



INTERIOR BOARD OF INDIAN APPEALS

In the Matter of the Estate of Emerson Leo Spotted Bear

44 IBIA 15 (11/08/2006)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
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ARLINGTON, VA 22203

IN THE MATTER OF THE ESTATE OF : Order Docketing and Dismissing
EMERSON LEO SPOTTED BEAR : Appeal and Referring Matter to the
: Administrative Law Judge
:
: Docket No. IBIA 07-27
:
: November 8, 2006

Appellant Betty Engen, the daughter of Emerson Leo Spotted Bear, appeals from a September 28, 2006 Order Dismissing Case from Docket entered by Administrative Law Judge (ALJ) Marcel S. Greenia in the Matter of the Estate of Emerson Leo Spotted Bear, (Putative) Deceased Oglala Sioux Indian, Case No. P-0000-17290 IP, IP Probate No. TC 224 G00. ^{1/} At issue was whether, pursuant to 43 C.F.R. § 4.204, sufficient evidence had been produced to support a determination that Spotted Bear was deceased. The ALJ concluded that there was insufficient evidence and dismissed the case. For the reasons discussed below, the Board of Indian Appeals (Board) docketed this appeal, but dismisses it for lack of jurisdiction and refers the matter to the ALJ for consideration as a petition for rehearing.

Section 4.204 of 43 C.F.R. authorizes an ALJ to “receive evidence on and determine the issue of whether any person by reason of unexplained absence, is to be presumed dead.” Pursuant to this section, Appellant first sought in 1999 to have Spotted Bear declared deceased and his estate probated. On May 24, 2001, the ALJ dismissed the case from the docket “as there had not been a ‘true diligent search or an intensive investigation’ to conclude that Emerson Spotted Bear is to be presumed dead.” Memorandum Order at 4

^{1/} The ALJ’s decision consists of three documents: (1) Order Dismissing Case From Docket (Dismissal Order), (2) an Order, containing the ALJ’s findings and conclusions in support of his dismissal order (Memorandum Order), and (3) a notice of appeal rights (Notice).

(quoting an order dated May 24, 2001). 2/ Appellant apparently did not seek rehearing nor did she appeal to this Board. 3/

Four years later, on March 28, 2005, Appellant attempted a second time to have Spotted Bear declared to be presumptively dead by filing a motion to Restore Case to Docket and Declare [Emerson Spotted Bear] Deceased. The ALJ held a hearing on March 30, 2006 at which testimony and other evidence was received concerning Appellant's efforts to locate Spotted Bear, the identity of potential heirs, and whether the putative decedent had executed a last will and testament. Memorandum Order at 5. The ALJ again concluded that "an insufficient investigation was conducted by [Appellant]" to locate Spotted Bear, and denied the motion. Memorandum Order at 8. The Notice accompanying the resulting order advised Appellant that she had 60 days to file a notice of appeal with this Board. Appellant filed an appeal with this Board within the 60-day period.

The jurisdiction of the Board in probate matters is set forth in 43 C.F.R. § 4.320(a), which limits the Board's review to appeals from orders on petitions for rehearing, petitions for reopening a probate proceeding, and tribal purchases of interests in decedents' trust estates. See also 43 C.F.R. §§ 4.1(b)(2) (same), 4.240(b) (governing the finality of ALJ decisions where no petition for rehearing is filed). Consequently, in probate matters that do not involve tribal purchases of interests, any legal and/or factual errors and omissions as well as any newly discovered evidence first must be presented to the ALJ before an appeal to the Board will be ripe for review.

Based on the foregoing, we conclude that the appeal instructions accompanying the ALJ's September 28, 2006 decision were incorrect in advising Appellant that she could file an appeal from the decision with the Board. Because Appellant followed the appeal information provided in the Notice and filed her appeal within the time period provided, the Board concludes that the appeal should be considered as a timely petition for rehearing and should be referred to the ALJ for consideration pursuant to 43 C.F.R. § 4.241. See Estate of Owen Snez, 40 IBIA 96 (2004).

2/ The ALJ's May 24, 2001 decision is not enclosed with the Notice of Appeal.

3/ It is not known whether any rehearing or appeal rights were provided with the ALJ's May 24, 2001 decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this appeal is docketed but dismissed as premature. This matter is referred to the ALJ for consideration as a petition for rehearing.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge