the cleaning of public entrances, exits, stairways and lobbies, the collection of trash, and so forth, are not considered as services rendered to the occupant.

(3) Example. The application of this paragraph may be illustrated by the following example:

Example.

A, an individual, owns a building containing four apartments. During the taxable year, he receives \$1,400 from apartments numbered 1 and 2, which are rented without services rendered to the occupants, and \$3,600 from apartments numbered 3 and 4, which are rented with services rendered to the occupants. His fixed expenses for the four apartments aggregate \$1,200 during the taxable year. In addition, he has \$500 of expenses attributable to the services rendered to the occupants of apartments 3 and 4. In determining his net earnings from self-employment, A includes the \$3,600 received from apartments 3 and 4, and the expenses of \$1,100 (\$500 plus one-half of \$1,200) attributable thereto. The rentals and expenses attributable to apartments 1 and 2 are excluded. Therefore, A has \$2,500 of net earnings from self-employment for the taxable year from the building.

* * *

In order to be eligible for MEUC benefits, claimant must have received at least \$5,000 in “self-employment income,” as that term is defined under 26 U.S.C. § 1402(b), during the most recent tax year that ended prior to his initial claim for regular UI benefits. Claimant filed his initial claim for regular UI benefits in 2019. Therefore, claimant must have earned at least \$5,000 in self-employment income during the 2018 tax year. Claimant has not met his burden to show that he met that requirement.¹

Under 26 U.S.C. § 1402(b), “self-employment income” means, in relevant part, an individual’s “net earnings from self-employment” (“NESE”), as that term is defined under 26 U.S.C. § 1402(a). However, under 26 U.S.C. § 1402(a)(1), the definition of NESE specifically excludes “rentals from real estate and from personal property leased with the real estate” unless the rental income is, in relevant part, “received in the course of a trade or business as a real estate dealer.”² 26 CFR § 1.1402(a)-4(a) defines “real estate dealer” as “an individual who is engaged in the business of selling real estate to customers,” and *not* “an individual who merely holds real estate for investment or speculation and receives rentals therefrom.” The record shows that claimant and his wife rented their property, and does not show that claimant was engaged in the business of *selling* real estate to customers. Therefore, claimant was not a “real estate dealer,” and does not meet that exception under 26 U.S.C. § 1402(a)(1).

26 CFR § 1.1402(a)-4(c) also contains an exception to the definition of “rentals from real estate.” Under that paragraph, payments for the use or occupancy of rooms or other space where services are also rendered to the occupant do not constitute rentals from real estate. Such services are considered “rendered to the occupant” if they are primarily for the occupant’s convenience, such as maid service, and are “other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only.” 26 CFR § 1.1402(a)-4(c). At hearing, claimant explained that the work he did for the rental space included cleaning it “after it’s done,” such as cleaning the bathroom and washing the linens. Transcript at 26–27. Claimant did not offer evidence to show that he provided any services to his customers other than those associated with the rental of the property itself.

Additionally, claimant’s decision to report the rental income on a Schedule E form further supports this conclusion. In his written argument, claimant asserted that “the instructions provided for Federal Schedule E explain very clearly that reporting on Schedule E is “required” unless the filer also “provided significant services to the renter such as maid service,” in which case the filer should report the income on a Schedule C.³ Claimant’s Written Argument at 1–2. It stands to reason that claimant would not have reported the income on that form if he had provided “significant services.” Therefore, the preponderance of the evidence shows that claimant did not provide “significant services” to his customers. Thus, claimant failed to show that he received rental income for offering rooms where services were also rendered to occupants, such that his rental income would not count as “rentals from real estate” under 26 CFR § 1.1402(a)-4(c). Instead, claimant’s rental income is properly classified as “rentals from real estate,” which under 26 U.S.C. § 1402(a)(1), is specifically excluded from his NESE.

¹ *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (where the Department has paid benefits it has the burden to prove benefits should not have been paid; by logical extension of that principle, where benefits have not been paid claimant has the burden to prove that the Department should have paid benefits).

² 26 U.S.C. § 1402(a)(1) also contains exceptions to excluded real estate rentals for certain agricultural arrangements not relevant to this case.

³ See <https://www.irs.gov/pub/irs-prior/i1040se--2018.pdf> at E-6.

For the above reasons, claimant’s 2018 rental income did not constitute “self-employment income.” The record does not show that claimant had any other income that would constitute “self-employment income” for tax year 2018. Therefore, claimant was not eligible for MEUC benefits for the weeks at issue.

DECISION: Orders No. 22-UI-198528 and 22-UI-198529 are affirmed.

D. Hettle and A. Steger-Bentz;
S. Serres, not participating.

DATE of Service: November 1, 2022

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

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Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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