



INTERIOR BOARD OF INDIAN APPEALS

Estate of Jerome Hummingbird

55 IBIA 210 (07/31/2012)

Reconsideration denied:

55 IBIA 246



## Background

Decedent died intestate on May 20, 2009. The ALJ held a probate hearing for Decedent's estate on May 17, 2010, where Appellant presented copies of her adoption decree and her original birth certificate. Appellant's original birth certificate lists her mother's maiden name as Janice Spottedhorse; in another box on the birth certificate, Appellant's mother is identified as Janice Bird. No father is identified on the birth certificate.

On May 27, 2010, the ALJ issued his Order Determining Heirs, in which he found that Appellant had been adopted out during Decedent's lifetime and therefore is ineligible to share in Decedent's estate. *See* 25 U.S.C. § 2206(j)(2)(B)(iii)(I) (under AIPRA's default rule, a person who has been adopted is not considered to be the child or issue of her natural parents for purposes of AIPRA). The ALJ therefore declined to determine whether Decedent was Appellant's biological father because that determination would not affect the distribution of Decedent's estate under AIPRA.

After the Order Determining Heirs was issued, Appellant sent two letters to the ALJ, each discussing her search for her biological parents and requesting DNA tests to confirm her biological relationship to Decedent. *See* Letters from Appellant to ALJ, June 4, 2010, & June 14, 2010.<sup>2</sup> In her letters, Appellant also contested testimony given at the hearing that Jennie Birdshead Curtis was not Appellant's biological mother. *See id.*; *see also* Transcript of Probate Hearing, May 17, 2010, at 10:18-19:20. Appellant contends that Jennie Birdshead Curtis is the same person as Janice Spottedhorse and Janice Bird.

The ALJ construed Appellant's two letters as a single petition for rehearing, which he then denied. In the Rehearing Order, the ALJ explained that Appellant did not dispute that AIPRA applied or that she had been adopted by another family during Decedent's lifetime. The ALJ thus found that the issue of Appellant's paternity was moot because she would not share in the estate regardless of her biological relationship to Decedent. The ALJ held that Appellant did not identify error or injustice that would result from upholding his determination that Appellant was not an heir of Decedent. He found that Appellant's only purpose in seeking rehearing was to elicit further information about her biological relations, which is an insufficient basis for seeking rehearing. He therefore determined that Appellant did not have standing to seek rehearing, and he dismissed her petition. Rehearing Order at 1 (citing *Estate of Elvina Shay*, 44 IBIA 133 (2007)).

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<sup>2</sup> Neither probate judges nor the Board presently have authority to order DNA testing. *Estate of Earl Sanford Howe, Jr.*, 53 IBIA 3, 4 n.2 (2011).

Appellant then appealed the Rehearing Order to the Board.<sup>3</sup> On appeal, Appellant argues that the ALJ committed error by not investigating whether tribal laws existed that might apply instead of AIPRA's default intestacy rules with regard to adopted-out children. *See* 25 U.S.C. § 2206(j)(2)(B)(iii)(I). For support, she cites § 2206(j)(2)(B)(iii)(II) of AIPRA, which states that Federal and tribal laws “may otherwise define the inheritance rights of adopted-out children.” Appellant’s filings cite no tribal law at all, much less any that relate to the inheritance rights of adopted-out children. Instead she alleges, without support, that the ALJ did not fulfill an affirmative duty to seek out and identify such laws before excluding Appellant from sharing in the estate. Appellant now asks that the Rehearing Order and underlying Order Determining Heirs be reversed and remanded with instructions to apply § 2206(j)(2)(B)(iii)(I) only after the ALJ has first determined that no other Federal or tribal laws could apply.

### Discussion

We affirm the Rehearing Order on a threshold issue: Appellant failed to raise the argument she makes in this appeal in her petition for rehearing. But even if Appellant’s newest claim were properly before the Board, we would still affirm the Rehearing Order on its merits.

The Board ordinarily declines to consider issues that were not first raised before the ALJ. *See* 43 C.F.R. § 4.318 (“An appeal will be limited to those issues that were before the administrative law judge . . . [in] the petition for rehearing . . . .”); *Estate of Dominic Orin Stevens, Sr.*, 55 IBIA 53, 62 (2012). We see no reason to depart from our rule here. Therefore, because Appellant did not raise this issue before the ALJ in her petition for rehearing, we affirm the Rehearing Order.

Had we reached the merits, we would be compelled to find that Appellant failed to meet her burden, which is to demonstrate error in the Rehearing Order. *See Estate of Byron Keith Other Bull*, 55 IBIA 115, 117 (2012). She makes only an unsupported assumption that the ALJ failed to assert whether tribal law might apply and she fails to identify any law that requires the ALJ to do so. In fact, the law is to the contrary: The ALJ must identify the laws upon which he *did* rely in his decision. *See* 43 C.F.R. § 30.235(c)(1) (in the case of an intestate decedent, the probate judge must “[c]ite the law of descent and distribution *under which the decision is made.*” (Emphasis added)).

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<sup>3</sup> Appellant initially sent her appeal to the ALJ, who in turn forwarded it to the Board, where it was timely received. Soon after, the Board received a second notice of appeal from Appellant, through counsel. The two notices, which address identical issues, are construed as a single appeal.

Moreover, Appellant has not identified any tribal laws that might apply to Decedent's estate. If such laws exist and are applicable, it would be the failure to apply them that would be the source of injury to Appellant, not simply the failure of a judge to assert whether tribal law exists that could be applied to Decedent's estate. Thus, not only has Appellant failed to show that the ALJ has the burden of confirming that he has searched for applicable tribal law and found none, she has not shown that there is, in fact, tribal law that should have been applied instead of AIPRA.

Had Appellant raised her argument before the ALJ, the ALJ in all likelihood would have allowed Appellant an opportunity to identify any alleged applicable law, and might have conducted his own inquiry into that possibility, assuming he had not already done so. *See, e.g.*, 25 U.S.C. §§ 2205, 2206(a)(1)(A) & (b)(1). But we reject the argument that the ALJ's decision must be reversed for failure to assert, either on the record or in his decision, that he confirmed the absence or inapplicability of tribal law. Nothing in the record suggests that the ALJ overlooked applicable tribal law and nothing in the law requires that he assert that tribal law on the rights of adopted-out children does not exist or does exist but is inapplicable. Thus, we would still affirm the Rehearing Order.

### Conclusion

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 affirms the July 8, 2010, dismissal of rehearing.

I concur:

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Debora G. Luther  
Administrative Judge

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Steven K. Linscheid  
Chief Administrative Judge