



INTERIOR BOARD OF INDIAN APPEALS

Estate of Thomas Jefferson Boe

56 IBIA 15 (10/31/2012)

Related Board case:
47 IBIA 138



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

ESTATE OF THOMAS JEFFERSON)	Order Affirming Decision
BOE)	
)	Docket No. IBIA 10-142
)	
)	October 31, 2012

Appellant Walter David Boe, a.k.a. David Walter Nolen, appealed to the Board of Indian Appeals (Board) from an August 27, 2010, decision (Final Reopening Order) by Administrative Law Judge (ALJ) Thomas F. Gordon that removed Appellant as an heir to the estate of Thomas Jefferson Boe (Decedent).¹ We affirm the Final Reopening Order because the preponderance of the evidence supported the ALJ’s determinations that the presumption of paternity, pursuant to which Appellant is presumed to be Decedent’s son, was rebutted and that Appellant is not Decedent’s son.

Appellant had initially been excluded from the 1984 Order Determining Heirs for Decedent’s estate, but petitioned for reopening and was added as an heir in 2001. Upon learning of the 2001 reopening in 2006, one of Decedent’s daughters (Linda) petitioned to have Appellant removed because she claimed he was not related to Decedent. The petition was denied and Linda appealed the denial to the Board. The Board vacated the denial and remanded the matter for further proceedings to determine whether Decedent’s estate should be reopened to remove Appellant as an heir. *Estate of Thomas Boe*, 47 IBIA 138 (2008) (*Estate of Boe I*).

On remand, Linda had the burden of rebutting the presumption that Appellant, who was conceived and born while his mother (Lillian) was married to Decedent, is Decedent’s son. Linda rebutted the presumption by presenting evidence showing that Decedent and Lillian did not have physical access to each other at the time Appellant likely was conceived. The burden then shifted to Appellant to prove that he was Decedent’s son. After receiving

¹ Decedent was a Gros Ventre Indian of the Fort Belknap Reservation, whose estate was assigned No. P000070677IP in ProTrac, the Department of the Interior’s tracking system.

and weighing all of the evidence, the ALJ determined that Appellant had not met his burden. He thus reopened the estate and removed Appellant as an heir.

On appeal, Appellant first argues that the evidence was insufficient to rebut the presumption of paternity and thus he is entitled to the benefit of the presumption. We disagree and find that the evidence—documentary evidence of Decedent’s military service and testimony that he was stationed in Japan at the time of Appellant’s conception—rebutted the presumption of paternity. Appellant also argues that, notwithstanding the absence of the presumption, he met his burden of establishing that Decedent is his father. Again, we are compelled to agree with the ALJ that the greater weight of all the evidence supports the finding that Appellant was not Decedent’s child. We therefore affirm the ALJ’s August 27, 2010, Final Reopening Order.

Background

I. Legal Framework

We begin with the presumption of paternity: “When a child is conceived and born during the course of a valid marriage, as was Appellant, it is presumed that the child’s parents are the husband and wife.” *Estate of Anthony “Tony” Henry Ross*, 44 IBIA 113, 120 (2007). This presumption of paternity may be rebutted by showing either (1) the biological unlikelihood of the husband being the child’s father (e.g., through DNA or blood tests or by proving infertility), or (2) that the husband and wife did not have physical access to one another for the purpose of sexual relations at the time the child was conceived. *Id.* and cases cited therein; *see also* 41 Am. Jur. 2d Illegitimate Children §§ 26-27, 31-32 (2005). To rebut the presumption by showing a lack of access, a challenger need not establish incontrovertible proof that the spouses lacked physical access to each other. The quantum of evidence required both to rebut the presumption and establish paternity is a preponderance of the evidence. *Estate of Ross*, 44 IBIA at 120. A “preponderance of the evidence” is:

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black’s Law Dictionary 1301 (9th ed. 2009).

Thus, the party challenging the presumption of paternity need not establish absolutely or conclusively the impossibility of physical access, but only that the superior

weight of the evidence supports the conclusion that the spouses did not have physical access to one another at or about the time of conception (or, alternatively, supports the biological unlikelihood of paternity).

Once the presumption is rebutted, the burden of producing evidence then shifts to the party seeking to establish paternity. Under the facts presented here, it is Appellant who seeks a determination that Decedent is his father. Therefore, Appellant bears the burden of producing evidence that shows it is more likely than not that Decedent *is* Appellant's biological father. Under the facts of this case—where the Appellant contends that he *is* the son of the husband—the burden of refuting the evidence that rebuts the presumption effectively merges with the burden of establishing paternity.

II. Family History

Decedent and Lillian were married in April 1937. *See* Marriage License and Marriage Certificate (PR² 3 Ex. 6). Lillian bore five children between 1938 and 1943: Thomas, Robert, Linda, Kenneth, and Margery. Linda and Thomas testified that, after Decedent severely beat Lillian, Decedent and Lillian separated permanently after Christmas 1944. Tr. at 18-19.³ Decedent moved out of the family home, enlisted in the Army in February 1945, and received an honorable discharge in December 1945. *Id.*; *see also* Army Enlistment Records (PR 3 Ex. 11). Decedent re-enlisted in February 1946 and was not discharged until February 1949. Army Enlistment Records (PR 3 Ex. 11). Thomas testified that during that second tour of duty, Decedent was stationed in Japan and Alaska. Tr. at 57. Linda and Thomas testified that Decedent wrote letters and sent pictures from Japan. *Id.* at 18, 58. Thomas and Linda also testified that Decedent was completely absent from the family home between 1944 until sometime in 1949, when he returned for a brief visit. *Id.* at 14, 18-19, 57. According to Thomas, “there was no love lost between [Lillian and Decedent].” *Id.* at 31.

Appellant was born on December 5, 1947, and his birth certificate reflects that the pregnancy lasted 9 months. *See* Appellant's Birth Certificate (PR 3 Ex. 5). Appellant's birth certificate lists his name as “Walter David Boe,” lists Decedent as his father, and lists

² All citations to “PR” are to the probate record for Decedent's estate.

³ All citations herein to “Tr.” are to the transcript of the hearing held on September 24, 2009.

“Lillian Boe” as the person who provided the information for the birth certificate. *Id.*⁴ The birth certificate also reflected that Lillian had resided in Ventura for the past 7 years. *Id.*

Lillian, represented by counsel, filed for divorce from Decedent in 1950. In May 1950, Lillian and Decedent both signed a divorce agreement (Agreement) in which they agreed, among other things, that the marriage had produced five children: Thomas, Robert, Linda, Kenneth, and Margery. Agreement, May 10, 1950 (PR 1 Tab 10, Attach.). Decedent agreed to pay child support for those five children and retained visitation rights. *Id.* The Agreement did not mention Appellant, much less provide for his care or visitation rights. An Interlocutory Judgment of Divorce (IJD) was issued by the Ventura County (California) Superior Court and it incorporated the Agreement by reference. IJD, May 26, 1950 (PR 1 Tab 11, Attach.). The IJD also named “the five minor children of the parties hereto,” and did not mention Appellant. *Id.* at 2. The final Judgment of Divorce was issued one year later, in 1951. PR 1 Tab 11, Attach.

Lillian married Robert Nolen sometime in the early 1950s. Tr. at 75, 101-102. Appellant assumed the name “David Walter Nolen” after Lillian remarried.⁵ See School Enrollment Record (PR 3 Ex. 7). None of Appellant’s older siblings adopted the name Nolen. Lillian died in 1976. OHA-7 Form (PR 1 Tab 55).

Decedent died on February 2, 1981. At the time of his death, he was the sole owner of all mineral interests in Allotment No. 999 on the Fort Belknap Reservation in Montana. PR 1 Tab 59. The record does not reflect any additional trust interests that Decedent owned.

III. Procedural History

Decedent’s estate was probated in 1984. No notice of the probate proceeding was sent to Appellant, and only Linda appeared at the hearing. The records before the ALJ⁶ indicated that Decedent had five children: Thomas, Linda, Robert, Kenneth, and Margery. The records did not mention Appellant, nor did Linda mention Appellant in her testimony.

⁴ There is no signature block on the birth certificate for the parents’ or the informant’s signatures.

⁵ Nothing in the record suggests that Robert Nolen was Appellant’s biological or adoptive father. In fact, Thomas testified that a Wendell (or Windell) P. Mitchell, who lived with the family for a few months in 1947, was Appellant’s father. Tr. at 26-30.

⁶ At least six probate judges have presided over various stages of this case. For simplicity, we will not distinguish between them.

The ALJ then issued the Order Determining Heirs and distributed Decedent's trust estate in equal 1/3 shares to Thomas, Linda, and Kenneth. PR 1 Tab 56.⁷

In 1999, Appellant petitioned for reopening after learning that he was not included in the Order Determining Heirs. He averred that he did not have notice of the 1984 hearing and that he was Decedent's child. For proof, Appellant submitted his birth certificate. He also submitted notarized statements from Lillian's siblings stating that they believed that Decedent was Appellant's father. PR 3 Ex. 10. The ALJ issued an Order to Show Cause (OSC) on August 17, 2001, ordering the interested parties to show cause why Appellant should not be added as an heir. PR 1 Tab 43. No responses were received, so the ALJ added Appellant as an heir and redistributed the trust estate accordingly (in 1/4 shares to each of the four heirs—Thomas, Linda, Kenneth, and Appellant). AR 1 Tab 42.⁸

In 2006, Linda learned for the first time that Appellant had been added as an heir. Linda petitioned to reopen Decedent's estate to set aside the 2001 decision and remove Appellant as an heir because, according to Linda, Appellant was not Decedent's child. The probate judge assigned to the case denied Linda's petition for reopening. Order Denying Petition to Reopen, May 12, 2006 (PR 1 Tab 41).

Linda appealed the denial of reopening to the Board. *See Estate of Boe I*. On appeal, the Board vacated the denial of reopening and remanded the matter to allow Linda to present her arguments. The Board held:

[I]t is undisputed that [Appellant] was born during the marriage between Decedent and Lillian, and therefore the legal presumption attaches that Decedent is [Appellant's] father. . . . Thus, after a supplemental hearing, and upon consideration of evidence offered by or on behalf of [Linda] or [Appellant], if it is determined that [Linda] has not rebutted the presumption of paternity by a preponderance of the evidence, then there are no grounds to grant reopening to set aside the 2001 order. If, on the other hand, [Linda]

⁷ Robert predeceased Decedent and did not leave a widow or issue; Kenneth post-deceased Decedent. As to Margery, Linda testified in 1984 that Margery had told her that Decedent was not her father, which led to her omission as one of Decedent's heirs in the Order Determining Heirs. Subsequently, Margery successfully petitioned for reopening to be included as a daughter and heir of Decedent. *See* Final Reopening Order at 10; Order Reopening Case to Address Paternity Issues, Mar. 17, 2010, at 11 (PR 1 Tab 10, Attach.). That decision was not appealed, and is now final.

⁸ The ALJ's OSC was sent to Linda at a "long-outdated" address in Idaho. *Estate of Boe I*, 47 IBIA at 140.

does rebut the presumption by a preponderance of the evidence, the probate judge must then determine whether a preponderance of the evidence, taken as a whole and without consideration of the presumption, establishes that Decedent was [Appellant's] father. If [Linda] rebuts the presumption of paternity, the burden then shifts to [Appellant] to prove by a preponderance of the evidence that he is Decedent's son. If [Appellant] then does not satisfy his burden, the estate should be reopened and the 2001 order set aside, because to do otherwise would result in a manifest injustice.

Id. at 145.

The ALJ held a hearing on September 24, 2009. Linda argued that Decedent had left the family home long before Appellant was conceived and was on active duty with the U.S. Army in Japan in 1947. She presented documentary evidence of Decedent's enlistment, but did not have specific information related to his duty stations or periods of leave.⁹ Both Linda and Thomas testified that Decedent moved out of the family home in 1944, after he beat Lillian. Thomas, who turned 9 years old in 1947, testified that Decedent "shipped out for Japan" shortly after reenlisting in 1946 and did not return to California until 1949. Tr. at 57. He and Linda both testified that Decedent sent letters and pictures from Japan during his absence.

Appellant's representative, Kimberly Hernandez (Kimberly), also presented evidence at the 2009 hearing.¹⁰ She resubmitted the birth certificate and the statements from Lillian's siblings. She also submitted supplemental statements from the siblings and Appellant's elementary school enrollment record. Appellant offered explanations for why he might have been left out of the divorce documents and suggested that Decedent and Lillian may have visited one another in 1947, but did not submit any evidence to support his speculations.

At the hearing, the parties discussed documents from Decedent's and Lillian's divorce proceedings, but no one had copies of the documents at that time. The ALJ later obtained copies of the divorce judgments, circulated them to the interested parties, and

⁹ Those records were apparently lost in a fire at an Army records center in 1973.

¹⁰ Appellant did not appear at either the 2009 hearing or the 2010 supplementary hearing. He authorized Kimberly, who is his daughter, to represent him in this matter and she explained that his doctor advised that he should avoid stressful situations. *See* PR 3 Ex. B. Appellant revoked Kimberly's power of attorney on April 3, 2012, Notice of Revocation, Apr. 3, 2012, and is represented by counsel before the Board.

solicited responses, *see* Order Disseminating Information, Jan. 28, 2010 (AR 1 Tab 11), which were received prior to issuance of the March 17, 2010, Order Reopening Case.

In his Order Reopening Case, the ALJ held that Linda had successfully rebutted the presumption of paternity. *Id.* at 4-9. He determined that a preponderance of the evidence supported the finding that Decedent did not have access to Lillian for sexual relations at the time Appellant was conceived. *Id.* The ALJ relied on the Army enlistment records, Thomas's testimony, and the IJD. *Id.* at 9. He scheduled a supplemental hearing to give Appellant an opportunity to establish that he is Decedent's son. In addition, the ALJ also obtained a copy of the Agreement referenced in the IJD. The ALJ provided a copy of the Agreement to the parties with his Order Reopening Case and advised that the parties could provide evidence concerning the Agreement as well as the divorce proceedings generally at the supplemental hearing.

The supplemental hearing was held on June 22, 2010. At the supplemental hearing, Appellant (through Kimberly) rested on the same evidence that he submitted at the 2009 hearing. Again, Appellant offered suppositions to explain why he might have been omitted from the divorce documents and suggested again that Decedent and Lillian may have visited one another in 1947. However, as before, Appellant presented no evidence to support his speculations.

The ALJ issued his Final Reopening Order on August 27, 2010.¹¹ He first reiterated his holding that Linda had rebutted the presumption of paternity as to Appellant. Final Reopening Order at 6-8. He then weighed all the evidence without the benefit of the presumption and found that a preponderance of the evidence supported the finding that Decedent was not Appellant's father. *Id.* at 10. The ALJ's conclusions were based on Thomas's testimony, the Army enlistment records, and the divorce documents, especially the Agreement. *Id.* at 8-10. He thus reopened the case to set aside the 2001 reopening order and removed Appellant as an heir.

The ALJ explained and reaffirmed his conclusion that Thomas's testimony was reliable. Final Reopening Order at 7. He also noted that Thomas's testimony that Decedent was absent from the household in 1947 was "uncontested." *Id.* The ALJ agreed with Appellant that the divorce documents were not "'determinative' or 'conclusive'" as to the issue of paternity, but he found them to be "relevant and probative" nonetheless. *Id.* at 8. He "assign[ed] little weight" to the school record and to the BIA records because he presumed they both were based on the birth certificate and the statements from Lillian's siblings. *Id.* at 9. Finally, though Lillian's siblings believe Appellant to be Decedent's child,

¹¹ There was a technical correction issued on September 9, 2010.

their beliefs are based on the birth certificate and the fact that Lillian and Decedent were married at the time. *Id.* at 10. Thus, the ALJ concluded that their statements added little to Appellant's case. The ALJ assigned greater weight to the divorce documents than to the birth certificate and gave greater weight to Thomas's testimony than to Lillian's siblings' statements. He thus determined that the greater weight of the evidence supported finding that Appellant was not Decedent's child and he removed Appellant as an heir.

Appellant appealed the ALJ's decision to the Board. Appellant submitted an opening brief, Linda submitted an answer, and Appellant submitted a reply.

Discussion

I. Standard and Scope of Review

In *Estate of Dominic Orin Stevens, Sr.*, 55 IBIA 53, 62 (2012), we set forth our well-known standard and scope of review:

The Board reviews factual determinations by the probate judge to determine whether they are substantially supported by the record. *Estate of Samuel Johnson (John) Aimsback (Aims Back)*, 45 IBIA 298, 303 (2007). We review legal determinations and the sufficiency of the evidence *de novo*. *Estate of Laberta Stewart*, 54 IBIA 198, 203 (2012). The burden lies with Appellants to show error in the [probate judge's] Order. *See Estate of Margerate Arline Glenn*, 50 IBIA 5, 21 (2009).

Unless manifest error or injustice is shown, the Board's scope of review is limited to reviewing those issues brought before the [probate judge] on rehearing [or reopening]. 43 C.F.R. § 4.318 (scope of the Board's review ordinarily is limited to those issues raised before the probate judge on rehearing or reopening); *Estate of Edward Benedict Defender*, 47 IBIA 271, 280 (2008), *aff'd*, *Defender v. U.S. Dept. of the Interior*, Civ. No. 08-1022, 2010 WL 1299767 (D.S.D. Mar. 30, 2010). Therefore, we ordinarily will not consider allegations of error or evidence that could have been, but were not, presented to the probate judge.

II. Merits

On appeal, Appellant argues that the ALJ erred in finding that Linda's evidence was sufficient to rebut the presumption of paternity. Opening Brief (Br.) at 3. He asserts that Linda's evidence did not conclusively "prove" a lack of access and that Thomas's testimony was not reliable or sufficient. *Id.* at 4-5. He claims that the divorce documents are not

relevant in resolving the issue of access or of paternity in general. *Id.* at 6-9. He argues that there was a second step to rebutting the presumption of paternity—establishing who *is* Appellant’s father—that Linda did not complete. *Id.* at 10-11. Appellant also maintains that there was no manifest error shown to support reopening Decedent’s estate to remove him as an heir. Finally, he argues that evidence in the record supports a finding that Decedent was Appellant’s father. *Id.* at 9, 11-12. We disagree with Appellant and we affirm the ALJ for the reasons that follow.

A. Presumption of Paternity

Looking first to the sufficiency of the evidence proffered by Linda to rebut the presumption, we agree with the ALJ that she met her burden. The ALJ found that “[w]hen the IJD is combined with Thomas’[s] testimony, and with the evidence that the decedent was in the army when [Appellant] was conceived, . . . Linda ha[s] successfully rebutted the presumption that [Appellant] was a child of the marriage between the decedent and Lillian.” Order Reopening Case at 9. As explained *supra*, the presumption of paternity may be rebutted by showing (1) that it is biologically unlikely that the husband fathered the child or (2) that the husband and wife did not have physical access to one another at the time of conception. Linda did not produce any evidence showing that it was biologically unlikely that Decedent fathered Appellant, but she did produce evidence showing that it is more likely than not that Decedent and Lillian did not have access to each other for sexual relations at the time of Appellant’s conception in or about March 1947: Both Thomas and Linda testified that Decedent left the family home and permanently separated from Lillian in 1944; they testified that there was great animosity between Decedent and Lillian and that they never reconciled; they also testified that Decedent was stationed in Japan in 1947 and did not return to visit the family until 1949; and they testified that a man from Texas was living in the family home in the first few months of 1947 when Appellant was conceived and that this man is Appellant’s father. No evidence was offered to contradict or refute this evidence. In addition, the testimony she offered is partly corroborated by the Army enlistment records that show that Decedent was on active duty throughout 1947 and by Appellant’s concession that “Decedent was *still* serving in Japan until at least mid-November 1948,” based on a newspaper article that confirmed that Decedent was stationed in Japan in November 1948. Opening Br. at 5 n.27 (emphasis added).¹²

¹² Appellant did not produce a copy of the article but argued that it nevertheless showed that Thomas’s testimony was not reliable because he testified that Decedent left Japan in early or mid-1948. Because this argument is unsupported—Appellant did not produce a copy of the article—it does not undercut Thomas’s testimony. We are not so constrained with respect to any statements that Appellant makes that are against his interests: He asserts that “Decedent was *still* serving in Japan until at least mid-November 1948,”

(continued...)

Appellant argues not only that Linda's evidence, itself, is insufficient to rebut the presumption of paternity. We disagree. To the contrary, we agree with the ALJ that Linda's evidence is both supportive and probative of the issue of Lillian's and Decedent's lack of physical access to one another.

Appellant maintains that Linda failed to meet her burden because, “[w]hile the evidence does show that Decedent was enlisted in the Army and may not have been living in the family home when [Appellant] was conceived, it fails to prove that Decedent and Lillian lacked access to one another for sexual relations at [the] time [of Appellant's conception].” Opening Br. at 3. Appellant continues to speculate that Decedent may have visited Lillian while on leave from the Army or that Lillian may have visited Decedent. Linda was not required to rule out each and every opportunity that might have existed for Decedent to have fathered Appellant. Doing so would be a higher burden of proof than is required. Linda's burden was to show that it was more likely than not that Decedent and Lillian did not have access to one another, and we conclude that the uncontroverted evidence—that (1) Decedent was on active duty with the Army from 1946-1949 and stationed in Japan and Alaska during this time while Lillian remained in Ventura, California, and (2) relations between husband and wife were hostile—is more than sufficient to support the ALJ's conclusion that it is more likely than not that Decedent and Lillian did not have access to one another at the time Appellant was conceived.

Next, Appellant argues that Thomas's (and, presumably, Linda's) testimony is unreliable because, at the time of his testimony, Thomas was recalling events that occurred more than 60 years earlier.¹³ Appellant maintains that the Board has cautioned against relying upon “relationships and events that occurred some 50 years ago.” Opening Br. at 5 n.25 (quoting *Estate of Willard Guy*, 13 IBIA 252, 254 (1985)). In *Estate of Guy*, “virtually all of the testimony . . . [was] at best hearsay.” 13 IBIA at 254. But, Thomas and Linda were not recounting hearsay when they testified that Decedent left their mother's home shortly after Christmas in 1944 and they did not see him again until 1949. This testimony is based on their personal knowledge. To the extent that they testified that Decedent was stationed in Japan, they relied on letters and pictures, but Appellant concedes that Decedent was stationed in Japan.

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Opening Br. at 5 n.27 (emphasis added), which at a minimum corroborates Thomas's and Linda's testimony that Decedent was stationed in Japan and at most concedes that Decedent was stationed in Japan when Appellant was conceived.

¹³ Thomas was born in March 1938 and, therefore, was 9 years old when Appellant was conceived and born in 1947.

Appellant also argues that Thomas's testimony is unreliable because the ALJ found it "admittedly unclear" how Thomas knew of Decedent's dates of employment and duty stations. Opening Br. at 5 (quoting Final Reopening Order at 7).¹⁴ But the ALJ concluded that "[r]egardless of where the decedent was stationed in 1947, however, Thomas[s] testimony that the decedent was absent from the household at that time is uncontested." Final Reopening Order at 7. We agree with the ALJ that the evidence supports his conclusion that Lillian and Decedent were not cohabiting and, in fact, were antagonistic towards each other. Moreover, as we have previously pointed out, Appellant now concedes that Decedent was indeed stationed in Japan, which corroborates Thomas's and Linda's testimony.

In his final argument as to Thomas's testimony, Appellant asserts that it should be discounted because his testimony is inconsistent and therefore unreliable. This argument was not raised below and therefore we may disregard it. But even assuming that it had been raised below, the examples provided by Appellant did not concern the significant and material facts on which we rely and which are uncontroverted: Decedent was active duty military at the time Decedent was conceived, was not living in the family home at that time, was likely living in Japan, and that relations between Decedent and Lillian were hostile.¹⁵

Aside from challenging Thomas's testimony, Appellant also claims that rebutting the presumption of paternity is a "two-step process," wherein the challenger first shows biological unlikelihood or lack of access between husband and wife, and second must establish paternity by another man. Opening Br. at 10-11. Appellant errs. This two-step process applies when a child, born into a valid marriage, seeks to establish paternity by a man *other than* the husband. See *Estate of Ross*, 44 IBIA at 121.¹⁶ Here, the issue is whether

¹⁴ The ALJ only stated it was unclear how Thomas knew of Decedent's duty stations, not the dates of his deployment, which were established by Decedent's enlistment records.

¹⁵ Appellant provides three examples of "inconsistencies" in Thomas's testimony: Thomas first stated that Decedent was stationed in Kobe, then stated it was Kobe or Yokohama; Thomas stated that Decedent was stationed in Japan until the first part of 1948, when it appears that he might have been stationed there still in November 1948; and Thomas maintained that Margery was not Decedent's daughter, then changed his mind and agreed that she was.

¹⁶ In *Estate of Ross*, the appellant argued that he was the decedent's son and one of his heirs. However, the appellant was born during the marriage of his mother to a different man. Thus, in order to establish that appellant was entitled to inherit from the decedent, the appellant not only had the burden of rebutting the presumption of paternity, but also the

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the husband in the marriage fathered Appellant, not whether someone outside the marriage fathered Appellant. Thus, establishing Appellant's paternity by another man is not required to rebut the presumption of paternity.

Finally, Appellant argues that there is no "manifest error" that justifies reopening Decedent's probate to remove him as an heir. Opening Br. at 11 (citing 43 C.F.R. § 4.242(i)¹⁷). This argument, too, was not raised below and, moreover, attempts to revisit our decision in *Estate of Boe I*. In *Estate of Boe I*, we determined that Linda was entitled to an opportunity to rebut the presumption that Appellant is Decedent's son and if the evidence ultimately showed that he is not, it would then be manifest error *not* to reopen the estate to remove Appellant as an heir. 47 IBIA at 145. That decision is final and we will not revisit it here.

B. Shifting Burdens: Appellant's Evidence that Decedent is his Father

In rebutting the presumption of paternity, Linda's burden was to show that it was more likely than not that Decedent and Lillian did not have physical access to each other in March 1947 when Appellant likely was conceived. We agree with the ALJ that she met that burden. Once the presumption of paternity was rebutted, the burden then shifted to Appellant to prove by a preponderance of the evidence that Decedent *is* his biological father. Appellant contends that his birth certificate, Margery's sworn statement, the statements of Lillian's brother and two sisters,¹⁸ BIA's "certification," and Appellant's school records, taken as a whole, establish that Decedent is his father. Again, we agree with the ALJ that this evidence did not prove paternity.

Lillian's siblings and Margery all offer their *opinions* that they believe Decedent to be Appellant's father, but no foundation for their opinions is provided. *See* Statements (PR 3, Ex. 10). Similarly, nothing in BIA's certificate explains how BIA arrived at *its* conclusion that Decedent is Appellant's father. The school records do not purport to decide Appellant's paternity, but only note that his last name is also reflected to be Boe. The birth certificate is the most probative evidence proffered by Appellant. It identifies Decedent as

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burden of establishing that the decedent was his biological father. *See* 44 IBIA at 123. Here, the burden rests with Appellant to prove that Decedent is his father.

¹⁷ Section 4.242 is now found at 43 C.F.R. § 30.243.

¹⁸ Appellant characterizes the statements of Lillian's siblings as "sworn statements." Opening Br. at 9. They are not. The statements were notarized, which means that the identity of the person signing the document was verified by the notary. Nothing in the statements signed by Lillian's siblings suggests that they are sworn statements or affidavits.

the father of Appellant and identifies the person providing the information on the birth certificate to be Lillian.

But, as the ALJ concluded, the birth certificate, standing alone, does not outweigh the evidence of Decedent's military service at the time of Appellant's conception and the strong testimony from Thomas that he never saw Decedent between the time he moved out of the family home in 1944 until he returned on a visit in 1949. And we agree with the ALJ that the divorce documents are not preclusive on the issue of Appellant's paternity, but that they are nevertheless probative of the issue and nowhere is Appellant mentioned in them, much less is he mentioned as a child of the marriage.¹⁹ In particular, the Agreement carries significant weight because it was signed by both Lillian and Decedent and it identifies by name each of the five children of the marriage. Appellant's name is not among the five. In contrast, Appellant's birth certificate was not signed by either Lillian or by Decedent. Thus, while the birth certificate is some evidence of paternity, we agree with the ALJ that it and other evidence offered by Appellant did not constitute a preponderance of the evidence and thus failed to satisfy Appellant's burden of proof.

Therefore, we affirm the ALJ's conclusion that, on the whole, a preponderance of the evidence supports the finding that Decedent is not Appellant's father.

Conclusion

Linda rebutted the presumption of paternity by presenting uncontradicted testimony and evidence that Decedent and Lillian did not have access to one another for the purpose of sexual relations at the time Appellant was conceived. The burden of proof then shifted to Appellant to prove that Decedent is his father and Appellant failed to satisfy his burden. Reopening of Decedent's estate thus was warranted to set aside the 2001 reopening order and remove Appellant as an heir to Decedent's estate.

¹⁹ Receiving the divorce documents as probative does not raise any conflict with the cases cited by Appellant, *Janzen v. Janzen*, 228 P.3d 425 (2010), and *Martin v. Estate of Martin*, 565 So.2d 1 (1990). Opening Br. at 10 n.64. In both of the latter cases, the courts held that the child was not precluded by judgments entered in divorce proceedings from bringing a separate action to establish that the husband in the divorce proceedings was, in fact, the child's father. Similarly, we have not given preclusive effect to the divorce documents. Appellant was presumed to be a child of the marriage. This presumption was rebutted based on evidence that included but was not dependent upon the divorce documents, and Appellant has been afforded the opportunity to show that he *is*, in fact, Decedent's son.

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 ALJ's August 27, 2010, Final Reopening Order.

I concur:

// original signed
Debora G. Luther
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge