



INTERIOR BOARD OF INDIAN APPEALS

Estate of Clement Herman Beargrease

48 IBIA 162 (12/15/2008)

Related Board case:

55 IBIA 169

51 IBIA 312



United States Department of the Interior

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

ESTATE OF CLEMENT HERMAN)	Order Docketing and Dismissing Appeal
BEARGREASE)	
)	
)	Docket No. IBIA 09-01
)	
)	
)	December 15, 2008

Appellant Barbara Anne (Jacobson) Wienke seeks review from the Board of Indian Appeals (Board) of an Order Denying Petition to Reopen Estate (Order Denying Reopening) entered on July 29, 2008, by Administrative Law Judge Richard J. Hough (ALJ) in the estate of Clement Herman Beargrease (Decedent), deceased Fond Du Lac Indian, Probate No. IP TC 510S 93, P000068067IP. Appellant maintains that she is Decedent’s daughter and was omitted as an heir when his estate was originally probated in 1995.¹ We docket this appeal but dismiss it as untimely because it was filed more than 60 days after the date of the ALJ’s decision.

Appeals from orders on reopening must be filed with the Board “[w]ithin 60 days from the date of the decision.” 43 C.F.R. § 4.320(b). The 60-day deadline for filing an appeal is jurisdictional. *See id.* § 4.320(b)(3). Untimely appeals must be dismissed. *Estate of Bernard Charles Little Nest*, 47 IBIA 52 (2008); *Estate of Alvin Sherwood LeSage*, 46 IBIA 324 (2008).

The Order Denying Reopening issued on July 29, 2008. The “Notice to All Persons Having or Claiming an Interest in the Subject Matter of this Proceeding” (Notice) that accompanied the Order Denying Reopening contained correct instructions for appealing to the Board, including the time for filing an appeal and the current address for the Board. Appellant was included on the service list for the Order Denying Reopening with the same address that she has included with her appeal to this Board and thus is presumed to have received the Order Denying Reopening and the accompanying Notice. *See Estate of Ella Sarah Case Barnes*, 17 IBIA 72, 74 (1989).

¹ In the Order Determining Heirs, which issued in Decedent’s estate on April 6, 1995, all of Decedent’s Indian trust property was distributed to Decedent’s non-Indian widow.

Pursuant to 43 C.F.R. § 4.320(b) and the instructions contained in the Notice, Appellant then had until September 29, 2008, to file her appeal with the Board.² Appellant's appeal was not filed until October 3, 2008, when the Board received her forwarded appeal from the Office of Hearings and Appeals at Fort Snelling, Minnesota. On October 7, 2008, the Board ordered Appellant to show cause why her appeal should not be dismissed as untimely. Appellant filed a response.³

In response to the Board's order to show cause, Appellant contends that "[d]ue to my disability I am not able to organize research or gather information in a timely fashion." Response to Order to Show Cause. She also avers that she has sought unsuccessfully to obtain legal advice from her tribe's legal office, from the Bureau of Indian Affairs, and from a local attorney. Although Appellant may have a disability or may have been seeking assistance with her appeal, these reasons do not provide a basis for the Board to ignore the fact that she failed to file her appeal with the Board within 60 days from the date of the Order Denying Reopening. As already noted, the deadline for filing an appeal is jurisdictional. Even if that were not the case, we note that, notwithstanding the reasons offered by Appellant for her failure to submit a timely appeal to the Board, she was able to send her appeal to the Office of Hearings and Appeals in Fort Snelling and could well have properly filed it with the Board in a timely manner.

Appellant also avers that 43 C.F.R. § 4.332(c) "may apply" to excuse her untimely appeal. Subsection 4.332(c) provides, "[w]hen the appellant is an Indian . . . not represented by counsel, the official who issued the decision appealed shall, upon request of the appellant, render such assistance as is appropriate in the preparation of the appeal." But this subsection cannot aid Appellant in overcoming her untimeliness because it does not apply to probate proceedings. Section 4.332(c) applies to administrative appeals from decisions by officials of the Bureau of Indian Affairs. No similar provision is included in the probate regulations. *See* 43 C.F.R. §§ 4.320-4.323. Moreover, Judge Hough did provide

² Appellant gained two extra days to submit her appeal inasmuch as the 60th day after the date of the Order Denying Petition, September 27, fell on a Saturday. Pursuant to 43 C.F.R. § 4.310(c), where the last day for filing falls on a nonbusiness day (Saturday, Sunday, or Federal holiday), the filing date is extended to the next business day. *Estate of LeSage*, 46 IBIA at 325. Therefore, the deadline for Appellant's appeal was extended to Monday, September 29.

³ In addition, the Board ordered Appellant to send a copy of her notice of appeal to all interested parties and to file a statement with the Board to confirm that she had done so. Appellant provided the required confirmation to the Board.

assistance to Appellant by informing her, in the Notice that accompanied his Order Denying Reopening, that she had 60 days to appeal his decision to this Board and by providing her with the Board's correct address. Appellant did not follow the instructions provided to her by Judge Hough.

We note that Appellant asserts that she is "not seeking financial gain, I just want to be equally represented in this matter as I am [Decedent's] only legal heir that was an enrolled member of the Fond Du Lac Tribe at the time [the] probate [decision was made]." Letter from Appellant to Board, Nov. 12, 2008. To the extent that Appellant seeks to have official notice in Decedent's probate records that she is his daughter, Appellant is advised that Decedent's probate record now contains the communications from her and from BIA, including the records she submitted that relate to her paternity. However, because Appellant's notice of appeal was filed with the Board after the 60-day appeal period expired, her appeal as to the merits of the Order Denying Reopening must be dismissed.

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 docketed this appeal, but dismisses it for lack of jurisdiction because it is untimely.

I concur:

 // original signed
Debora G. Luther
Administrative Judge

 // original signed
Steven K. Linscheid
Chief Administrative Judge