



INTERIOR BOARD OF INDIAN APPEALS

Henry W. Begay; and Bessie Benally v. Navajo Area Director,
Bureau of Indian Affairs

12 IBIA 119 (12/09/1983)

Also published at 90 Interior Decisions 539

Judicial review of this case:

Compromise settlement, *Begay v. Clark*, No. CIV 84-1285-PCT-PGR
(D. Ariz. Apr. 21, 1986)

Related Board cases:

10 IBIA 189
10 IBIA 221
11 IBIA 285

Stipulated dismissal, *Allen v. Watt*, No. CIV-83-1921-PCT-WPC
(D. Ariz. June 4, 1985)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

HENRY W. BEGAY

v.

AREA DIRECTOR, NAVAJO AREA OFFICE, BUREAU OF INDIAN AFFAIRS 1/

IBIA 82-13-A, etc.

Decided December 9, 1983

Consolidated appeals from decisions of the Navajo Area Director, Bureau of Indian Affairs, terminating financial assistance to appellants.

Plan rejected; appeals dismissed.

1. Administrative Procedure: Burden of Proof--Indians: Welfare

Speculation or presumptions concerning an individual's circumstances are insufficient to support a finding under 25 CFR 20.21 (a) that the individual is not eligible for receipt of general assistance from the Bureau of Indian Affairs on the grounds that his or her needs are met by other resources.

2. Indians: Welfare

The requirement in 25 CFR 20.11 (b), that a recipient of assistance from the Bureau of Indian Affairs report any change in circumstances, is an administrative procedure, not an eligibility requirement.

1/ The Board hereby consolidates Bessie Benally v. Area Director, Navajo Area Office, Bureau of Indian Affairs, Docket No. IBIA 82-16-A, with Begay.

3. Indians: Welfare--Regulations: Publication

Individuals may not be deprived of custodial care benefits provided by the Bureau of Indian Affairs solely on the basis of eligibility requirements set forth only in the Bureau of Indian Affairs Manual.

4. Indians: Welfare

The Board of Indian Appeals will not force individuals to accept assistance from the Bureau of Indian Affairs that they have not shown they desire.

APPEARANCES: Stephen LeCuyer, Esq., DNA-Peoples' Legal Services, Inc., Shiprock, New Mexico, for appellants; Penny Coleman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

Henry W. Begay and Bessie Benally (appellants) are Navajo Indians who were receiving care and training funded by the Bureau of Indian Affairs (BIA) at Toyei Industries (Toyei), Toyei, Arizona. This assistance was terminated effective January 12, 1981, on the grounds that appellants were not eligible for custodial care under the provisions of 66 BIAM (Bureau of Indian Affairs Manual) 5.10A. The BIA found that appellants did not require care from others in daily living due to age, infirmity, physical or mental impairment. Appellants sought review of these decisions by the Navajo Area Director, BIA, and the Deputy Assistant Secretary--Indian Affairs (Operations) (Deputy Assistant Secretary). When the Deputy Assistant Secretary did not render decisions in appellants' cases within the 30-day time period established in 25 CFR 2.19, appellants sought and obtained review by the Board of Indian Appeals (Board).

In decisions dated October 15, 1982, the Board found, inter alia, that appellants' assistance had been improperly terminated by reference to a rule published only in the BIA Manual in violation of 5 U.S.C. § 552 (1976) and Morton v. Ruiz, 415 U.S. 199 (1974). The Board ordered BIA to develop a plan to implement the holdings, and retained jurisdiction over the appeals to review the BIA plan. See Begay v. Navajo Area Director, 10 IBIA 189 (1982); Benally v. Navajo Area Director, 10 IBIA 221 (1982).

Discussion and Conclusions

In response to the Board's October 15, 1982, orders, BIA attempted to contact appellants. A March 29, 1983, letter from the Deputy Assistant Secretary to the Board states that BIA was unable to contact appellant Begay. Although messages had been left for him at the local trading post, according to the usual and accustomed practice, appellant had not contacted BIA. Attempts to reach appellant continued through June 9, 1983, without success. Based upon appellant's past history of receipt of supplemental security income (SSI) payments, BIA speculated that he was again receiving these benefits.

The BIA was able to contact appellant Benally's mother, who informed the interviewer that appellant had been married and was living with her husband. Appellant's mother stated that she knew appellant was not interested in returning to Toyeyi. The BIA, therefore, speculated that appellant's needs were being met through her marriage.

The BIA plan for appellants involves finding them ineligible for custodial care assistance from the time they left Toyeyi. This plan is apparently

based upon a presumption that appellants' needs were being met through other resources, on the assumption that if their needs were not being met, they would have contacted BIA for further assistance.

If BIA were able to prove that appellants' needs were being met through other resources, the disposition of these cases would be controlled by the Board's holding in Allen v. Navajo Area Director, 12 IBIA 116 (1983). That case held that the eligibility criteria for BIA general assistance set forth in 25 CFR Part 20, and particularly in 25 CFR 20.21(a), can be applied in determining eligibility for receipt of custodial care assistance. Under section 20.21(a), a person otherwise eligible for general assistance is rendered ineligible if his or her needs are met by other resources. See also Barton v. Navajo Area Director, 12 IBIA 110 (1983).

[1] The Board will not accept speculation or presumptions as proof that appellants' needs are being met by other resources. ^{2/} Because BIA is not able to demonstrate that appellants' needs are met by other resources, or that they are ineligible for receipt of custodial care assistance by reason of any other criterion set forth in 25 CFR 20.21, appellants may not be determined ineligible on the mere assumption that they fail to meet the basic eligibility criteria for BIA general assistance.

[2] Alternatively, in its reply to appellants' response to the plan developed for them, BIA raises 25 CFR 20.11(b) as grounds for finding appellants ineligible. This regulation states:
"Recipients shall be required to

^{2/} These cases are thus distinguishable from Allen, supra, in which BIA representatives spoke personally with the appellants.

make timely and accurate reports of any change in circumstances which may affect their eligibility or the amount of financial assistance."

Even assuming arguendo that appellants were "recipients" of BIA general assistance so that they should bear the burden of proving changed circumstances, 3/ and that both appellants in fact had experienced a change in their circumstances, 4/ BIA's argument is still not convincing. Section 20.11(b) is clearly identified as an "administrative procedure," not as an eligibility requirement. There is no indication in the regulation or surrounding sections that failure to comply with it renders an individual ineligible for receipt of further assistance. The Board declines to read such a drastic punishment into a regulation obviously intended merely to assist BIA with administrative and recordkeeping functions.

[3] The only remaining basis for BIA's determinations would be the provisions of 66 BIAM. The use of eligibility criteria set forth only in the BIA Manual was addressed in the original decisions in these and 17 related cases. The Board held that eligibility criteria found only in the BIA Manual could not be used to deprive an individual of benefits because although these provisions were "rules" within the meaning of 5 U.S.C. § 551(4) (1976), they had not been published in the Federal Register as required by 5 U.S.C. § 552(a)(1)(D) (1976) and by the Supreme Court's decision in Morton v. Ruiz, supra. Appellants state that no social services regulations were published

3/ The Board's Oct. 15, 1982, order in these cases places the burden on BIA to show appellants' present circumstances.

4/ Although the record indicates that appellant Benally was married, which presumably is a change of circumstances of the type envisioned in the regulation, there is no suggestion that appellant Begay's circumstances have changed in any way.

in the Federal Register between October 15, 1982, the date of the Board's original decisions, and the time when BIA proposed to find appellants ineligible for assistance. Appellee does not dispute this statement, and the Board is not independently aware of any such publication.

The same reasoning applies to the application of BIA Manual provisions to the present eligibility determinations. The Board hereby incorporates by reference those parts of the original decisions that pertain to the need for publication of rules of general applicability in the Federal Register. See 10 IBIA 199-200, 10 IBIA 231-32.

Because the eligibility criteria in the BIA Manual have not been published in the Federal Register, they may not be used to deprive appellants of custodial care assistance. There is, therefore, no legally sufficient basis in the record for a determination that appellants are not eligible for custodial care assistance. Accordingly, the Board rejects BIA's plan for appellants that proposes to find them ineligible for receipt of custodial care assistance.

[4] However, the record also does not permit a determination that appellants actually desire to receive assistance from BIA. The record indicates that BIA has made good faith efforts to contact appellants in accordance with the Board's order and to determine if appellants are eligible for and desire to receive assistance. There are no affirmative assertions by appellants that they, in fact, desire to receive assistance from BIA, or

explanations for their failure to respond to BIA. 5/ Under these circumstances, the Board will not require BIA to continue efforts to contact appellants or force individuals to accept assistance without proof that they are actually seeking assistance. Appellants' social services records, however, shall be amended to show that they are not receiving assistance because of their failure to indicate a desire for assistance, rather than a determination that they were ineligible. 6/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the BIA plan for appellants is rejected, but the appeals are nonetheless dismissed on the grounds that there is no evidence that appellants actually desire to receive assistance from BIA.

//original signed
Jerry Muskrat
Administrative Judge

We concur:

//original signed
Franklin D. Arness
Administrative Judge

//original signed
Bernard V. Parrette
Chief Administrative Judge

5/ Appellants present only legal argumentation that they cannot be found ineligible.

6/ A settlement agreement between Toyei and BIA on the amount owed to Toyei for services previously rendered to appellants, was approved by the Board on Aug. 23, 1983. Payment has been made under this agreement. This settlement is conclusive of all issues arising from BIA general assistance payments to appellants before they received notification of the termination of their assistance. See Begay v. Navajo Area Director, 12 IBIA 107 (1983).