

BUREAU OF LAND MANAGEMENT

v.

WILLIAM CARLO, JR.

IBLA 90-408

Decided August 1, 1995

Appeal from a decision by Chief Administrative Law Judge Parlen L. McKenna finding that William Carlo, Jr., had a Native allotment application for an area of land known as Parcel B pending before the Department on December 18, 1971. F-14769.

Affirmed.

1. Evidence: Presumptions--Rules of Practice: Evidence--Rules of Practice: Hearings

A rebuttable presumption exists that officers of the Government charged with receipt of applications duly and properly discharged their duties with respect to such applications. Where the records of the Department fail to disclose the receipt of an application, a party challenging this presumption bears the affirmative burden of establishing, by a preponderance of the evidence, that the application in question was duly filed.

2. Evidence: Generally--Evidence: Sufficiency--Evidence: Weight--Rules of Practice: Evidence

The Board has full authority to reverse findings of fact made by an Administrative Law Judge. However, when the resolution of disputed facts is clearly premised upon a Judge's findings of credibility, which are in turn based upon the Judge's reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they ordinarily will not be disturbed by the Board. The basis for this deference is the fact that the Judge who presides over a hearing has the opportunity to observe the witnesses and is in the best position to judge the weight to be given to conflicting testimony.

APPEARANCES: William E. Caldwell, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for William Carlo, Jr.; Dennis J. Hopewell, Esq., Deputy Regional Solicitor, Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Bureau of Land Management (BLM) has appealed from a decision by Chief Administrative Law Judge Parlen L. McKenna, dated May 17, 1990, finding that William Carlo, Jr., did have a Native allotment application (F-14769) for an area of land known as Parcel B pending before the Department on December 18, 1971. For reasons set forth below, we affirm.

The Board first considered this matter in an appeal by Carlo from a decision of the Fairbanks District Office, BLM, which had denied his request to amend his Alaska Native allotment application to include a 110-acre parcel of land, which he referred to as Parcel B, in addition to the 50-acre parcel already on record with BLM. Carlo asserted that on December 10, 1971, he had signed a Native allotment application form which left blank the description of the land sought with the understanding that the Bureau of Indian Affairs (BIA) would fill in the descriptions of two parcels of land (50 and 110 acres, respectively) which he had designated on maps as lands which he desired to have allotted to him under the Native Allotment Act of 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed by section 18 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617 (1988)). On December 16, 1971, BIA filed appellant's Native allotment application and evidence of use and occupancy with BLM. As filed, the application described only a single 50-acre parcel of land located along the edge of the Tanana White Alice Site road in sec. 9, T. 4 N., R. 22 W., Fairbanks Meridian. No other parcel was indicated on the application form filed with BLM.

In his original appeal to the Board, Carlo argued that he had, in fact, also made application for a 110-acre parcel of land north of the Yukon River in sec. 25, T. 13 N., R. 11 W., Fairbanks Meridian, and that BIA had apparently failed to transmit his application for this parcel to BLM. In our review of the case record, we found that, except for appellant's affidavit, there was nothing in the record corroborating his contention that it was his original intention to include Parcel B in his application. While noting the absence of any independent corroboration, we, nevertheless, ordered a fact-finding hearing in which he would be afforded an opportunity to establish that he did, indeed, timely make application for Parcel B with officials of BIA. Accordingly, we referred the matter to the Hearings Division for a hearing on this issue, noting that appellant would bear the burden of establishing, by a preponderance of the evidence, the timely filing of his application on or before December 18, 1971. See William Carlo, Jr., 104 IBLA 277, 282 (1988).

Pursuant to this decision, Judge McKenna held a hearing on August 21, 1989, in Fairbanks and on August 22, 1989, in Tanana, Alaska. At the hearing, testimony was taken and exhibits were entered which purportedly were relevant to the circumstances surrounding the filing of Carlo's application. In his decision, Judge McKenna found that Carlo had timely filed for Parcel B based, he declared, on his observations of the witnesses, and his analysis of the entire record, including the arguments raised by the parties. He concluded in pertinent part:

The testimony and evidence presented were consistent with the proposition that William Carlo, Jr. told Kathy Adams [1/] he wanted parcel B to be part of his original application when he signed it, and that Ms. Adams later failed to add parcel B when she filled in the legal description for him. I therefore find that appellant has presented clear evidence which overcomes the presumption of administrative regularity in favor of BLM, leaving the case in my hands to weigh and rule on the evidence as appropriate.

* * * * *

* * * William Carlo, Jr. testified before me at the hearing, under oath. I found him to be a sincere and credible witness. Moreover, his testimony was confirmed by the testimony of his father and the deposition of his brother, at least to the extent that he intended to apply for parcel B and that he has steadfastly maintained ever since his original application that he did apply for parcel B. BLM, on the other hand, offered no evidence which assailed the veracity of appellant's witnesses or rebutted their testimony. The live, credible testimony of William Carlo, Jr., as well as the testimony of the other witnesses, was sufficient to sustain appellant's evidentiary burden. Therefore, I find that the appellant had an application for parcel B pending before the Department on December 18, 1971.

(Decision at 8).

On appeal, BLM asserts that the evidence of record does not satisfactorily establish the timely filing of an application for Parcel B. BLM maintains that Carlo had the burden of proof to establish the timely filing and this burden was not met. Further, it argues that there is not enough corroborating evidence to overcome the applicable presumption of administrative regularity. BLM contends that the Judge's conclusory

1/ Kathy Adams (now Nunan) was identified as the BIA employee who assisted Carlo in the completion of his application in 1971. She did not testify at the hearing, though a deposition which she had provided in a different Native allotment hearing was submitted as Exhibit A-5.

findings are erroneous and, further, that the Board should make a de novo review as to the weight to be given the witnesses' oral testimony.

Carlo has responded by asking the Board to summarily affirm the Judge's decision, asserting that BLM has merely raised the same arguments presented to and considered by Judge McKenna (Response at 3). He suggests that the processing of his application and the omission of Parcel B from that application is consistent with the BIA confusion and conditions that existed during the time of the "rush" to process the mass of applications received in 1970-71. He notes that, although most applicants could point out the location of the land in their applications, as he did, very few could provide the correct legal descriptions, contending that "the BIA provided the legal descriptions of the land chosen by the applicants in virtually all, if not all, cases; and these descriptions were added after the applications had been entrusted to BIA's care, i.e., out of the presence of the applicants" (Response at 7). He cites a line of case law that, he asserts, confirms the error-prone nature of this process and which highlights similar mix-ups and mistakes. He argues that the Judge properly evaluated the facts of his case against this background of "chaos and error" (Response at 12).

Moreover, despite the fact that Carlo believes that the Judge reached the correct result, he argues that the decision below erroneously applied a "presumption of administrative regularity." Carlo maintains that this presumption applies only when an agency engages in "regular" activities, whereas in this case the presumption does not apply when an agency deviates from its established procedure, citing *Wilson v. Hodel*, 758 F.2d 1369, 1372 (10th Cir. 1985). In this instance, Carlo emphasizes that the record confirms BIA's inadequacies in following its procedures and carrying out its duties and argues that, for this reason, the case should have been decided on the basis of the preponderance of the evidence (Response at 12-13).

Even assuming, *arguendo*, that the presumption is applicable, Carlo asserts that the Judge's decision is still correct and supported by the record since, as Judge McKenna found, it confirms that his intent was always to include Parcel B in his application. He points out that Parcel B is located in an area historically used by the Carlo family and reiterates his assertion that, when he prepared his application, he told Kathy Adams he wanted both parcels and she located the sites by placing pins containing his name on a map on the wall. He notes that his father and his brother Kenneth confirmed this intent, while the Government did not present any evidence to rebut these assertions (Response at 14-16). He asks that Judge McKenna's decision confirming his timely application for Parcel B be affirmed.

[1] As an initial matter, it seems clear to us that both BLM and Carlo have misapprehended the nature and scope of the presumption of regularity as it appertains to the present case. Thus, on the one hand,

Carlo argues that the record establishes that there is no basis for application of any presumption of regularity since, he contends, the entire application process was fraught with error. BLM, for its part, complains that Judge McKenna failed to give adequate deference to the presumption in concluding that Carlo had overcome it. Both of these arguments, in our opinion, are premised on an erroneous perception of the presumption involved.

Insofar as Carlo's criticisms are concerned, we must note that the presumption of regularity has never proceeded on the assumption that errors are not made in the normal course of the administration of official functions. Indeed, it is the recognition that errors can be made which renders the presumption rebuttable in the first instance. Instead, the presumption proceeds from recognition that the procedural safeguards under which an agency generally operates in fulfilling its statutory duties will support an inference, in any specific case, that the agency properly discharged its responsibilities therein. This is not to say that a situation could never arise in which a complaining party could establish either that the general procedures followed were so susceptible to error that no inference of correct handling could properly arise or that the manifest record of specific error establishes that, regardless of procedural safeguards theoretically in place, in practice the level of error requires the abandonment of any inference of regularity. However, Carlo's showing herein, which merely establishes that a high volume of applications were filed with BIA in 1971 and that some errors did, in fact, occur in the handling of these applications, fails to establish that either situation obtained. In short, Carlo has provided a clearly insufficient basis upon which to predicate abandonment of the presumption of regularity with respect to the handling of Native allotment applications by either BLM or BIA. 2/

Turning to BLM's assertion that Judge McKenna failed to give adequate weight to the presumption of regularity, in our view it is BLM, not Judge McKenna, which has mistaken the scope of the presumption. Thus, the Board has noted on numerous occasions that "rebuttable presumptions are, in essence, procedural devices by which the burden of proof is shifted from one party to another." Bernard S. Storper, 60 IBLA 67, 70 (1981), aff'd, Civ. No. 82-0449 (D.D.C. Jan. 20, 1983); see also Legille v. Dann, 544 F.2d 1 (D.C. Cir. 1976); United States v. Hess, 46 IBLA 1, 7-8 (1980). Herein, the presumption of regularity was implicitly recognized in our original decision in William Carlo, supra, as the basis for requiring Carlo, who alleged tender of his application for Parcel B even though the

2/ It is important to note, in this context, that the lost files described in Judge Fitzgerald's decision in Fanny Barr v. United States, No. A 76-160 Civil (Jan. 18, 1980), to which Carlo refers, generally involved actions not of either BLM or BIA but rather those of volunteers working for the Rural Alaska Community Action Program, who were not employees of the Department of the Interior.

BLM and BIA records failed to corroborate receipt, to bear the affirmative burden of establishing that the application for Parcel B was timely filed.

There is, however, no hard and fast rule that, in order to overcome the presumption of regularity, independent corroboration must necessarily be presented. On the contrary, in our decision in William Carlo, *supra*, we specifically adverted to the absence of any corroboration but noted that, while this absence "weakens the evidentiary weight which may be accorded appellant's assertions," he was entitled to a fact-finding hearing on the substance of his claims that he had filed the application for Parcel B. *Id.* at 282. While corroboration might, indeed, make it easier for Carlo to carry his burden of proof, there is no per se rule requiring the submission of such independent corroboration as an absolute precondition for discharging this obligation. Judge McKenna could, if convinced by the totality of the evidence presented, find that Carlo had met this burden based solely on his determination that Carlo's testimony was credible and worthy of belief.

In this case, Judge McKenna, after hearing all of the testimony and reviewing the various submissions, determined from his vantage point that Carlo had presented clear evidence that overcame the presumption of administrative regularity. He found specifically that Carlo had presented credible testimony, which, he believed, was confirmed by his father and brother, that he had intended all along to file for both Parcel A and B. He also found that testimony and depositions presented by BLM had not sufficiently rebutted Carlo's case since they did not effectively challenge the veracity of Carlo or his father and brother. He concluded, therefore, that Carlo had overcome the presumption of regularity and established, by a preponderance of the evidence, that he had timely applied for Parcel B (Decision at 6-8).

[2] It is well established that the Board has full authority to reverse findings of fact made by an Administrative Law Judge. See, e.g., United States v. Knoblock, 131 IBLA 48, 101 I.D. 123 (1994); United States v. Collord, 128 IBLA 266 (1994). At the same time, however, this Board has also noted that, where the resolution of disputed facts is influenced by the Judge's findings of credibility, which are in turn based upon the Judge's reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they ordinarily will not be disturbed by the Board. The basis for this deference is the fact that the Judge who presides over a hearing has the opportunity to observe the witnesses and is in the best position to judge the weight to be given to conflicting testimony. See, e.g., Yankee Gulch Joint Venture v. Bureau of Land Management, 113 IBLA 106, 136 (1990); United States v. Whittaker, 95 IBLA 271, 286 (1987); United States v. Ramsey, 84 IBLA 66, 68 (1984); United States v. Chartrand, 11 IBLA 194, 80 I.D. 408 (1973).

Admittedly, we have, on occasion, reversed an Administrative Law Judge's fact-finding even when it was implicitly based on credibility

determinations (see e.g., Lawrence E. Willmorth, 64 IBLA 159 (1982)). But, the predicate of our action in those cases was the existence of other facts of record which, to our mind, fatally compromised the testimony which the Administrative Law Judge found credible. Absent the existence of such evidence, we must exercise extreme caution in challenging findings of fact which are premised on the demeanor of the witnesses who testify before an Administrative Law Judge. See State Director for Utah v. Dunham, 3 IBLA 155, 78 I.D. 272 (1971).

We have reviewed the record on appeal and find no justification for substituting the Board's evaluation of the testimony for that of Judge McKenna. He weighed testimony on the crucial matter of Carlo's actions and intent when he filed his original application with BIA, finding that Carlo had intended to include both Parcel A and B in his application when he pointed out the areas of his use to Kathy Adams, a BIA employee. Noting the lack of testimony contradictory thereto, he overturned BLM's determination relying on his judgment of witness credibility.

In the present appeal, it suffices to note that there is adequate basis in the record to support the Judge's conclusions. BLM argues that the Judge ignored evidence which tended to show that Carlo had not conducted himself subsequent to 1971 consistent with his assertion that he believed his application encompassed Parcel B and that his recollection of the operative events was vague and unpersuasive. While we would agree with BLM that there was clearly enough evidence of record to have justified Judge McKenna in discounting Carlo's testimony, ^{3/} the fact of the matter is that he found him a convincing and credible witness. In State Director for Utah v. Dunham, supra, a similar situation was examined: "Admittedly, the appellee's testimony was not free from contradiction. However, the cold words of a record are no substitute for the exercise of the examiner's evaluation of the veracity of the witnesses. We find that the examiner's conclusions are supported by substantial evidence." Id. at 163, 78 I.D. at 275-76. So, too, in the instant appeal, we find nothing in the record developed below which would justify overturning Judge McKenna's express findings of credibility. Accordingly, BLM's appeal must be rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed

^{3/} Thus, there was certainly sufficient testimony of record that, subsequent to 1971, Carlo had maintained only a most attenuated relationship with the land embraced within Parcel B (see Tr. 141-42), such as might support a finding that his actions were inconsistent with his assertion that he believed he had applied for Parcel B in 1971. Yet, Judge McKenna, who heard all of the testimony, found to the contrary.

from is affirmed, and the case is returned to BLM for further processing consistent herewith.

James L. Burski
Administrative Judge

I concur.

John H. Kelly
Administrative Judge

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