



INTERIOR BOARD OF INDIAN APPEALS

Estate of Robert Ray Limpy

50 IBIA 1 (07/06/2009)

Related Board case:
52 IBIA 55



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF ROBERT RAY LIMPY) Order Docketing and Dismissing Appeal
) as Premature and Remanding
)
) Docket No. IBIA 09-090
)
) July 6, 2009

On June 4, 2009, the Board of Indian Appeals (Board) received a notice of appeal from Peter Brush (nee Jeffery Limpy) (Appellant). Appellant seeks review of an Order Denying Request for De Novo Review (Order Denying Review) entered on May 11, 2009, by Administrative Law Judge (ALJ) Richard L. Reeh in the estate of Robert Ray Limpy (Decedent), deceased Cheyenne and Arapaho Indian, Probate No. P 0000 66296 IP. The order denied Appellant’s request for the ALJ to review de novo an Order Determining Heirs and Decree of Distribution (Order Determining Heirs) issued by Attorney Decision Maker (ADM) Leah Harjo Ware on November 4, 2008. The ADM determined that Decedent’s trust funds and his trust real property interests that were equal to or greater than five percent ownership in allotments should pass to his surviving sibling, and that his trust real property interests that were less than five percent ownership in allotments should pass to the Indian tribe with jurisdiction.¹

Appellant is a nephew of Decedent, and apparently sought to assert, in his request for de novo review, that he is entitled to a share of the estate, as the child of Decedent’s pre-deceased sister, Mamie Marie Limpy. *See* Order Denying Review at 1. The ALJ concluded that Appellant is not an actual or probable heir of Decedent, and therefore he is not an interested party, and not entitled to request de novo review of the ADM’s decision. The

¹ The ADM found that Decedent had died on January 2, 2008, without a will, and she concluded that the distribution of Decedent’s estate was governed by the American Indian Probate Reform Act (AIPRA) provisions on intestate succession, 25 U.S.C. § 2206. According to the Order Determining Heirs, Decedent owned interests that were less than five percent in one or more allotments subject to the respective jurisdictions of three different tribes — the Cheyenne and Arapaho Tribe of Oklahoma, the Affiliated Tribes of the Wind River Reservation, and the Northern Cheyenne Tribe — and thus each tribe was entitled to the interests in the respective allotment(s) subject to its jurisdiction.

ALJ advised Appellant that he could appeal the Order Denying Review to the Board, and Appellant did so.

We conclude that the ALJ's appeal instructions were in error. The Board does not have jurisdiction to review an ALJ's order denying de novo review of an ADM decision. We also conclude, however, that the Order Denying Review *was* subject to and initially reviewable through a petition to the ALJ for rehearing. Only after an order on the petition for rehearing is issued is the matter appealable to the Board. Therefore, we dismiss this appeal as premature and remand the case to the Probate Hearings Division to consider Appellant's "appeal" as a petition for rehearing from the Order Denying Review.

The Board's jurisdiction over appeals in probate matters is limited to appeals from orders on rehearing, reopening, purchase of interests in a decedent's trust estate, and modification of a trust estate inventory. 43 C.F.R. § 4.320, *as amended*, 73 Fed. Reg. 67,256, 67,288 (Nov. 13, 2008). Not included in this list are orders issued by ALJs or IPJs in response to requests for de novo review of an ADM's decision. Thus, the Board lacks jurisdiction to review an ALJ's order on a request for de novo review.

The question remains whether Appellant is entitled to any further review of the Order Denying Review. We conclude that he is. The regulations governing the probate of Indian trust estates authorize ADMs to adjudicate and issue final orders determining heirs and decrees to distribute an Indian decedent's trust estate, subject to the right of interested parties to seek de novo review of the case by an ALJ. *See* 43 C.F.R. §§ 4.212 - 4.215 (2008) (applicable until Dec. 15, 2008); *see also* 73 Fed. Reg. at 67,297-67,298, *to be codified at* 43 C.F.R. § 30.200 - 30.207 (effective Dec. 15, 2008).² When an "interested party"³ who is adversely affected by an ADM's decision requests de novo review, the case is assigned to an ALJ or an Indian Probate Judge (IPJ), who "will review the merits of the

² The ADM's decision in this case was issued when the regulations codified at 43 C.F.R. §§ 4.212 - 4.215 (2008), were in effect, although the ALJ's Order Denying Review was issued after the new regulations had become effective. For purposes of deciding the jurisdictional issue in this case, the former and current regulations are not materially different, and because the ADM's decision was issued, and the request for de novo review by the ALJ was filed, before the regulations were amended, we cite to those regulations in this decision with respect to the procedures governing de novo review of an ADM decision.

³ When Appellant filed his request for de novo review, "interested party" was defined in relevant part to include "[a]ny probable or actual heir," 43 C.F.R. § 4.201, and, as revised, the regulations define the term to include "[a]ny potential or actual heir," *see* 73 Fed. Reg. at 67,291, *to be codified at* 43 C.F.R. § 30.101.

case de novo, conduct a formal hearing as necessary or appropriate pursuant to the regulations . . . and issue a new decision in accordance with [43 C.F.R.] § 4.240.” 43 C.F.R. § 4.215(e) & (f). The decision of an ALJ or IPJ issued under section 4.240 is subject to a petition for rehearing. *See id.* § 4.241(a). What is not expressly addressed in the regulations, however, is whether any further review is available from an order denying a request for de novo review altogether, on the ground that the requester is not entitled, as a threshold matter, to make the request because he or she is not an interested party.

In the present case, the ALJ found it unnecessary to review the *underlying* merits of the ADM’s decision, i.e., whether she correctly determined that AIPRA required the distribution of various interests in Decedent’s trust estate among his surviving sibling and the three tribes. Instead, he concluded, as a threshold matter, that Appellant was not an “interested party,” and thus was not even entitled to request de novo review. The ALJ also concluded, apparently, that his decision was not subject to a petition for rehearing, although he did advise Appellant that he could appeal to the Board.

We do not construe section 4.215’s reference to a review of the “merits” as narrowly confined to a review of the underlying merits of an ADM’s decision. If a person or entity files a request for de novo review, the threshold issue of standing — whether they are an interested party — is among the issues that must be reviewed as part of the ALJ’s de novo review of the case. The threshold issue may indeed be dispositive, as the ALJ concluded in this case, rendering any additional de novo review unnecessary. But it was still a merits determination on the issue of standing. And the Board has previously held that an ALJ’s decision on the merits, after de novo review of an ADM’s decision, is subject to a petition for rehearing, and not directly appealable to the Board. *See Estate of Owen Snez*, 40 IBIA 96, 97 (2004).

Section 4.215 provides that when the ALJ issues a decision on a request for de novo review, that decision will be issued in accordance with 43 C.F.R. § 4.240. And, as noted earlier, the first level of review from a decision issued under section 4.240 is through a petition for rehearing. We conclude that whether an ALJ’s decision on a request for de novo review is resolved on the threshold ground of standing, or on the underlying merits, it is properly considered a decision under section 4.240. In the present case, that means that Appellant’s appeal to the Board is premature, and must first be considered as a petition for rehearing.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board dismisses this appeal as premature, and

remands the matter to the Probate Hearings Division, for consideration of Appellant's "appeal" as a petition for rehearing.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge